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Volume 3

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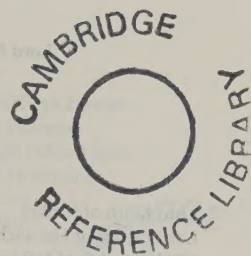
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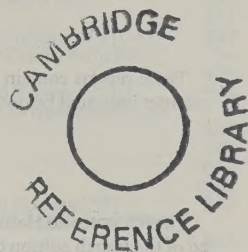
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REFERENCES

These reports contain references to the following major works of legal reference described in the manner indicated below.

Halsbury's Laws of England

The reference 26 Halsbury's Laws (4th edn) para 577 refers to paragraph 577 on page 296 of volume 26 of the fourth edition of Halsbury's Laws of England.

Halsbury's Statutes of England and Wales

The reference 27 Halsbury's Statutes (4th edn) 208 refers to page 208 of volume 27 of the fourth edition of Halsbury's Statutes of England and Wales.

The reference 4 Halsbury's Statutes (4th edn) (1987 reissue) 953 refers to page 953 of the 1987 reissue of volume 4 of the fourth edition of Halsbury's Statutes of England and Wales.

The reference 39 Halsbury's Statutes (3rd edn) 895 refers to page 895 of volume 39 of the third edition of Halsbury's Statutes of England.

The Digest

References are to the green band reissue volumes of The Digest (formerly the English and Empire Digest).

The reference 36(2) Digest (Reissue) 764, 1398 refers to case number 1398 on page 764 of Digest Green Band Reissue Volume 36(2).

Halsbury's Statutory Instruments

The reference 1 Halsbury's Statutory Instruments (Grey Volume) 278 refers to page 278 of Grey Volume 1 of Halsbury's Statutory Instruments.

The reference 17 Halsbury's Statutory Instruments (4th reissue) 256 refers to page 256 of the fourth reissue of volume 17 of Halsbury's Statutory Instruments; references to other reissues are similar.

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House of Lords petitions

This list, which covers the period 10 October to 14 December 1987, sets out all cases which have formed the subject of a report in the All England Law Reports in which an Appeal Committee of the House of Lords has, subsequent to the publication of that report, dismissed a petition for leave to appeal either on a perusal of the papers or after an oral hearing. Where the result of a petition for leave to appeal was known prior to the publication of the relevant report a note of that result appears at the end of the report.

Hadjiloucas v Crean [1987] 3 All ER 1008, CA. Leave to appeal refused 10 December 1987 (Lord Bridge, Lord Templeman and Lord Ackner) (oral hearing)

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CORRIGENDA

[1987] 2 All ER

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p 967. **Slazengers Ltd v Seaspeed Ferries International Ltd, The Seaspeed Dora**. Page 968 line *d* 1, p 970 line *g* 3 and p 972 line *f* 3 case referred to should be *Davies (Joseph Owen) v Eli Lilly & Co* [1987] 3 All ER 94, [1987] 1 WLR 1136.

The River Rima

COURT OF APPEAL, CIVIL DIVISION

SIR JOHN DONALDSON MR, NOURSE AND WOOLF LJJ

13 APRIL, 1 MAY 1987

Admiralty – Jurisdiction – Action in rem – Claim arising in respect of goods or materials supplied to a ship for her operation or maintenance – Goods supplied to a ship for her operation – Containers – Agreement by plaintiffs to hire containers for use on defendants' cargo-carrying ships – Plaintiffs delivering containers to depots for filling by shippers – Containers used interchangeably on ships owned or chartered by defendants – Whether containers 'goods supplied to a ship for her operation' – Whether claim in respect of container agreement falling within jurisdiction of Admiralty Court – Supreme Court Act 1981, ss 20(2)(m), 21(4).

The plaintiffs entered into an agreement with the defendant shipping line to lease to them containers for use on their cargo-carrying vessels. Under the terms of the agreement the containers were delivered direct to shippers at specified depots to be filled and were used interchangeably on a number of vessels which were either owned or chartered by the defendants. Subsequently, the plaintiffs issued a writ in rem claiming, inter alia, damages for breach of the agreement and one of the defendants' ships was arrested. Under s 20(2)(m)^a of the Supreme Court Act 1981 the Admiralty Court had jurisdiction regarding 'any claim in respect of goods . . . supplied to a ship for her operation' and by s 21(4)^b an action in rem could be brought against the ship in connection with which the claim arose or against any other ship in the same entire beneficial ownership or chartered to the same person under a charter by demise, so long as that person would have been liable on the claim if the action had been brought in personam. The defendants applied for the writ to be struck out and the ship released from arrest, on the ground that the plaintiffs' claim did not lie within the jurisdiction of the Admiralty Court. The judge dismissed the application, holding that the containers were goods supplied to a ship for her operation and that accordingly the plaintiffs' claim fell within s 20(2)(m) of the 1981 Act. The defendants appealed to the Court of Appeal.

Held – In order to maintain an action under s 20(2)(m) of the 1981 Act it was necessary to demonstrate a sufficiently direct connection between the agreement relied on and the operation of the ship. Since the true purpose of the leasing agreement was to enable the defendants to meet the convenience of shippers in providing packaging for all their cargoes, the containers had not been shown to be sufficiently closely connected with the operation of the defendants' ships, or with any ships, so as to bring the plaintiffs' claim within s 20(2)(m). Furthermore (per Sir John Donaldson MR and Woolf LJ), it had not been established, for the purposes of s 21(4) of the 1981 Act, that when the cause of action arose the defendants were the beneficial owners or charterers of a ship or ships to which the plaintiffs' claim related, and accordingly there was insufficient evidence to justify the ship's arrest under s 21(4). It followed that the plaintiffs' claim did not come within the

^a Section 20(2), so far as material, is set out at p 3 *a b*, post

^b Section 21(4) is set out at p 5 *a* to *c*, post

House of Lords petitions

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b

The River Rima

COURT OF APPEAL, CIVIL DIVISION

SIR JOHN DONALDSON MR, NOURSE AND WOOLF LJJ

13 APRIL, 1 MAY 1987

c

Admiralty – Jurisdiction – Action in rem – Claim arising in respect of goods or materials supplied to a ship for her operation or maintenance – Goods supplied to a ship for her operation – Containers – Agreement by plaintiffs to hire containers for use on defendants' cargo-carrying ships – Plaintiffs delivering containers to depots for filling by shippers – Containers used interchangeably on ships owned or chartered by defendants – Whether containers' goods supplied to a ship for her operation' – Whether claim in respect of container agreement falling within jurisdiction of Admiralty Court – Supreme Court Act 1981, ss 20(2)(m), 21(4).

d

The plaintiffs entered into an agreement with the defendant shipping line to lease to them containers for use on their cargo-carrying vessels. Under the terms of the agreement the containers were delivered direct to shippers at specified depots to be filled and were used interchangeably on a number of vessels which were either owned or chartered by the defendants. Subsequently, the plaintiffs issued a writ in rem claiming, inter alia, damages for breach of the agreement and one of the defendants' ships was arrested. Under s 20(2)(m)^a of the Supreme Court Act 1981 the Admiralty Court had jurisdiction regarding 'any claim in respect of goods . . . supplied to a ship for her operation' and by s 21(4)^b an action in rem could be brought against the ship in connection with which the claim arose or against any other ship in the same entire beneficial ownership or chartered to the same person under a charter by demise, so long as that person would have been liable on the claim if the action had been brought in personam. The defendants applied for the writ to be struck out and the ship released from arrest, on the ground that the plaintiffs' claim did not lie within the jurisdiction of the Admiralty Court. The judge dismissed the application, holding that the containers were goods supplied to a ship for her operation and that accordingly the plaintiffs' claim fell within s 20(2)(m) of the 1981 Act. The defendants appealed to the Court of Appeal.

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Held – In order to maintain an action under s 20(2)(m) of the 1981 Act it was necessary to demonstrate a sufficiently direct connection between the agreement relied on and the operation of the ship. Since the true purpose of the leasing agreement was to enable the defendants to meet the convenience of shippers in providing packaging for all their cargoes, the containers had not been shown to be sufficiently closely connected with the operation of the defendants' ships, or with any ships, so as to bring the plaintiffs' claim within s 20(2)(m). Furthermore (per Sir John Donaldson MR and Woolf LJ), it had not been established, for the purposes of s 21(4) of the 1981 Act, that when the cause of action arose the defendants were the beneficial owners or charterers of a ship or ships to which the plaintiffs' claim related, and accordingly there was insufficient evidence to justify the ship's arrest under s 21(4). It followed that the plaintiffs' claim did not come within the

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b Section 21(4) is set out at p 5 a to c, post

jurisdiction of the Admiralty Court. The appeal would therefore be allowed, the writ set aside and the ship released from arrest (see p 4 h j, p 5 d, p 6 g to h and p 7 b to f, post). a

Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co [1985] 1 All ER 129 applied.

The Sonia S [1983] 2 Lloyd's Rep 63 not followed.

Notes

For the jurisdiction of the Admiralty court in actions in rem, see 1 Halsbury's Laws (4th edn) paras 311, 337, and for cases on the subject, see 1(1) Digest (Reissue) 219-223, 287-290, 1240-1251, 1714-1728. b

For the Supreme Court Act 1981, ss 20, 21, see 1 Halsbury's Statutes (4th edn) 18, 23.

Cases referred to in judgments

Fairport, The (No 5) [1967] 2 Lloyd's Rep 162. c

Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co [1985] 1 All ER 129, [1985] AC 255, [1985] 2 WLR 74, HL.

Jade, The, The Eschersheim [1976] 1 All ER 920, [1976] 1 WLR 430, HL.

Riga, The (1872) LR 3 A & E 516.

River Jimini, The (29 June 1984, unreported), Rotterdam District Ct.

Sonia S, The [1983] 2 Lloyd's Rep 63. d

Cases also cited

Foong Tai & Co v Buchheister & Co [1908] AC 458, PC.

Span Terza, The [1982] 1 Lloyd's Rep 225, CA.

Interlocutory appeal

The defendants, Nigerian National Shipping Line (NNSL), the owners of the River Rima, appealed against the order of Sheen J dated 3 April 1987 whereby (i) he refused the defendants' application to set aside the writ issued in rem against the River Rima by the plaintiffs, Tiphook Container Rental Co Ltd, and discharge the vessel from arrest and (ii) declared that the plaintiffs' claim for damages for, inter alia, breach of their agreement with the defendants for the hire of cargo containers fell within the jurisdiction of the Admiralty Court. The facts are set out in the judgment of Sir John Donaldson MR. e

Richard Aikens QC and *L E Persey* for NNSL.

Jonathan Sumption QC and *Mark Hapgood* for the plaintiffs. f

At the conclusion of the argument Sir John Donaldson MR announced that the appeal would be allowed for reasons to be given later. g

1 May. The following judgments were delivered.

SIR JOHN DONALDSON MR. The River Rima is a Nigerian vessel registered in Lagos and owned by the Nigerian National Shipping Line (NNSL). In terms of design, she is what is called a 'combo' vessel, being equipped to carry both containers and general dry cargo. Since August 1986 she has been continuously under arrest at the suit of various parties and is berthed in the port of Liverpool. The arrest with which we are concerned was instigated by Tiphook Container Rental Co Ltd, who, on 9 March 1987, issued a writ in rem claiming damages for the conversion of certain containers leased to NNSL and further damages for breach of an obligation to maintain the containers in good condition and repair. h

The issue in the appeal is not whether these claims are well founded but whether they can be maintained in an action in rem. That jurisdiction of the Admiralty Court is governed, so far as is material, by ss 20 and 21 of the Supreme Court Act 1981. j

a Section 20(2) contains an exhaustive list of 'questions and claims' in lettered paragraphs, most of which can found an action in rem (s 21(2) and (4)). The particular lettered paragraphs relied on in the instant case are the following:

'(m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance; (n) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues.'

b However, for completeness, and because it might be thought by anyone who was unfamiliar with the decision of the House of Lords in *Gatol International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] 1 All ER 129, [1985] AC 255 to be a more obvious basis for the plaintiffs' claims, I should also mention para (h), which reads:

c 'any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.'

d The relevant facts are within a small compass and are largely undisputed. NNSL own a number of vessels capable of carrying containerised cargoes. They also have a number of contracts whereby NNSL lease containers from their owners, including one with the plaintiffs. That with the plaintiffs specified daily rates of hire for the containers, together with handling and other charges. It also specified various depots throughout the world at which containers can be picked up and redelivered. It is wholly silent as to the use to be made of the containers by NNSL, whether by land or by sea. However this omission is to some extent made good by an affidavit sworn by Mr Abdullah Abubakar, the Liverpool line manager of NNSL, who deposed as follows:

e '... 6. The procedure regarding the hire of the containers is as follows. As and when the containers are required, N.N.S.L. contact their container leasing agents—all current leasing is now dealt with by Scamar of Paris. The agents then arrange for the containers to be leased and to be delivered to the location where they are required, normally direct to the shippers so that the containers can be stuffed, and sometimes to a container terminal. 7. The containers will be carried by an N.N.S.L. vessel if such is available. However, if no N.N.S.L. vessel is available, they will be carried aboard any other vessel which is available with N.N.S.L. being named as the shipper on the Bill of Lading... 9. I am informed by Mr. Alegbeleye, the Hamburg Line Manager of N.N.S.L., that containers leased to N.N.S.L. have been used by Nigerian Green Line (a participating member of both Conference lines) over the last six months by way of an agreement reached between N.N.S.L. and Nigerian Green Line Limited. 10. Accordingly, I verily believe that the containers hired by N.N.S.L. are for the use of the company and not by way of supplies to N.N.S.L. vessels, for their operation or otherwise. The containers are for the convenience of the various shippers utilising N.N.S.L. services...'

h Sheen J held that the court had no jurisdiction under para (n), which in his judgment covered only 'items which become part of the ship or are carried permanently'. That part of his decision is now accepted. However, he held that para (m) did give the court jurisdiction, the containers being 'goods... supplied to a ship for her operation'. In reply to the argument that the operation of a ship involved only moving the ship from port to port, he said:

j 'It seems to me that the words "for her operation" cannot be construed so narrowly that they are confined to the meaning which [counsel for NNSL] submitted should be attached to them, namely "in order that the ship could operate, in the sense of moving from port to port". [NNSL's] ships are operated for commercial purposes. They are only profit earning when carrying cargo. NNSL took on hire containers solely for the purpose of increasing the profit earned by each ship by reducing the time taken to load and unload the cargo and also for the purpose of reducing the

number of men employed in those operations. All these considerations are related to the efficiency of [NNSL's] commercial activity in the operation of their ships. The operation of a ship must be viewed as a complete commercial operation . . . [NNSL], as shipowners, operate their ships for the purpose of earning money by carrying goods from one port to another, and for no other purpose. The only purpose for which [NNSL] hired the containers, supplied by the plaintiffs, and carried them in their ships was and is to facilitate that operation. The House of Lords has held that an agreement for the hire of containers is not an agreement relating to the carriage of goods in a ship. Having eliminated the relationship to the carriage of goods the containers must have been hired by [NNSL] and supplied by the plaintiffs for the operation of the ship. Accordingly, I agree with the decision of the Rotterdam District Court that containers leased to shipowners are goods supplied for the operation of their ships.' a

Accordingly he dismissed an application for the writ to be set aside and for the arrest of the vessel to be discharged. NNSL have appealed and, at the conclusion of the argument, we announced that the appeal would be allowed, but indicated that we would give our reasons for this decision at a later date. This I now do. b

There is no doubt that the judge was much influenced by the decision of the District Court of Rotterdam in *The River Jimini* (29 June 1984, unreported) to which he referred and by the desirability of there being a common international approach to the Admiralty jurisdiction of courts. In this he was clearly right. The International Convention relating to the Arrest of Sea-going Ships (Brussels, 10 May 1952; TS 47 (1960); Cmnd 1128), which has been ratified by Great Britain, was intended to have just this effect and the relevant sections of the Supreme Court Act 1981 and their predecessors in the Administration of Justice Act 1956 were intended to give effect to the convention. Nevertheless, it is not yet the case that there is any established body of law as to the meaning of art 1(1)(k) of the Brussels convention, which is the equivalent of para (m). c

The *River Jimini* was also owned by NNSL and the claim related to containers leased to them. The decision of the Rotterdam court was provisional in nature: d

'For the time being it must be . . . assumed that [the claimant] is right to allege that the claim for which the attachment has been made is a claim under maritime law in the sense of the Brussels treaty.' e

Furthermore, it did no more than decide that 'supplied' in the paragraph did not necessarily denote a change in ownership and that it was no obstacle to the application of the paragraph that the containers were not delivered on board the ship and were not used exclusively on board. As the judge pointed out, containers are 'stuffed' ashore and, to facilitate this process, carriers often make suitable containers available to shippers for later carriage on their own ships. In *The River Jimini*, the containers concerned appear all to have been intended for carriage, and were in fact carried, on board that vessel or on board her sister ships. By contrast, in the instant case the containers were in practice carried by vessels in other ownerships, if NNSL vessels were not available. f

There are two interrelated obstacles in the way of the plaintiffs. The first arises under para (m) itself and the second under s 21(4) of the 1981 Act which gives effect to the right to arrest sister ships contained in the Brussels convention. g

As there is no clear connection between the containers, the subject matter of the action, and the *River Rima* or indeed any particular ship, the plaintiffs are driven to argue that the effect of s 6 of the Interpretation Act 1978 is to cause para (m) to be read as 'any claim in respect of goods or materials supplied to a ship or ships for her or their operation or maintenance' and that accordingly it matters not what ship or ships were involved or that it or they may not have been owned by NNSL. This is not necessarily correct, because the presumption that words in the singular include the plural only applies 'unless the contrary intention appears'. h

Assuming that it is correct, the plaintiffs still have to bring themselves with s 21(4), which is in the following terms:

In the case of any such claim as is mentioned in section 20(2)(e) to (r), where—(a) the claim arises in connection with a ship; and (b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against—(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.'

Applying this section, I turn to para (a) and ask myself in connection with what ship or ships the claim arises. The answer must be: ships in the ownership of NNSL or other ships in different ownerships by which the containers have been or are to be carried under bills of lading naming NNSL as the shippers. I then turn to para (b) and ask myself whether NNSL was, when the cause of action arose, the owner or charterer of, or in possession or control of, that ship or those ships. The answer is: probably, but not necessarily. This answer is insufficient to justify the application of s 21(4), without which the issue of a writ in rem and the consequential arrest cannot be upheld.

There is a further obstacle in the way of the plaintiffs which arises from para (m) viewed in isolation, namely the construction and application to the facts of this case of the words 'supplied to a ship [or ships] for her [or their] operation'. Like the judge of the Rotterdam court, I am not impressed either by the fact that the containers were not sold to NNSL, an objection which would apply to much electronic equipment on vessels, or by the fact that the containers were not delivered directly on board. But it does have to be shown that the containers were leased to NNSL for the operation of the ship or ships. In a broad 'loosely woven' sense this is no doubt true. As Sheen J pointed out, containerisation is encouraged by shipowners because it makes cargo handling easier and quicker and in some circumstances increases the cargo-carrying capacity of the ship by making deck storage available for goods which otherwise could not be so carried. But it can equally, and as I think more cogently, be said that the purpose of supplying containers is to meet the convenience of shippers by providing them with ready-made packaging for their goods, something which has nothing to do with the operation of the ship. So viewed, para (h) becomes much more relevant than para (m). The containers were leased by NNSL in relation to the carriage of goods in a ship, whether this was for the profit or convenience of the shippers or the carriers or both.

It is at this point that it becomes necessary to consider the decision of the House of Lords in *Gatol International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] 1 All ER 129, [1985] AC 255 and *The Sonia S* [1983] 2 Lloyd's Rep 63. In *The Sonia S* Sheen J was confronted with a claim identical to that of the plaintiffs in the present case, save that there was no suggestion that the containers would be carried in any ships other than those of the defendants. The arrest was sought to be justified under paras (h), (m) and (n). Sheen J upheld the arrest under para (h), no doubt thinking that this was the firmest basis, and gave no ruling on the application of para (m) or (n). He said ([1983] 2 Lloyd's Rep 63 at 65):

'It is said on behalf of the defendants that the plaintiffs' claim in this action is a claim for money due under a leasing agreement and is no more than a claim for rental of certain containers. The defendants contend that the Court should not look further than that. I do not take that view. The reality of the agreement is quite clear. This is a claim by the owners of containers against shipowners to whom they lease these containers, quite clearly to enable the shipowners to provide a service to their

customers. That was a service or facility to enable the customers to pack their own goods in containers and thereafter for those goods to be carried by sea in the defendants' ships and ultimately to their destination, whether at a port or inland. It seems to me that the claim arises out of an agreement which relates to the carriage of goods in a ship. It relates to it, as I have said, because the only purpose of the agreement was for the shipowners to provide for their customers the facility of packing their own goods, and for no purpose other than to have those goods carried in a ship.'

Then after referring to *The Jade, The Eschersheim* [1976] 1 All ER 920, [1976] 1 WLR 430 and quoting from the speech of Lord Diplock, the judge continued:

'By parity of reasoning the only possible use for these containers which was contemplated by the parties to this agreement was that they would be used for the carriage of goods in one of the defendants' ships. I have no doubt that this is a claim arising out of an agreement relating to the carriage of goods.'

However, in *Gatol International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] 1 All ER 129 at 137, [1985] AC 255 at 271 Lord Keith, giving the leading speech, said:

'I consider that in *The Sonia S* there was likewise an insufficiently direct connection between the agreement for the hire of containers and the carriage of goods in a ship. There is clear fallacy in the reasoning of Sheen J in the latter part of his judgment, where he equates the use to which the containers were to be put with the use to which the salvage vessel was to be put in *The Jade, The Eschersheim*. The salvage vessel there was a ship which was to be used under the salvage agreement. The containers were not a ship. In my opinion that decision was wrong and should be overruled.'

In the *Gatol* case, underwriters were seeking to arrest a ship in order to recover insurance premiums due under a cargo policy and were relying on the equivalent of para (h). The House of Lords held that, even allowing that 'relating to' had a broader or looser connotation than 'for' which is the relevant participle in para (m), the agreement sued on must have a reasonably direct connection with the carriage of goods in a ship and that a contract of insurance was not connected with the carriage of goods in a ship in a sufficiently direct sense to be capable of falling within para (h). Consistently with that strict approach, I consider that I must hold that this leasing agreement between the plaintiffs and NNSL, whilst no doubt designed to enable NNSL to provide a service for cargo-owners, to encourage the routing of cargo via NNSL and to enable NNSL to handle cargo more easily in cases in which they were themselves the carriers, is not sufficiently directly connected with the operation of ships to enable me to say that the containers were supplied by the plaintiffs to NNSL 'for the operation of a ship or ships'.

For these reasons I was in favour of allowing the appeal, setting aside the writ and discharging the vessel from arrest, subject to the rights of various caveators.

NOURSE LJ. I agree. Counsel for the plaintiffs accepted Sheen J's decision that the claim made in this action does not fall within para (n) of s 20(2) of the Supreme Court Act 1981. Moreover, the disapproval of the decision of the same judge in *The Sonia S* [1983] 2 Lloyd's Rep 63 by the House of Lords in *Gatol International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] 1 All ER 129, [1985] AC 255, although I would respectfully doubt whether that disapproval was necessary to their Lordships' decision, precluded counsel for the plaintiffs from asking this court to hold that the claim falls within para (h). That meant that he was left only with para (m), which is in these terms:

'Any claim in respect of goods or materials supplied to a ship for her operation or maintenance.'

- a Counsel for the plaintiffs referred us to the statutory predecessors of para (m), which before the enactment of s 1 of the Administration of Justice Act 1956 applied to 'necessaries' supplied to a ship as interpreted by authority, in particular by *The Riga* (1872) LR 3 A & E 516. He relied on the view expressed by Brandon J in *The Fairport* (No 5) [1967] 2 Lloyd's Rep 162 to the effect that claims under para (m) are certainly no narrower than claims which were formerly described as claims for necessities under the earlier legislation. While that no doubt is correct, I would myself think that each case must be
- b considered on its own facts, in order to see whether the claim which is made is one in respect of goods or materials supplied to a ship for her operation or maintenance.

- In the present case there can be no doubt that the containers were 'goods'. I am also prepared to accept that it is possible to conceive of a state of affairs in which they would have been goods supplied to a ship for her operation. The question is whether the existence of that state of affairs is disclosed by the evidence. In my judgment it is not. I
- c do not think that the containers can fairly be said to have been 'supplied to a ship'. I do not think it conclusive that the lease agreement did not link the user of the containers with NNSL's ships, or indeed with any ship. I would agree that you must look at all the facts together. But when you do that you find that the containers were delivered, not to a ship, but to the location where they were required, normally direct to the shippers so that they could be stuffed by them. That suggests to me that they were supplied not to
- d the ship but to the shippers, and I do not think that that reality was transformed into something different by the fact that they were leased to the shipowner and not to the shippers. All that that meant was that the shipowner provided the shippers with a facility for the more convenient shipment of their goods. It did not mean that the containers were supplied to the ship.

- e On that short ground I too was in favour of allowing this appeal. I prefer to express no view as to the effect of s 21(4) of the 1981 Act.

- WOOLF LJ.** I agree that the appeal should be allowed. For the reasons given by both Sir John Donaldson MR and Nourse LJ the claim does not fall within para (m) of s 20(2) of the Supreme Court Act 1981. In addition, for the reasons set out in the judgment of
- f Sir John Donaldson MR the claim does not fall within s 21(4) of the 1981 Act. It follows, therefore, that the plaintiffs were not entitled to bring and enforce the proceedings in rem.

Appeal allowed.

- g Solicitors: *Hill Dickinson & Co*, Liverpool (for NNSL); *Allen & Overy* (for the plaintiffs).

Diana Procter Barrister.

Secretary of State for the Home Department v Oxford Regional Mental Health Review Tribunal and another

HOUSE OF LORDS

LORD BRIDGE OF HARWICH, LORD BRANDON OF OAKBROOK, LORD ACKNER, LORD OLIVER OF
AYLMERTON AND LORD GOFF OF CHIEVELEY

9, 29 JULY 1987

Mental health – Mental health review tribunal – Discharge of restricted patient – Discharge – Decision directing conditional discharge of restricted patient – Direction subject to arrangements being made for support of patient – Whether decision directing conditional discharge a provisional or final decision – Whether tribunal having power to reconsider decision – Whether decision vitiated by failure to inform Secretary of State of date of hearing – Mental Health Act 1983, s 73(2)(7).

The appellant, who was a restricted patient under the Mental Health Act 1983, applied to a mental health review tribunal under s 73⁴ of that Act to be discharged from hospital. The tribunal heard the application but, contrary to the requirements of the Mental Health Review Tribunal Rules 1983, failed to inform the Secretary of State of the date of hearing. The tribunal directed that the appellant be conditionally discharged under s 73(2) but that the discharge be deferred under s 73(7) to enable suitable arrangements to be made for the appellant's care. The Secretary of State applied for judicial review of the tribunal's decision, contending that the failure to notify him of the hearing amounted to a breach of natural justice. The judge dismissed the application, holding that a tribunal's decision under s 73(2) and (7) was merely provisional and the tribunal could therefore reconvene to cure any breach of the rules and reconsider their decision. On appeal by the Secretary of State, the Court of Appeal held that the tribunal's decision to direct a conditional discharge was final and could not be reconsidered once made and therefore since the Secretary of State had not been given the opportunity to make representations the decision was vitiated. The appellant appealed to the House of Lords.

Held – Where a mental health review tribunal satisfied themselves that a restricted patient should be conditionally discharged pursuant to s 73(2) of the 1983 Act but directed, pursuant to s 73(7), that the conditional discharge be deferred, the tribunal were not entitled later to reconsider the question whether the patient should in fact be conditionally discharged, because the purpose of the deferment under s 73(7) was merely to enable arrangements to be made to satisfy the conditions imposed. Accordingly, the tribunal were not entitled to reconvene to reconsider whether the appellant should be discharged. It followed that their original decision was vitiated by the failure to inform the Secretary of State of the date of hearing. The appeal would therefore be dismissed (see p 11 e, p 12 c to g and p 13 j to p 14 b, post).

Per curiam. Where a tribunal directs that a patient's conditional discharge be deferred, the deferment should not be to a fixed date but instead the decision should simply specify what arrangements are required and indicate that the direction is deferred until those arrangements have been made to the satisfaction of the tribunal (see p 13 g to p 14 b, post).

Decision of the Court of Appeal sub nom *R v Oxford Mental Health Review Tribunal, ex p Secretary of State for the Home Dept* [1986] 3 All ER 239 affirmed.

Notes

For the discharge from detention of restricted patients, see Supplement to 30 Halsbury's Laws (4th edn) para 1201A.

^a Section 73, so far as material, is set out at p 10 b to d, post

For the Mental Health Act 1983, s 73, see 28 Halsbury's Statutes (4th edn) 714.

- a* For the Mental Health Tribunal Rules 1983, see 17 Halsbury's Statutory Instruments (4th reissue) 39.

Appeal

- C*, a restricted patient detained at Broadmoor Hospital pursuant to ss 37 and 41 of and para 3 of Sch 5 to the Mental Health Act 1983, appealed pursuant to leave given by the
b Appeal Committee of the House of Lords on 5 November 1986 against the decision of the Court of Appeal (Lawton, Stephen Brown LJ and Sir John Megaw) ([1986] 3 All ER 239, [1986] 1 WLR 1180) on 23 April 1986 allowing an appeal by the Secretary of State for the Home Department against the decision of Woolf J hearing the Crown Office list on 8 November 1985 whereby he dismissed an application by the Secretary of State for judicial review by way of (i) an order of certiorari to quash the decision of the Oxford
c Regional Mental Health Review Tribunal (president her Honour Judge Norwood) made on 12 February 1985 that the appellant be conditionally discharged, such discharge to be deferred until 28 June 1985 for proposals to meet the conditions to be prepared, and (ii) an order of mandamus requiring the tribunal to redetermine the appellant's application for review after receiving such supplementary observations as the Secretary of State might place before it. The facts are set out in the opinion of Lord Bridge.

- d* *David Sullivan QC* and *Oliver Thorold* for the appellant.
Nigel Fleming for the Secretary of State.
 The tribunal were not represented.

Their Lordships took time for consideration.

- e* 29 July. The following opinions were delivered.

- LORD BRIDGE OF HARWICH.** My Lords, the appellant, who is now 46 years old, suffers from psychopathic disorder as defined in s 1 of the Mental Health Act 1983. When he was 17 years old he sexually abused and strangled a six-year-old boy. He was
f acquitted of murder, but convicted of manslaughter on the ground of diminished responsibility. There being no power at that time to make a hospital order, he was sentenced to ten years' imprisonment. He was released in 1965. In 1969 he became a voluntary patient at the West Middlesex Hospital and shortly thereafter was admitted to and detained at Broadmoor Hospital pursuant to s 26 of the Mental Health Act 1959. He disclosed that he had committed certain burglaries, of which he was in due course
g convicted, and he was thereupon made subject to a hospital order under s 60 of the 1959 Act and a restriction order without limit of time under s 65. Those orders continue in force under the corresponding ss 37 and 41 of the 1983 consolidating Act.

- The Secretary of State has power under s 42 of the 1983 Act to order the discharge of a patient subject to a hospital order and a restriction order either absolutely or subject to conditions. On absolute discharge both the hospital order and the restriction order cease
h to have effect. A conditional discharge leaves the patient liable to recall by the Secretary of State, which, in effect, reactivates the hospital order and the restriction order. Under the 1959 Act it was only by the exercise of this executive discretion that such a patient could secure his discharge. But now such a patient (a 'restricted patient' within the definition of that phrase in Pt V of the 1983 Act) enjoys the benefit of one of the changes
j in the law effected by the Mental Health (Amendment) Act 1982 in that a mental health review tribunal is empowered to order his discharge under s 73 of the 1983 Act.

The provisions of s 73 of the 1983 Act on which this appeal depends, if written out in full to include in sub-s (1)(a) the words incorporated by reference from s 72(1)(b), read as follows:

'(1) Where an application to a Mental Health Review Tribunal is made by a

restricted patient who is subject to a restriction order, or where the case of such a patient is referred to such a tribunal, the tribunal shall direct the absolute discharge of the patient if satisfied—(a)[(i) that he is not then suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or (ii) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment]; and (b) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment. a
b

(2) Where in the case of any such patient as is mentioned in subsection (1) above the tribunal are satisfied as to the matters referred to in paragraph (a) of that subsection but not as to the matter referred to in paragraph (b) of that subsection the tribunal shall direct the conditional discharge of the patient . . .

(7) A tribunal may defer a direction for the conditional discharge of a patient until such arrangements as appear to the tribunal to be necessary for that purpose have been made to their satisfaction; and where by virtue of any such deferment no direction has been given on an application or reference before the time when the patient's case comes before the tribunal on a subsequent application or reference, the previous application or reference shall be treated as one on which no direction under this section can be given . . . c
d

The effects of absolute and conditional discharge by order of a mental health review tribunal are the same as those respectively of absolute and conditional discharge by the Secretary of State under s 42. In addition, the Secretary of State may add to the conditions imposed by the tribunal and may, from time to time, vary any conditions, whether imposed by the tribunal or by himself. e

In June 1984 the appellant applied to the Oxford Regional Mental Health Review Tribunal for his discharge. The procedure in relation to such an application is governed by the Mental Health Review Tribunal Rules 1983, SI 1983/942. I need not refer to them in any detail. In accordance with the rules, reports on the appellant by Dr Tidmarsh, the consultant psychiatrist who had been responsible for the care and treatment of the appellant at Broadmoor since 1981, were submitted to the tribunal. These were to the effect that discharge would be quite inappropriate. The Secretary of State, who is clearly the only party capable of representing any interest the public may have in opposing an application for discharge, notified the tribunal of his opposition. The tribunal heard and determined the application on 12 February 1985. In breach of the rules the Secretary of State was not given notice of the hearing. A report commissioned by the appellant's solicitor from Dr Russell Davis, a consultant psychiatrist who had seen the appellant for an aggregate of one and a half hours on two visits in January 1985, was put before the tribunal. This supported the application for discharge on the ground that the appellant's disorder was not 'of a nature or degree which makes it appropriate for him to be liable to be detained'. A copy of this report, dated 1 February 1985, was sent to the Secretary of State, as the rules require, but did not reach him until the very day of the tribunal's determination. Dr Tidmarsh, your Lordships were told, attended the hearing and was cross-examined by the solicitor appearing for the appellant. Dr Russell Davis did not attend. f
g
h

The determination of the tribunal is recorded in a document headed 'Decision of the Oxford Regional Mental Health Review Tribunal'. The operative part reads as follows:

'The Tribunal has considered the Patient's Application relating to the above named and hereby directs that:—This patient shall be conditionally discharged, such discharge to be deferred to Friday 28 June 1985, for proposals to meet the conditions to be prepared. The conditions shall be that:—1. The patient reside at and abide by the rules of a suitably supervised hostel which has an Active i

- a* Rehabilitation Programme. 2. The patient shall be placed under the supervision of a suitable Probation Officer or suitable Social Worker, who shall report from time to time as requested to the Home Office and the hospital referred to in condition 3.
3. The patient shall attend a Psychiatric Out-Patient Clinic as directed by a Consultant Psychiatrist yet to be nominated. The Tribunal is satisfied about these reasons because:—They were satisfied that this patient continues to suffer from Psychopathic Disorder but not of a nature [or] degree which makes it appropriate for him to be
- b* liable to be detained in a hospital for medical treatment but were satisfied that this patient should remain liable to recall.'

It has always been common ground that this decision was made in breach of the rules. What is more important is that there was here a breach of the most fundamental rule of natural justice, in that the Secretary of State, as a vitally interested party, was denied a

c hearing. That is not in dispute.

On receiving notice of the tribunal's decision, the Secretary of State promptly applied by way of judicial review to have it quashed. On 8 November 1985 Woolf J refused the remedy sought on the ground that it was unnecessary and that the appropriate alternative remedy was for the tribunal to reopen the issue to the extent of considering the representations of the Secretary of State before finally determining the appellant's

d application under s 73(7). The Secretary of State's appeal against this decision was allowed by the Court of Appeal (Lawton, Stephen Brown LJ and Sir John Megaw), who on 23 April 1986 quashed the tribunal's decision (see [1986] 3 All ER 239, [1986] 1 WLR 1180). The appellant now appeals by leave of your Lordships' House.

My Lords, whatever view be taken, as a matter of construction, of the interaction between sub-ss (2) and (7) of s 73, as to which Woolf J and the Court of Appeal differed, I

e find it difficult to see how the tribunal's decision made in February 1985 can properly stand. Such a fundamental flaw as vitiated the proceedings leading to that decision must surely call for a complete rehearing de novo. If every issue remains open for decision under sub-s (7) and that provides the appropriate occasion for the rehearing, the earlier purported decision is at best irrelevant, at worst an embarrassment which the tribunal would have to do their best to put out of mind but which would make it difficult for

f justice to be seen to be done at a rehearing before the tribunal constituted as it was in February 1985. If the construction adopted by the Court of Appeal is right and there is no power under sub-s (7) to reopen any issue already decided under sub-s (2) the earlier decision must, of course, be quashed and that will enable the rehearing to take place, as the Court of Appeal thought that it should, before a differently constituted tribunal.

Counsel for the appellant was unable to suggest any avenue of escape from this

g dilemma. There is an inherent inconsistency in the argument advanced which, on the one hand, accepts that the 1985 proceedings were defective and relies on a rehearing under sub-s (7) to cure that defect, but, on the other hand, claims that the appellant is entitled to rely on the earlier decision in his favour which, though reversible, should be the point from which the rehearing ought to start. Though the earlier decision was made in breach of the rules of natural justice, which in a word means unfairly, it would

h nevertheless be unfair to the appellant, so it is said, to deprive him of the benefit of that decision, provisionally made in his favour, when the tribunal which made that decision reconsider it under sub-s (7). I am not persuaded by this argument.

I turn now to the question of the true construction of s 73 which your Lordships have to decide. The first issue which a mental health review tribunal must address on an

j application falling for determination under s 73 is whether they are satisfied as to one or other of the matters referred to in para (a) of sub-s (1). If they are so satisfied and also satisfied that the patient need not remain liable to recall it is mandatory under sub-s (1) that they shall direct his absolute discharge.

If the tribunal think the patient should remain liable to recall, they can only contemplate a conditional discharge under sub-s (2). Here the tribunal's satisfaction or

lack of satisfaction as to one or other of the para (a) matters will, I think, inevitably be coloured by the conditions they have in mind to impose. Thus the answers to the questions arising out of sub-para (a)(i), whether or not the patient's disorder is 'of a nature or degree which makes it appropriate for him to be liable to be detained in hospital for medical treatment', or sub-para (a)(ii), whether or not it is necessary for his own health or safety or for the protection of others 'that he should receive such treatment', which must here mean treatment under detention, may be vitally influenced by the conditions which are to be imposed to regulate his life style on release into the community. To take obvious examples suggested by the decision of the tribunal in this case, the tribunal may perfectly properly be satisfied that hospital detention is no longer necessary provided that the patient can be placed in a suitable hostel and required to submit to treatment as an out-patient by a suitable psychiatrist. These are matters to be secured by imposing appropriate conditions.

Once satisfied under sub-s (2) as to one or other of the matters referred to in para (a) of sub-s (1), it is mandatory that the tribunal 'shall direct the conditional discharge of the patient'. But if the tribunal are only able to be so satisfied by the imposition of conditions to which the patient will be subject on release, it is obvious that in many, perhaps most, cases some time must elapse between the decision that conditional discharge is appropriate and the effective order directing discharge of the patient, for the purpose of making the necessary practical arrangements to enable the patient to comply with the conditions, eg securing a suitable hostel placement for him and finding a suitable psychiatrist who is prepared to undertake his treatment as an out-patient. This seems to me to be the common sense of the matter and it is, I think, precisely for this purpose that the tribunal, being satisfied as required by sub-s (2), are given the option either to direct the immediate discharge of the patient under sub-s (2) or to defer that direction under sub-s (7). Unless a decision has first been reached under sub-s (2) that discharge on certain conditions is appropriate, I find it difficult to see what is envisaged by the words in sub-s (7) 'such arrangements as appear to the tribunal to be necessary for that purpose'. The purpose contemplated must surely be that of enabling the patient to comply with the conditions which the tribunal have already decided to impose. Conversely, when the tribunal have deferred a direction for the conditional discharge of the patient, the words of sub-s (7) which reserve to the tribunal the further decision as to whether the necessary arrangements 'have been made to their satisfaction' are wholly inapt to indicate a deferment of the decision whether the tribunal can be satisfied, as required under sub-s (2), of the matters on which a decision in favour of conditional discharge depends.

The contrary argument is that no direction for the conditional discharge of the patient can ever be given unless the tribunal are satisfied as required by sub-s (2) at the moment when the direction is given. Having deferred a direction under sub-s (7) the tribunal, it is submitted, not only may, but must, examine the whole issue afresh before the direction for discharge is given. If this were right, the two-stage procedure, which seems to be contemplated by sub-ss (2) and (7) and which, as it appears to me, is designed to serve the purpose I have suggested in the foregoing paragraph, would not seem to serve any useful purpose at all. Moreover, for reasons indicated earlier in this opinion this construction of s 73 would not avail the appellant in resisting an order to quash the decision of the tribunal in this case. But, to my mind, the conclusive refutation of this suggested construction is to be found in the second part of sub-s (7) following the semicolon. This provision contemplates (i) an application or reference leading to a deferred direction for conditional discharge and (ii) a further application or reference relating to the same patient coming before the tribunal before any direction for his conditional discharge has actually been given. In this situation it is provided that no direction may be given pursuant to the first application or reference. The effect of this is that the whole issue must be reopened pursuant to the second application or reference. If, as submitted on behalf of the appellant, the whole issue always remains at large following a deferred

a direction for conditional discharge, this provision would be otiose. Its evident purpose is to ensure that, in the situation to which it applies, it will not be open to the tribunal when the second application or reference comes before them to say: 'We decided on the first application or reference in favour of conditional discharge but deferred giving the direction; being now satisfied that the necessary arrangements have been made for the purpose we now direct the conditional discharge of the patient pursuant to that application or reference and there is no necessity for us to consider the matter afresh pursuant to the new application or reference.'

b I think this provision, so interpreted, also meets the point, of which much was made in the argument, that, if the tribunal having deferred a direction under sub-s (7) have no power to reopen the issue under sub-s (2), they may be compelled to discharge a patient whose condition has deteriorated since the tribunal first considered the matter and made a deferred direction for conditional discharge. It may well be, I think, that the second c part of sub-s (7) is designed to meet this very contingency. But, whether that is so or not, it certainly enables the Secretary of State, when a deterioration in the condition of the patient is brought to his attention, to forestall the patient's discharge by exercising his power under s 71 of the 1983 Act to refer the patient's case to the tribunal afresh.

d My Lords, the conclusion I have expressed on the true construction of s 73 is one I have reached by considering the statute without reference to the rules. Both Woolf J at first instance and Sir John Megaw in the Court of Appeal relied substantially on the rules in support of the respective conclusions, which they reached on the meaning of the statute. I doubt, with respect, whether the rules are strictly available as an aid to construing the statute. But, on turning to the rules, I am comforted to find, as I think and as Sir John Megaw thought, that they have been drafted in a way which is wholly consistent with the interpretation of the 1983 Act which I prefer and inconsistent with e that urged on behalf of the appellant.

f Apart from the substantive issue, there was some discussion in argument of the form of the decision made by the tribunal on 12 February 1985. The members of the tribunal were not, of course, in any way responsible for the administrative failure to notify the Secretary of State of the hearing date, which vitiates their decision. If it had been made after the Secretary of State had had the opportunity to be heard, I should be minded to g criticise its form in only one substantial respect. Leaving aside pedantic quibbles over terminology, the document recording the decision in writing, as required by r 24(1) of the 1983 rules, makes clear in substance that it is what the rules call 'a deferred direction for conditional discharge in accordance with section 73(7) of the Act' (see r 2), and properly sets out the conditions to be imposed and the reasons for the tribunal's decision which show that they have applied their minds to and determined the issues arising h under s 73(2). My criticism is of the deferment to a fixed date. There is no authority for this in the Act or the rules and in the nature of the case it is impossible for a tribunal in making a deferred direction for conditional discharge to predict how long it will take to make the necessary arrangements. The decision should simply indicate that the direction is deferred until the necessary arrangements have been made to the satisfaction of the tribunal and specify what arrangements are required, which can normally be done, no i doubt, simply by reference to the conditions to be imposed. Whoever is responsible for making the arrangements should then proceed with all reasonable expedition to do so and should bring the matter to the attention of the tribunal again as soon as practicable after it is thought that satisfactory arrangements have been made. Pursuant to r 25 the tribunal may then decide that the arrangements are to their satisfaction without a further hearing.

j I would dismiss the appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge. I agree with it and for the reasons which he gives I would dismiss the appeal.

LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge. I agree with it and for the reasons which he gives I would dismiss the appeal. a

LORD OLIVER OF AYLMEYTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge. I agree that the appeal should be dismissed for the reasons which he has given. b

LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge. I agree that the appeal should be dismissed for the reasons which he has given. b

Appeal dismissed.

Solicitors: *Alexander & Partners* (for the appellant); *Treasury Solicitor*. c

Mary Rose Plummer Barrister. d

Gulf Oil (GB) Ltd v Page and others

COURT OF APPEAL, CIVIL DIVISION

SIR NICOLAS BROWNE-WILKINSON V-C, PARKER AND RALPH GIBSON LJJ

19 MARCH, 2 APRIL 1987 e

Libel and slander – Injunction – Interlocutory injunction – Justification – Defendant pleading justification – Plaintiff seeking injunction restraining publication – Truth of words published not in question – Words published in pursuance of conspiracy having sole or dominant purpose of injuring plaintiff – Whether injunction restraining further publication should be granted. f

By an exclusive supply agreement made in 1982 the defendants, who owned and operated a number of petrol stations, agreed to buy and the plaintiff, an oil company (G), agreed to sell all the petrol required for certain of the defendants' filling stations. Disputes arose between the parties over the terms of that agreement and in June 1986 G obtained judgment for over £500,000 on its claim for outstanding moneys due. In December 1986, in separate proceedings instituted by the defendants, the judge held that G was in breach of its agreement to supply petrol and ordered an inquiry as to the quantum of damages, which, it was not disputed, would probably be about £1,500. After judgment a document giving an account of the litigation and the judgment was circulated to a number of G's customers and on 18 March 1987 during a major race meeting a light aircraft hired by the defendants flew over the area towing a sign displaying the clearly visible words '[G] exposed in fundamental breach'. The aircraft could be seen both from G's head office and from the racecourse where G was entertaining a number of customers. g
The next day, after an exchange of telexes between the parties' solicitors, G applied for an interim injunction to restrain further display of the sign. The judge refused relief on the ground that the truth of the words was not in issue and that, in a libel action where a defendant intended to justify, interim relief was, as a matter of principle, never granted. h
G appealed to the Court of Appeal, contending that where there was clear evidence of a conspiracy to injure the principle had no application. j

Held – The principle that an interlocutory injunction would not be granted to restrain publication of defamatory material where the defendant intended to plead justification

a did not apply where the material was being published in pursuance of a conspiracy which had the sole or dominant purpose of injuring the plaintiff. In the circumstances, the occasion, scale and manner of publication was such that there was a prima facie case that it was carried out by the defendants as part of a concerted plan to inflict damage on G. Accordingly the appeal would be allowed and the injunction granted (see p 18 b to d j and p 19 c to h, post).

b *Bonnard v Perryman* [1891-4] All ER Rep 965 and *Fraser v Evans* [1969] 1 All ER 8 considered.

Notes

For the granting of an interlocutory injunction in libel cases, see 28 Halsbury's Laws (4th edn) paras 166-168, and for cases on the subject, see 32 Digest (Reissue) 323-327, 2682-2719.

c Cases referred to in judgments

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, [1975] AC 396, [1975] 2 WLR 316, HL.

Bonnard v Perryman [1891] 2 Ch 269, [1891-4] All ER Rep 965, CA.

Coulson (William) & Sons v James Coulson & Co (1887) 3 TLR 846, CA.

d *Fraser v Evans* [1969] 1 All ER 8, [1969] 1 QB 349, [1968] 3 WLR 1172, CA.

Harakas v Baltic Mercantile and Shipping Exchange Ltd [1982] 2 All ER 701, [1982] 1 WLR 958, CA.

Schering Chemicals Ltd v Falkman Ltd [1981] 2 All ER 321, [1982] QB 1, [1981] 2 WLR 848, CA.

e Interlocutory appeal

f The plaintiff, Gulf Oil (GB) Ltd (Gulf), appealed against the decision of Warner J on 19 March 1987 whereby he refused its application for an interlocutory injunction against the defendants, Alfred William James Page, Stephen Martin Page and Segap Garages Ltd, restraining them from exhibiting or publishing on any airborne sign the legend 'Gulf exposed in fundamental breach'. The facts are set out in the judgment of Parker LJ.

John Cherryman QC and Edward Davidson for Gulf.

Leolin Price QC and Hubert Picarda for the defendants.

g At the conclusion of the argument Sir Nicolas Browne-Wilkinson V-C announced that the appeal would be allowed and limited relief granted for reasons to be given later.

2 April. The following judgments were delivered.

h **PARKER LJ** (giving the first judgment at the invitation of Sir Nicolas Browne-Wilkinson V-C). The brothers Alfred and Stephen Page own, control and are directors of a company, Segap Garages Ltd (Segap). That company owns and operates a number of petrol filling stations. By an exclusive supply agreement dated 5 May 1982 Segap agreed to buy and Gulf Oil (GB) Ltd (Gulf) agreed to sell all the fuel required for certain of Segap's filling stations. The term of the agreement was five years from 13 April 1982.

j At the beginning of 1985 Gulf was supplying the fuel to four filling stations. All were being supplied on credit terms. By 3 April 1985 Segap's product debt amounted to some £400,000, of which about £6,800 was due for payment on 10 April, about £7,000 on the 11 April and the remainder on 20 April. Segap had also by that date placed orders for deliveries on the 4, 6 and 9 April. In this situation, Gulf, by telex dated 3 April, refused to make any further deliveries save on cod direct debit terms. Segap refused to accept deliveries on such terms and Gulf maintained its refusal to supply on existing credit terms. As a result Gulf did not make the deliveries due on 4, 6 and 9 April. On 10 April

Segap obtained supplies from an alternative source but made it clear that it was holding Gulf to the agreement. It did not, however, make the payments due on 10 and 11 April. On 15 April Gulf gave notice terminating the agreement, claiming to be entitled so to do pursuant to a clause in the agreement which gave it a right to terminate in the event of breach of the agreement by Segap. The breaches relied on by Gulf were the obtaining of supplies from another source and the failure to make the payments due on 10 and 11 April. Gulf did not thereafter make any further deliveries and Segap did not make the payment due on 20 April or any further payment, albeit that it continued to assert that Gulf remained bound by the supply agreement. a
b

In July 1985 Gulf issued a writ against Segap and the two Pages claiming, inter alia, the outstanding moneys due under the agreement for which it was alleged the two Pages as well as Segap were liable. Judgment in this action was given in favour of Gulf by Knox J on 9 June 1986. Also in July 1985 Segap issued proceedings against Gulf claiming damages for Gulf's failure to supply from 3 April onwards. In this action Segap continued to claim that the agreement was still in full force and effect. Judgment in those proceedings was given by Scott J on 19 December 1986. By that time Segap and the two Pages had paid £550,000 on account of the amount awarded by Knox J plus interest and costs. Scott J held that Gulf was in breach of the supply agreement in refusing peremptorily to supply save on cod direct debit terms but that it was entitled on 15 April to terminate the agreement for non-payment of the amounts due on 10 and 11 April. Accordingly, the agreement was terminated by the telex of 15 April and Segap was entitled to damages, but only in respect of the failure to fulfill the orders for deliveries on 4, 6 and 9 April. An inquiry as to the quantum of such damages was ordered. It is not disputed that such damages will probably be in the order of £1,500. c
d

Segap has appealed and Gulf has cross-appealed against the judgment of Scott J and the appeal and cross-appeal are pending. e

After the judgment of Scott J a document giving an account of the litigation and judgment was circulated to a number of Gulf customers, and on 18 March 1987, during the Cheltenham race meeting, a light aircraft flew over Cheltenham where it could be seen both from Gulf's head offices and from the racecourse where Gulf was entertaining a number of customers. The aircraft was displaying a clearly visible legend 'Gulf exposed in fundamental breach'. Thereupon Gulf's solicitors sent two telexes to the solicitors acting for Segap and the two Pages in the following terms. f

The first read:

'Our client: Gulf Oil (Great Britain) Limited.

Your clients: Messrs A.W.J. + S.M. Page and Segap Garages Limited. g

Our client has been aware for some time of a campaign, which is believed to be orchestrated by your clients and which has been conducted by circulating leaflets to our client's retail outlets about the recent litigation between our respective clients. Today an aeroplane flew low over the Cheltenham area (where it is well known our client's head office is situated and large crowds were attending the races) towing a sign bearing the words "Gulf Oil exposed in fundamental breach". Our client has reason to believe that this too was arranged by your clients. Our client takes a very serious view of this flagrantly offensive conduct, for which there can be no conceivable explanation but an intention to damage our client in a blaze of publicity, the potential damage of which is incalculable. Please note that application will be made on behalf of our client ex parte tomorrow morning in the Chancery Division for an immediate injunction to restrain any repetition of today's activity. Please inform us immediately of the name and address of the operator of the aircraft concerned. We believe the operator to be Airspace Outdoor Advertising Limited of PO Box 2, Bishops Waltham, Hampshire. Our client will hold your clients liable for all damage suffered as a result of your clients' conduct.' h
j

The second read:

a 'Your clients: Messrs A.W.J. Page and S.M. Page and Segap Garages Limited.
Our client: Gulf Oil (Great Britain) Limited.

b One point further to our telex timed at 17:32 today arises: Please let us know if you have instructions to accept service of the writ we propose issuing tomorrow. This request goes to the writ only: If an order is made tomorrow, it will have to be served personally.'

The following morning Gulf's solicitors received the following reply:

'Your client: Gulf Oil (Great Britain) Limited.

Our clients: A.W.J. Page and S.M. Page and Segap Garages Limited.

c 1. I thank you for your telexes of yesterday evening on which we have taken instructions. 2. Our clients arranged the aeroplane towing the sign. 3. You have correctly identified the operator of the aeroplane. 4. You have not identified any cause of action which your client says it has against ours. How does your client put its case? Is there in existence a draft statement of claim or draft evidence which we could see? If so, please fax together with draft minutes of order. 5. We are instructed to appear by counsel (Mr Price Q.C) on your client's ex parte application and if injunctive relief is obtained to your client to apply immediately inter partes for the discharge of such relief. Will your application be before the motions judge or have any other arrangements been made? Please let us know. 6. We have instructions to accept service of the writ. 7. Finally, we assume but please confirm that the truth of the words on the sign is not at issue? Regards.'

e On receipt of this telex Gulf immediately applied in the Chancery Division for an interim injunction in these terms:

f '... that until trial or further order in the meantime the defendants and each of them, in the case of the third defendant by its directors and officers and in the case of all defendants by themselves their servants or agents or otherwise howsoever be restrained from exhibiting or publishing on any airborne sign or otherwise howsoever the legend "Gulf exposed in fundamental breach" or any words to the like or similar effect.'

g The application was heard by Warner J. It was opposed by counsel on behalf of Segap and the two Pages. It was refused by Warner J. At that time no writ had been issued but the writ which Gulf proposed to issue was intended to be, and subsequently was, indorsed with a claim for damages for conspiracy. The matter was of great urgency because the Cheltenham Gold Cup was due to be run at 3 pm the same day and this is an event which attracts particularly large numbers of racegoers. Gulf accordingly appealed forthwith to this court against the refusal to grant interim relief and the appeal was heard at 2 pm. Interim relief was, after brief argument on both sides and for reasons to be given later, granted in the terms sought, save that the injunction was limited to exhibition by h airborne sign and to the duration of the current Cheltenham Race Meeting.

j Relief was refused by Warner J on the simple ground that the truth of the words was not in issue and that, in a libel action, if a defendant intends to justify, interim relief is, as a matter of principle, never granted. Counsel for Gulf did not seek to challenge the principle, but contended that where there was clear evidence of a conspiracy to injure the principle had no application. Counsel for the defendants advanced the contrary contention, asserting that if interim relief could be granted in such a case as this it would, in effect, reverse the long-standing principle because it would often be open to a plaintiff in a libel action to claim also in conspiracy against the reporter, editor, printers and publishers of the libel.

The point is an important one and it is unfortunate that time considerations did not

allow counsel on either side to prepare or develop full argument. This being so, and the matter being in any event interlocutory only, it is, in my view, undesirable that this court should make any further pronouncement on the law than is absolutely necessary for the purpose of disposing of the appeal. a

There was in the exchange of telexes clear evidence of a combination between the two Pages and Segap to display the airborne sign over the Cheltenham Racecourse where it could be seen, and in order that it should be seen, by the maximum number of people, the vast majority of whom would have no interest whatever in the supply of fuel to retail filling stations. This was done, moreover, at a time when appeal and cross-appeal from the judgment of Scott J was pending and when, according to his judgment, the supply agreement had been terminated. The defendants had therefore, at the time, no immediate interest of their own to protect against Gulf and no interest of their own to further as against Gulf. In these circumstances there is, in my view, a strong inference that the purpose of the display was simply to inflict on Gulf the maximum possible damage in its business by way of revenge. There is thus not merely a serious question to be tried, but a strong prima facie case in conspiracy to injure. It may be that that case will not in the event succeed, but, unless the libel principle is a complete answer to the claim for interlocutory relief, this is a plain case for the grant of such relief on the principles enunciated in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396. Indeed, this was not seriously disputed. b
c
d

In my view, the principle mentioned is not a bar. It was established in this court in *Bonnard v Perryman* [1891] 2 Ch 269, [1891-4] All ER Rep 965, in which case the court expressly approved the statement of the law by Lord Esher MR in *William Coulson & Sons v James Coulson & Co* (1887) 3 TLR 846. It has been applied consistently ever since: see, for example, *Fraser v Evans* [1969] 1 All ER 8, [1969] 1 QB 349, *Harakas v Baltic Mercantile and Shipping Exchange Ltd* [1982] 2 All ER 701, [1982] 1 WLR 958 and *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 All ER 321, [1982] QB 1. It is, in my view, unaffected by the general principles laid down in *American Cyanamid*. e

However, in *Fraser v Evans* [1969] 1 All ER 8 at 10, [1969] 1 QB 349 at 360, Lord Denning MR, explaining the reason for the rule, said:

'The court will not restrain the publication of an article, even though it is defamatory, when the defendant says that he intends to justify it or to make fair comment on a matter of public interest. That has been established for many years ever since *Bonnard v. Perryman* ([1891] 2 Ch 269, [1891-4] All ER Rep 965). The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge; but a better reason is the importance in the public interest that the truth should out. As the court said in that case ([1891] 2 Ch 269 at 284, [1891-4] All ER Rep 965 at 968): "The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done." There is no wrong done if it is true, or if it is fair comment on a matter of public interest. The court will not prejudice the issue by granting an injunction in advance of publication.' f
g
h

It is true that there is no wrong done if what is published is true provided that it is not published in pursuance of a combination and, even if it is, there is still no wrong unless the sole or dominant purpose of the combination and publication is to injure the plaintiff. If, however, there is both combination and purpose or dominant purpose to injure there is a wrong done. When a plaintiff sues in conspiracy there is, therefore, a potential wrong even if it is admitted, as it is in the present case, that the publication is true and thus that there is no question of a cause of action in defamation. In such a case the court can, and in my view should, proceed on the same principles as it would in the case of any other tort. j

The prospect that this would open the floodgates and reverse the principle applicable

a in libel actions is, in my view, unreal. A plaintiff in an action against the author and publisher of a newspaper article, for example, might well establish a combination, but it appears to me that it would only be in the rarest case that sufficient evidence of a dominant purpose to injure could be made out to warrant the grant of interlocutory relief, and I have no doubt that the court would scrutinise with the greatest care any case where a cause of action in conspiracy was joined to a cause of action in defamation and would require to be satisfied that such joinder was not merely an attempt to circumvent the rule in defamation.

b Where, however, it is not asserted that there is any cause of action in libel and the plaintiff relies on conspiracy only, then the court needs only to be satisfied that there is a serious question on combination and intention to injure to be tried. Very often there may not be, but in the present circumstances, in my view, there clearly was. The occasion, scale and manner of publication of the true statement was such that a strong prima facie case of dominant purpose to injure was made out.

c I find it unnecessary to consider the question of the apparent anomaly that an act done by one which is not actionable can become actionable if done in combination and with the sole or dominant intent to injure, for it is well established that this is so.

d I also find it unnecessary to consider counsel's submission for the defendants that the alleged conspiracy was between two directors of a company and the company itself, for it is admitted in the telexes that the arrangements for the aerial display were made by all three defendants.

For the above reasons the plaintiffs were, in my view, entitled to the limited injunction granted.

e **RALPH GIBSON LJ.** I agree that the judge was not right to refuse relief on the ground that, in this case, the principle established in *Bonnard v Perryman* [1891] 2 Ch 269, [1891-4] All ER Rep 965 constituted a bar. Although that principle, which is applied in defamation cases, is not directly applicable in its terms to a case where the basis of claim is conspiracy to inflict deliberate damage without any just cause, nevertheless it seems to me that that principle, namely the individual and the public interest in the right of free speech, is a matter of great importance in the consideration of the question whether in the exercise of the court's discretion an interlocutory injunction should be made and, if Yes, what should be the extent of any restriction on publication of any statement pending trial. The plaintiffs made out, as I think, an arguable case that the aerial display was carried out by the defendants as part of a concerted plan to inflict deliberate damage on the plaintiffs thereby without any just cause. Due regard being given to the principle of free speech, the plaintiffs were, in my judgment, entitled to the limited injunction granted by this court.

SIR NICOLAS BROWNE-WILKINSON V-C. I agree with both judgments and have nothing to add.

h *Appeal allowed. Limited injunction granted.*

Solicitors: *Metson Cross & Co* (for Gulf); *Gamlens* (for the defendants).

Celia Fox Barrister.

Perez-Adamson v Perez-Rivas (Barclays Bank plc, third party)

COURT OF APPEAL, CIVIL DIVISION

DILLON, STEPHEN BROWN AND NICHOLLS LJJ

26 MARCH 1987

Divorce – Property – Adjustment order – Transfer of property – Application for property adjustment order in respect of matrimonial home – Wife registering claim for ancillary relief as pending action – Husband obtaining loan from bank secured by first charge on matrimonial home – Bank not searching land charges register – Whether wife's application for property adjustment order having priority over bank's charge – Land Charges Act 1972, s 5 – Matrimonial Causes Act 1973, ss 24(1), 37.

Land charge – Pending action – Registration – Pending land action – Application by wife for transfer of matrimonial home – Wife registering claim for ancillary relief as pending action – Husband obtaining loan from bank secured by first charge on matrimonial home – Bank not searching land charges register – Whether wife's application for property adjustment order having priority over bank's charge – Land Charges Act 1972, s 5 – Matrimonial Causes Act 1973, ss 24(1), 37.

On the breakdown of the parties' marriage the wife left the matrimonial home, which was unregistered land in the husband's sole name, and on 4 June 1985 she presented a petition for divorce. She also asked, in the usual general terms, for ancillary relief including a property adjustment order but without specifying any particular property. On 7 June she registered her claim for ancillary relief as a pending action under s 5^a of the Land Charges Act 1972, the matrimonial home being described as the property charged. On 21 June the husband saw the manager at the local branch of his bank, with which he had had business dealings since 1974, seeking what he described as a bridging loan for the purchase of a house to be secured by a first charge on the matrimonial home. The bank manager agreed to the loan because he regarded the husband as a reliable businessman and a good customer. The loan was accordingly arranged and the husband executed a legal charge over the matrimonial home on 4 July 1985. The bank made the advance without any search in the land charges register and thus had no actual knowledge of the wife's registration of the *lis pendens*. Subsequently, the bank discovered that the husband had acted dishonestly with the intent of realising as many of his assets as he could and transferring them out of the jurisdiction in order to defeat the wife's claim. The wife applied for, *inter alia*, a property adjustment order in respect of the matrimonial property under s 24(1)^b of the Matrimonial Causes Act 1973 and for an order to set aside the bank's legal charge under s 37^c of that Act. The judge gave judgment for the wife, set aside the charge and ordered that the proceeds of sale of the property be transferred to her. The bank appealed.

Held – A wife's application for a property adjustment order under s 24 of the 1973 Act was a claim to property which, if registered against the matrimonial home under s 5 of the 1972 Act as a pending land action, constituted notice to, and had priority over, any subsequent mortgage or conveyance executed by the husband. It followed that the wife's

^a Section 5, so far as material, is set out at p 24 *a b*, post

^b Section 24(1), so far as material, provides: 'On granting a decree of divorce . . . the court may make any one or more of the following orders, that is to say—(a) an order that a party to the marriage shall transfer to the other party . . . such property . . . as to which the first-mentioned party is entitled, either in possession or reversion . . .'

^c Section 37, so far as material, is set out at p 22 *j* to p 23 *d*, post

a claim for a property adjustment order had priority over the bank's charge. The appeal would accordingly be dismissed (see p 23 g to j, p 24 c d g h, p 25 h and p 26 a to c e to g, post).

Whittingham v Whittingham (National Westminster Bank Ltd intervening) [1978] 3 All ER 805 applied.

Notes

b For registration of pending land actions, see 26 Halsbury's Laws (4th edn) paras 747–753, and for cases on the subject, see 40 Digest (Reissue) 242–243, 1873–1881.

For the Land Charges Act 1972, s 5, see 42 Halsbury's Statutes (3rd edn) 1604.

For the Matrimonial Causes Act 1973, ss 24, 37, see 27 Halsbury's Statutes (4th edn) 726, 751.

c Cases referred to in judgments

Calgary and Edmonton Land Co Ltd v Dobinson [1974] 1 All ER 484, [1974] Ch 102, [1974] 2 WLR 143.

Sowerby v Sowerby (1982) 44 P & CR 192.

Whittingham v Whittingham (National Westminster Bank Ltd intervening) [1978] 3 All ER 805, [1979] Fam 9, [1978] 2 WLR 936, ChD and CA.

Cases also cited

Green v Green (Barclays Bank Ltd, third party) [1981] 1 All ER 97, [1981] 1 WLR 391.

Greer v Downs Supply Co [1927] 2 KB 28, [1926] All ER Rep 675, CA.

Taylor v Taylor [1968] 1 All ER 843, [1968] 1 WLR 378, CA.

e *Williams & Glyn's Bank Ltd v Boland, Williams & Glyn's Bank Ltd v Brown* [1980] 2 All ER 408, [1981] AC 487, HL.

Appeal

f The third party, Barclays Bank plc, appealed against the order of his Honour Judge Hutchinson sitting as a judge of the High Court in Lincoln made on 12 September 1986 whereby it was ordered that the legal charge dated 4 July 1985 and made between the bank and the respondent, Leobardo Perez-Rivas (the husband), be set aside and that the fund representing the proceeds of sale of the property Heydour Priory be transferred to the solicitors acting for the petitioner, Juliet Mary Perez-Adamson (the wife), and after all proper costs had been defrayed be transferred by them to the wife. The facts are set out in the judgment of Dillon LJ.

g *Gavin Lightman QC, Thomas Sharpe and Michael Jefferis* for the bank.
Joseph Jackson QC and Iain MacLeod for the wife.
 The husband did not appear.

h **DILLON LJ.** This is an appeal by the third party, Barclays Bank plc, against an order of his Honour Judge Hutchinson, sitting as a judge of the High Court, made on 12 September 1986. It arises in relation to proceedings in the Family Division between Mrs Juliet Mary Perez-Adamson, the petitioner, and Mr Leobardo Perez-Rivas, the respondent, formerly husband and wife.

j The husband came from abroad but had, until the matters in question, made his home with the wife in this country, latterly at a property called Heydour Priory, Heydour, near Grantham in Lincolnshire. The husband and wife had been married in December 1970, and since January 1974 the husband had been a customer of the bank at its Grantham branch. The marriage, however, unfortunately broke down. The wife left Heydour Priory, and on 4 June 1985 she presented a petition in the Lincoln County Court whereby she prayed for the dissolution of the marriage and to be granted custody of the four children of the marriage. She also asked, in the usual general terms, for ancillary relief,

which included, without specifying any particular property, a property adjustment order.

Having issued her petition, she applied to the court on the next day for various injunctions which are not directly relevant to these proceedings, but, in addition, she also applied through her solicitors to the Land Registry for the registration of a pending action under s 5 of the Land Charges Act 1972 in respect of her claim for ancillary relief. The registration was effected on 7 June 1985, and the property charged is described as Heydour Priory, Heydour, Grantham. That was obviously defined by the application for the registration.

On 18 June 1985 notice to proceed with the application for ancillary relief was duly issued by the wife's solicitors, returnable on 9 July 1985. That, for present purposes, is franked by the prayer in the petition. Then on 21 June the husband went to see the bank's manager at the Grantham branch, a Mr Sargeant, and he sought a loan from the bank on the security of the property Heydour Priory. Mr Sargeant regarded the husband as a reliable businessman and a blue-chip customer, and his evidence is that at his meeting with the husband the husband told him that the husband and the wife had decided to separate, that their affairs were being sorted out amicably and that the husband wished to purchase a property for the wife as part of the settlement of their affairs. He asked, therefore, for a bridging loan of £50,000 (later increased to £60,000) to purchase such a property. He said he had not yet found a suitable property, but he wanted the cash to be available to facilitate a speedy purchase when the right property was found. A bridging loan was therefore arranged for a period of 12 months to be secured by a first legal charge on the property. The husband was the sole legal owner of the property. The husband apparently told the bank manager that he had about £100,000 worth of investments, but that there might be disadvantages in realising investments to repay the bank loan because they had been recently purchased and realisation would result in a loss.

It was a plausible explanation; it was untrue. What the husband was in fact doing was realising as many of his assets as he possibly could and sending the money, via another bank account of which the wife did not know, out of the jurisdiction of this court. In this he was successful.

On 4 July 1985 a legal charge on Heydour Priory in favour of the bank was duly executed by the husband. On 8 July £50,000 of the agreed advance of £60,000 was drawn down by the husband. The balance of the advance was drawn down shortly afterwards. The bank accepted the legal charge and made the advance without making any search in the land charges register. Consequently, the bank did not actually know that the wife had effected the registration of the *lis pendens* under s 5 of the 1972 Act.

The bank found out, however, not very long afterwards, that the husband was not acting honestly. It was, of course, by that time too late to recall the money which the husband had had. I need not go further into the history of the husband's misdoings; he has played no part in the proceedings before the judge or in this court; he remains outside the jurisdiction with the money which he has succeeded in taking outside the jurisdiction and also, in breach of orders of the court, with the children of the marriage.

What came before the judge on the occasion on which he made his order were the wife's applications for ancillary relief, including application for a property adjustment order in respect of Heydour Priory and another property, and also an application by the wife to set aside the mortgage in favour of the bank under s 37 of the Matrimonial Causes Act 1973. That section starts with a definition of 'financial relief' as including relief under any of certain provisions of the Act which are referred to in the section and which include the statutory provision for making property adjustment orders. Section 37(2) provides:

'Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person—(a) if it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction

- a* or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim; *(b)* if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition; *(c)* if it is satisfied, in a case where an order has been obtained under any of the provisions mentioned in subsection (1) above by the applicant against the other party, that the other party has, with that intention, made a reviewable disposition, make an order setting aside the disposition . . .’

Then sub-s (4) provides:

- c* ‘Any disposition made by the other party to the proceedings for financial relief in question (whether before or after the commencement of those proceedings) is a reviewable disposition for the purposes of subsection (2)(b) and (c) above unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant’s claim for financial relief.’

- d* It is common ground in these proceedings, in so far as it is material, that the legal charge in favour of the bank was made for valuable consideration and that the bank acted in relation to it in good faith. It is also clear that the bank had no express notice of any intention on the part of the husband to defeat the wife’s claim for financial relief. The case turns on the effect of the registration under s 5 of the 1972 Act.

- e* The first point that is taken by counsel for the bank is that there was nothing capable of being registered under s 5 because the land in respect of which the wife was seeking a property adjustment order had not been identified in the proceedings between the wife and the husband at the time the registration was effected. He refers to some observations by Megarry V-C in *Sowerby v Sowerby* (1982) 44 P & CR 192 at 196–197, where the Vice-Chancellor considered at the end of his judgment that where the claim in the matrimonial proceedings was not particularised it could not be said that there was an action or a proceeding relating to land within the meaning of s 5. He said that a *lis pendens* must involve a claim in relation to specific property. But, having expressed his doubts and expressed, further, the view that, if a procedure was adopted in the Family Division for obtaining an order requiring a proper specification of the property in question, the doubts would be resolved, he left the matter there, recognising that he had not heard the matter fully argued out.

- g* If it is open to a wife, for instance, who has in the usual form sought a property adjustment order without indicating what property she has in mind in the petition for divorce, to particularise in the divorce proceedings by specifying the particular property, whether in response to a demand from her husband’s advisers or not, it seems to me that what one has got in the petition is a general claim to a property adjustment order in respect of any property the husband might own, which the wife has in this case particularised, so far as Heydour Priory is concerned, in her application to the Land Registry to register the *lis pendens* in respect of that property. I see no need for any further particularisation. The need that the property should be particularised arises for the protection of those dealing with the owner of the property and it is satisfied if there is a registration in respect of a particular property. Because of the provisions of the 1972 Act, persons dealing with the owner will not be prejudiced if they are dealing in respect of a property which has not been the subject of any registration. Therefore I would reject that point of counsel for the bank which would indeed, if valid, seem to upset the established practice in the Family Division. I see no reason why more should be required of an applicant wife in that respect.

Then comes the question: what is the effect of a registration under s 5 of the 1972 Act?

It is referred to as a registration in the register of pending actions, and it seems that registration of pending actions by the term *lis pendens* goes back as far as the Judgments Act 1839. Section 5(7) of the 1972 Act provides: a

‘A pending land action [that is the description of what is to be registered] shall not bind a purchaser without express notice of it unless it is for the time being registered under this section.’

Section 198 of the Law of Property Act 1925 provides: b

‘(1) The registration of any instrument or matter under the provisions of the Land Charges Act, 1925, or any enactment which it replaces, in any register kept at the land registry or elsewhere, shall be deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected, as from the date of registration or other prescribed date and so long as the registration continues in force . . .’ c

The clear implication, as it seems to me, from s 5(7) of the 1972 Act is that a pending land action does bind a purchaser, even if he has no express notice of it, if it is for the time being registered under the section. The term ‘pending land action’ is defined in s 17 of the 1972 Act as meaning ‘any action or proceeding pending in court relating to land or any interest in or charge on land’. ‘Land’ is widely defined, but does not include an undivided share in land. That definition was considered by Megarry J in *Calgary and Edmonton Land Co Ltd v Dobinson* [1974] 1 All ER 484 at 489, [1974] Ch 102 at 107. He said: d

‘As for more general considerations, it seems to me that once it is accepted (as it has been) that some restriction must be placed on the wide statutory language, the question becomes one of what restriction is most consonant with the language and general purposes of the statute, and with common sense and practicability. The rights made registrable under the Land Charges Act 1972, as under the Land Charges Act 1925, are in general substantive rights in the land. Those with specified rights or *claims* to the land or any interest in it must register those rights or claims (and so give warning to purchasers) or else suffer the consequences of failure to register. What is protected is some substantive right adverse to the owner, rather than a mere fetter on the owner’s rights of disposition . . . What is registrable as a pending land action is an action or proceeding which claims some proprietary right in the land, and not an action merely claiming that the owner should be restrained from exercising his powers of disposition.’ (My emphasis.) e

The effect of that, because otherwise there is no point in having registration to give warning to purchasers, seems to me to be that the claim, if it be a claim rather than a present right which is being protected, will bind the purchaser once registration has been effected, so long as the registration subsists. g

The position of registration of claims for ancillary relief was considered by the courts in *Whittingham v Whittingham* (*National Westminster Bank Ltd intervening*) [1978] 3 All ER 805, [1979] Fam 9. What that case actually decided was that, where a wife had applied in divorce proceedings for an order that a certain property be transferred to her but she had not effected any registration of the claim as a pending action and her husband subsequently charged the property in favour of a bank, the wife could not apply to set aside the charge because her claim under s 24 of the 1973 Act for the transfer of the property was not binding on the bank. Of course registration of such a claim for a property adjustment order could only arise after a divorce petition has been presented, and there may well be cases in which the avoidance transaction, or, as it is put in s 37, ‘the reviewable disposition’, has been made before the petition was presented. In those cases all that will have to be considered where a third party is concerned is whether the third party gave valuable consideration and at the time of the disposition acted in relation h
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a to it in good faith and without notice of any intention on the part of the other party to defeat the applicant's claim for financial relief. Where, however, there has been a registration, the position is not quite the same. Balcombe J, having given his reasons in *Whittingham v Whittingham* at first instance for concluding that on the facts of that case the wife's claim for ancillary relief was not binding on the bank, said at the end of his judgment ([1978] 3 All ER 805 at 812, [1979] Fam 9 at 18):

b 'I do not believe that the practical effect of this judgment will be seriously to prejudice the ability of a spouse, usually a wife, to set aside a reviewable disposition of land under s 37 of the 1973 Act. Where a party has applied for a transfer of property order, registration of that application as a pending land action should afford an effective protection against any future disposition.'

c When that case came to this court the decision of Balcombe J was affirmed. Stamp LJ said in giving the leading judgment of this court ([1978] 3 All ER 805 at 813-814, [1979] Fam 9 at 21):

d 'I am bound to say that considering the matter without the aid of authority I would not feel much hesitation in holding that a summons to obtain the transfer of a specified property under s 24 does relate to that property. Furthermore it appears to me desirable that a wife who has issued such a summons should be able to safeguard the property, pending hearing of the application, by registering a lis. If this is not so, she is placed in the unenviable position of having to establish that a transaction which subsequently takes place by way of sale or mortgage is a reviewable disposition within s 37, involving litigation in which the good faith of the purchaser [or] mortgagee and the question whether he had notice of the wife's intention fall to be considered. Such questions are not usually at all easy to decide; in fact it was because of the difficulties involved in establishing whether a purchaser or mortgagor had or had not constructive notice of a particular dealing with land that the policy of registration of interests in land was brought into force by the effect of the Land Charges Acts. The right of a wife or husband to apply for a transfer of property under s 24 is of recent origin, and I can see no good reason for not regarding a summons to obtain a transfer of a particular property as one which does relate to that property.'

f Orr LJ agreed.

The position therefore is that the long-established procedure for the registration of a lis pendens has to be married with the code under the 1973 Act for property adjustment as between spouses. The 1972 Act also includes provisions for the registration of various other property rights or interests which have in some cases been previously the subject of registrations under quite different statutes.

j Taking the whole together, I would accept the view of Stamp LJ that the code, as we now have it, has the effect that the registration of the lis pendens in respect of the wife's claim for property adjustment gives her priority over any subsequent conveyance or mortgage of the property executed by the husband. Counsel for the bank urges that that is only so if the other party to the transaction, being supposed to know of the claim for ancillary relief and the property adjustment order, is to be held to have had notice of intention on the part of the husband to defeat the wife's claim for financial relief. If the bank or other third party, not having actual knowledge of the registration and of the existence of the claim for ancillary relief, did not ask any questions, it might be difficult to establish that it had notice of an intention on the part of the husband to defeat the claim for ancillary relief. If the bank or third party did ask but was given a specious but untruthful answer, it would be well nigh impossible for a court to hold that the bank or other third party had the requisite notice of the husband's intention. There would be a very serious lacuna in the protection for the wife which Stamp LJ thought so desirable.

In my judgment there is no such lacuna, and so, for these reasons which are

substantially the same as those which the judge in the court below gave, I would dismiss the appeal because the wife's claim for a property adjustment order has priority to the bank's charge and the wife has obtained, from the order of the judge now under appeal, an order for the transfer of the proceeds of the property to her. The property was sold pending the hearing, it being common ground that neither spouse was then occupying it.

I would dismiss this appeal.

STEPHEN BROWN LJ. I agree, for the reasons given by Dillon LJ, that this appeal should be dismissed.

NICHOLLS LJ. I agree. In *Whittingham v Whittingham (National Westminster Bank Ltd intervening)* [1978] 3 All ER 805, [1979] Fam 9, this court decided that proceedings in which a property adjustment order is sought under s 24 of the Matrimonial Causes Act 1973 are, to the extent to which they relate to land, a pending land action within s 5 of the Land Charges Act 1972. The court reached that conclusion notwithstanding that until the property adjustment order is made, the applicant under s 24 has not, or may not have, a subsisting proprietary interest in the land in question.

The effect of registration of a pending land action in the register of pending actions is, as provided in s 198(1) of the Law of Property Act 1925, that the registration is 'deemed to constitute actual notice of [the] . . . matter . . . to all persons and for all purposes connected with the land affected'. In this case the 'matter' consists of the proceedings in which the property transfer order is being claimed.

In my view the effect of these statutory provisions is that, when the bank took a charge over the property after the registration of a pending land action had been made in the present case in respect of the property, that charge ranked behind the claims made by the wife with regard to that property in the pending petition. Any other view would fly in the face of the purpose intended to be achieved by registration. If what is registrable is, as here, a subsisting claim under a statute which enables the property or an interest therein to be transferred to the petitioner or to others, it seems to me to follow that what is intended to be protected by that registration, by means of all persons being deemed to have actual notice, is that claim. Accordingly, if that claim ultimately results in a property transfer order, a person who was deemed to have actual notice of that claim when he acquired his interest ranks behind the interest in the land which the court orders to be transferred to the petitioner or other person in accordance with s 24 of the 1973 Act. Accordingly, in this case the bank's charge ranks behind the interest in the property ordered to be transferred to the wife, and it does so without any recourse needing to be had to s 37 of the 1973 Act.

I too would dismiss this appeal.

Appeal dismissed.

Solicitors: *Durrant Piesse* (for the bank); *Norton & Hamilton*, Grantham (for the wife).

Vivian Horvath Barrister.

**Craven (Inspector of Taxes) v White
and related appeal**

**Inland Revenue Commissioners v Bowater
Property Developments Ltd**

**Baylis (Inspector of Taxes) v Gregory
and related appeal**

COURT OF APPEAL, CIVIL DIVISION

SLADE, PARKER AND MUSTILL LJJ

20, 21, 22, 23, 26 JANUARY, 24 MARCH 1987

Capital gains tax – Tax avoidance scheme – Composite transaction – Preordained series of transactions – Commercial purpose – Linear transactions – Second transaction not certain when first transaction carried out – Steps in series of transactions dependent on uncertain events – Steps having commercial purpose other than tax avoidance – Whether series of transactions to be treated as single composite transaction – Whether taxpayer liable for capital gains tax.

Development land tax – Tax avoidance scheme – Composite transaction – Preordained series of transactions – Taxpayer company wishing to sell land – Taxpayer company first fragmenting ownership of land among five other companies in same group in order to utilise tax exemptions available to each – Purchaser ending negotiations before sale agreed – Purchaser resuming negotiations some months later after change of circumstances – Purchase completed on terms different from those previously proposed – Whether series of transactions to be treated as single composite transaction – Whether taxpayer company liable for development land tax.

Capital gains tax – Assessment – Vacation – Unilateral vacating of assessment by Revenue – Year wrongly stated in assessment – Taxpayer not misled – When mistake discovered assessment for correct year impossible – Whether unilateral vacating of assessment possible – Whether error could be corrected – Taxes Management Act 1970, s 114.

In separate cases the question arose whether a series of linear transactions in which, in the events which happened, execution of the second transaction was not certain at the time the first transaction was effected was to be treated for tax purposes as a preordained series of transactions, i.e. a single composite transaction.

In the first case the taxpayers owned all the shares in a company (Q Ltd) which owned and operated supermarkets. In 1973 they decided to sell or merge the business with a similar business, but their attempts to do so were not successful until 1976. In 1976 they commenced negotiations with C Ltd for a merger and by March they were exploring the possibility of establishing a company in the Isle of Man to act as a holding company for the merger. In June 1976 M Ltd was incorporated in the Isle of Man and by an agreement on 19 July between the taxpayers and M Ltd (the July agreement) M Ltd acquired the issued share capital of Q Ltd in exchange for its own shares. Meanwhile, following an inquiry by another company (J Ltd), the negotiations with C Ltd were abandoned for a time, but they were resumed when it appeared that a sale to J Ltd would not go through. However, at a meeting between the taxpayers and J Ltd on 9 August an agreement (the August agreement) was reached whereby M Ltd sold the shares in Q Ltd to J Ltd for over £2m. On various occasions from March 1977 M Ltd, whose only assets were the proceeds of the sale of the shares in Q Ltd, made interest-free loans to the taxpayers and by October 1981 the entire proceeds had been lent to them. The taxpayers were assessed to capital

gains tax for 1976-77 and 1977-78 on the basis that on the sale of the shares by M Ltd to J Ltd there had been disposals by the taxpayers giving rise to chargeable gains, the consideration for the disposals being the cash received by M Ltd for the shares. On appeal by the taxpayers the Special Commissioners found that there had been a single composite transaction consisting of the transfer of the shares to M Ltd in July, their sale to J Ltd in August and the loans of the proceeds of sale to the taxpayers but that, since the July and August agreements had both been genuine transactions, and M Ltd had acquired the shares as a principal, the taxpayers could not be regarded as having disposed of their shares directly to J Ltd. a
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In the second case the taxpayer company, a member of a group of companies, was engaged in negotiations to sell certain land to a company (MP) outside the group at a price of £202,500. On 25 March 1980 the taxpayer company contracted to sell the land to five companies within the group (the first transaction). It was accepted that the first transaction was undertaken solely in order to take advantage of the £50,000 exemption from development land tax afforded by s 12 of the Development Land Tax Act 1976. On 22 May the taxpayer company sent a draft contract to MP in which the five companies were named as vendors. In July MP replied that it no longer wished to purchase the land. By February 1981, however, MP's circumstances had changed and negotiations were resumed. A sale of the land by the five companies to MP was completed in November 1981 at a higher price and on different terms (the second transaction). In 1984 the taxpayer company was assessed to development land tax on the footing that the second transaction was to be treated for tax purposes as a disposal of the land by the taxpayer company direct to MP. On appeal by the taxpayer company the Special Commissioners determined that if effect was to be given to two or more transactions as a single composite transaction there had to exist throughout an unbroken intention of an active nature, that on the facts the required continuity was lacking and accordingly that the true disponors of the land were the five companies and not the taxpayer company, and they therefore discharged the assessment. c
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In the third case G was the managing director of, and a shareholder in, a company (PGI) which he controlled. He was also a trustee of a family trust holding shares in PGI. In 1973 G entered into negotiations for the sale of the entire issued share capital of PGI to CSI. In order to postpone indefinitely capital gains tax which would otherwise have been payable on a direct sale of those shares to CSI, an Isle of Man company (PGH) was set up to exchange its shares for those of PGI and sell the PGI shares on to CSI, and the proceeds of the sale would then be lent, interest free, to the original shareholders of PGI (the shareholders). In February 1974 CSI broke off negotiations, but the share exchange between PGI and PGH was, nevertheless, proceeded with and completed in March 1974. In January 1976 PGH, which was effectively controlled by G, sold all the shares in PGI to a third party (H). The Revenue raised assessments for the year 1973-74 on all the shareholders on the ground that the share exchange constituted a chargeable disposal by the shareholders. In March 1982 further and alternative assessments were raised for the year 1975-76 on the ground that the sale of the PGI shares to H was to be regarded for capital gains tax purposes as a disposal by the shareholders. Because of a typing error in the further assessment on the trustees the year assessed was stated to be 1974-75. All the assessments were appealed against. By the time the Revenue noticed the incorrect date it was too late to raise any further assessment for the year 1975-76. The inspector therefore marked in the assessment book that the assessment for 1974-75 had been 'vacated' and notified the collector of taxes not to proceed against the trustees on that assessment. The inspector did not, however, inform the trustees of his actions. The solicitors acting for the trustees and the other shareholders eventually sent to the Revenue a schedule of the appeals in which the further assessment on the trustees was stated to be for the year 1975-76. The Special Commissioner found that the share exchange and the subsequent sale were not linked by any continuous pursued intention and they accordingly allowed the appeals. In relation to the mistake in the year of assessment the commissioners held that the assessment could not stand. f
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In each case an appeal by the Crown was dismissed by the judge. The Crown appealed to the Court of Appeal.

Held – The appeals would be dismissed for the following reasons—

(1) The fiscal consequences of a preordained series of transactions, intended to operate as such, were generally to be ascertained by considering the result of the series as a whole, and not by dissecting the scheme and considering each individual transaction separately. However, the mere fact that a scheme which involved a series of stages was designed to avoid or mitigate tax did not, by itself, entitle the Revenue to charge tax by reference to the result of the series as a whole without considering each individual stage separately. The phrases ‘a preordained series of transactions’ and ‘one single composite transaction’, which were synonymous, were not apt to describe two transactions, each of which, independently, undeniably had legal effect, unless at the time when the first transaction was effected all the essential features (and not merely the general nature) of the second transaction had already been determined by a person or persons who had the firm intention, and for practical purposes the ability, to procure the implementation of the second transaction (see p 34 j, p 35 g, p 37 j, p 41 d e, p 56 f, p 67 g, p 68 e to p 69 e, p 70 j to p 71 b, p 72 d and p 74 d, post); *W T Ramsay Ltd v IRC* [1981] 1 All ER 865, *IRC v Burmah Oil Co Ltd* [1982] STC 30 and *Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530 distinguished.

(2) It followed therefore that—

(a) on the basis of the facts found by the commissioners in the first case they could not in law properly have found that the July and August agreements constituted a single composite transaction for tax purposes, since at the date of the July agreement J Ltd’s final decision was unpredictable and the taxpayers, although hoping and intending that the sale to J Ltd would go through if they could achieve it, did not have the practical ability to ensure that result because their ability to do so depended on what J Ltd might finally be willing to contract with M Ltd on terms which the taxpayers regarded as acceptable (see p 46 f g, p 47 d, p 56 f, p 67 g, p 68 e f, p 73 e and p 74 d, post);

(b) on the facts of the second case it could not be said that, at the date of the first transaction, all the essential features of the second transaction had already been determined by a person who had the firm intention, and for practical purposes the ability, to procure the implementation of that second transaction. Furthermore, although the first transaction had been effected without any commercial or business purpose apart from a tax advantage, it would not have been open to the commissioners, on the facts found by them, properly to find that the first and second transactions had been one single composite transaction, and the judge had rightly decided that, when the second transaction followed, it did so as an independent transaction (see p 49 g h, p 50 a f, p 56 f, p 67 g, p 68 e f, p 73 g to j and p 74 d, post);

(c) on the facts of the third case it could not properly be said that the share exchange and the subsequent sale of the shares to CSI were a preordained series of transactions or a single composite transaction because, at the date of the share exchange, so far from the essential features of a sale to CSI or any other purchaser having already been determined, no one had the intention, still less the practical ability, to implement a sale to CSI or indeed to any other purchaser (see p 55 g, p 56 d to f, p 67 g, p 68 e f and p 74 b d, post).

(3) For the vacation of an assessment to be valid it had to be properly effected and, in the absence of any statutory authority for the purported ‘vacation’ by the inspector of taxes in the third case, his entry in the assessment book that the assessment had been ‘vacated’ had not been properly made and had no legal effect. Furthermore, on its true construction s 114^a of the Taxes Management Act 1970 did not give the Revenue power to treat an assessment made for one fiscal year as an assessment made for another fiscal year, the year of assessment being an essential part of the assessment itself. If the Revenue

^a Section 114 is set out at p 54 d e, post

made an assessment for a wrong year, their proper course was to issue an assessment for the correct year. It followed therefore that the assessment made against the trustees could not be treated as an assessment for 1975-76, and if it were to be regarded as an assessment for 1974-75 it could give rise to no liability on the part of the trustees (see p 53 b c, p 54 b c f j to p 55 a, p 56 f, p 68 e f and p 74 d, post).

Decisions of Peter Gibson J [1985] 3 All ER 125, of Warner J [1985] STC 783 and of Vinelott J [1986] 1 All ER 289 affirmed.

Notes

For the rules applying, for capital gains tax purposes, to the reorganisation of a company's share capital, see 5 Halsbury's Laws (4th edn) para 64.

For errors which do not invalidate assessments, see 23 *ibid* para 1581.

For the Taxes Management Act 1970, s 114, see 34 Halsbury's Statutes (3rd edn) 1346.

For the Development Land Tax Act 1976, s 12, see 46 *ibid* 1445.

As from 19 March 1985 development land tax was abolished and outstanding deferred liability was extinguished by the Finance Act 1985, s 93, and the 1976 Act was repealed by s 98(6) of and Pt X of Sch 27 to the 1985 Act.

Cases referred to in judgments

Aberdeen Construction Group Ltd v IRC [1978] 1 All ER 962, [1978] AC 885, [1978] 2 WLR 648, HL.

Black Nominees Ltd v Nicol (Inspector of Taxes) [1975] STC 372.

British Estate Investment Society Ltd v Jackson (Inspector of Taxes) (1956) 37 TC 79.

Canadian Eagle Oil Co Ltd v R [1945] 2 All ER 499, [1946] AC 119, HL.

Cape Brandy Syndicate v IRC [1921] 1 KB 64; *affd* [1921] 2 KB 403, CA.

Chinn v Collins (Inspector of Taxes) [1981] 1 All ER 189, [1981] AC 533, [1981] 2 WLR 14, HL.

Edwards (Inspector of Taxes) v Bairstow [1955] 3 All ER 48, [1956] AC 14, [1955] 3 WLR 410, HL.

Fleming (Inspector of Taxes) v London Produce Co Ltd [1968] 2 All ER 975, [1968] 1 WLR 1013.

Floor v Davis (Inspector of Taxes) [1979] 2 All ER 677, [1980] AC 695, [1979] 2 WLR 830, HL; *affg* [1978] 2 All ER 1079, [1978] Ch 295, [1978] 3 WLR 360, CA.

Furniss (Inspector of Taxes) v Dawson [1984] 1 All ER 530, [1984] AC 474, [1984] 2 WLR 226, HL; *rvsg* [1984] AC 474, [1983] 3 WLR 635, CA; *affg* [1982] STC 267.

Hart (Inspector of Taxes) v Briscoe [1978] 1 All ER 791, [1979] Ch 1, [1978] 2 WLR 832.

Hinckes, Re, Dashwood v Hinckes [1921] 1 Ch 475, [1921] All ER Rep 558, CA.

Honig v Sarsfield (Inspector of Taxes) [1986] STC 246, CA.

IRC v Burmah Oil Co Ltd [1982] STC 30, HL.

IRC v Duke of Westminster [1936] AC 1, [1935] All ER Rep 259, HL.

IRC v Plummer [1979] 3 All ER 775, [1980] AC 896, [1979] 3 WLR 689, HL.

IRC v Wesleyan and General Assurance Society [1946] 2 All ER 749, CA.

Mangin v IR Comr [1971] 1 All ER 179, [1971] AC 739, [1971] 2 WLR 39, PC.

Partington v A-G (1869) LR 4 HL 100.

Ramsay (W T) Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling [1981] 1 All ER 865, [1982] AC 300, [1981] 2 WLR 449, HL.

Tennant v Smith (Surveyor of Taxes) [1892] AC 150, HL.

Cases also cited

Barnes (Inspector of Taxes) v Hely-Hutchinson [1939] 3 All ER 803, [1940] AC 81, HL.

Bath and West Counties Properties Trust Ltd v Thomas (Inspector of Taxes) [1978] 1 All ER 305, [1977] 1 WLR 1423.

Bird v IRC [1985] STC 584; *rvsd in part* [1986] STC 168, CA.

Bye (Inspector of Taxes) v Coren [1985] STC 113; *affd* [1986] STC 393, CA.

Clearly v IRC [1967] 2 All ER 48, [1968] AC 766, HL.

Ewart v Taylor (Inspector of Taxes) [1983] STC 721.

Helvering (Comr of Internal Revenue) v Gregory (1934) 69 F 2d 809, Circuit Ct of Apps, 2nd Cir; *aff'd* (1935) 293 US 465, US SC.

IR Comr v Challenge Corp Ltd [1987] AC 155, PC.

Magnavox Electronics Co Ltd (in liq) v Hall (Inspector of Taxes) [1985] STC 260.

Morley-Clarke v Jones (Inspector of Taxes) [1985] 3 All ER 193, [1986] Ch 311, CA.

New Windsor Corp v Mellor [1975] 3 All ER 44, [1975] Ch 380, CA.

Young v Phillips (Inspector of Taxes) [1984] STC 520.

Appeals

Craven (Inspector of Taxes) v Stephen White

Craven (Inspector of Taxes) v Brian White

The Crown appealed against the order of Peter Gibson J ([1985] 3 All ER 125, [1985] 1 WLR 1024) entered on 3 June 1985 whereby he dismissed the appeals by the Crown by way of cases stated (set out at [1985] 3 All ER 126–148) from determinations of the Commissioners for the Special Purposes of the Income Tax Acts adjusting various assessments to capital gains tax made on Stephen White, Archibald Henry White and Brian White arising out of the exchange by them on 19 July 1976 of their shares in S White & Sons (Queensferry) Ltd (Queensferry) for shares in Millor Investments Ltd (Millor), an Isle of Man company, and the sale by Millor on 9 August 1976 to Morris & David Jones Ltd of the shares in Queensferry which it had acquired on 19 July 1976. Although the Crown had appealed against the commissioners' decisions in respect of all three Whites, Archibald Henry White died prior to the hearing in the High Court and, no personal representative of his estate having been appointed by the date of the hearing of the appeals, the appeals in the High Court related only to Stephen White and Brian White. The facts are set out in the judgment of Slade LJ.

IRC v Bowater Property Developments Ltd

The Crown appealed against the order of Warner J ([1985] STC 783) entered on 7 November 1985 whereby he dismissed the appeal by the Crown by way of case stated (set out at [1985] STC 784–794) from a determination of the Commissioners for the Special Purposes of the Income Tax Acts that Bowater Property Developments Ltd (BPD) should not be treated for the purposes of development land tax as the disponor in relation to the disposal of an interest in some 23 acres of land at Cooks Lane, Milton Regis, Sittingbourne, Kent to Milton Pipes Ltd effected by a contract dated 23 October 1981. The facts are set out in the judgment of Slade LJ.

Baylis (Inspector of Taxes) v Gregory

Baylis (Inspector of Taxes) v Gregory and Weare

The Crown appealed against the order of Vinelott J ([1986] 1 All ER 289, [1986] 1 WLR 624) entered on 30 December 1985 whereby he dismissed the appeal by the Crown by way of case stated (set out at [1986] 1 All ER 302) from a determination of the Commissioners for the Special Purposes of the Income Tax Acts discharging assessments to capital gains tax made on Robert Felix Gregory for the years 1973–74 and 1975–76, both in the sum of £785,000. The Crown also appealed against the order of Vinelott J ([1986] 1 All ER 289, [1986] 1 WLR 624) entered on 14 January 1986 whereby he dismissed the appeal by the Crown by way of case stated (set out at [1986] 1 All ER 291–302) from a determination of the Commissioners for the Special Purposes of the Income Tax Acts discharging two alternative assessments to capital gains tax made on Robert Felix Gregory and Bernard John Weare (the trustees) as trustees of the estate of Joseph Gregory deceased for the years 1973–74 and 1974–75 (or 1975–76), both in the sum of £155,000. The year for which the second assessment was made was one of the issues in

dispute before the commissioners. By an amended respondent's notice dated 26 January 1987 under RSC Ord 59, r 6(1)(b) the trustees gave notice that they would contend that the decision of Vinelott J incorporated in the order entered on 14 January 1986 should be affirmed on alternative grounds. The facts are set out in the judgment of Slade LJ.

The appeals were heard together by consent.

Jules Sher QC and Alan Moses for the Crown.

Leolin Price QC and Grant Crawford for the Whites.

Andrew Park QC and David Goy for BPD.

Michael Flesch QC for the trustees.

Cur adv vult

24 March. The following judgments were delivered.

SLADE LJ. There are before the court appeals by the Crown from three judgments. The first is from a judgment of Peter Gibson J delivered on 24 May 1985 in *Craven (Inspector of Taxes) v Stephen White, Craven (Inspector of Taxes) v Brian White* [1985] 3 All ER 125, [1985] 1 WLR 1024. The second is from a judgment of Warner J delivered on 18 October 1985 in *IRC v Bowater Property Developments Ltd* [1985] STC 783. The third is from a judgment of Vinelott J delivered on 26 November 1985 in *Baylis (Inspector of Taxes) v Gregory, Baylis (Inspector of Taxes) v Gregory and Weare* [1986] 1 All ER 289, [1986] 1 WLR 624. The first and third of these judgments concern assessments to capital gains tax. The second of them concerns an assessment to development land tax. The three cases are quite separate from one another on their facts. However, they raise similar problems concerning the extent and limitations of the principle relating to tax avoidance schemes which has come to be known as 'the Ramsay principle'. This was first stated by the House of Lords in *W T Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300 (*Ramsay*). It has subsequently been developed by their Lordships in *IRC v Burmah Oil Co Ltd* [1982] STC 30 (*Burmah*) and *Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530, [1984] AC 474 (*Dawson*), in which they reaffirmed the correctness of the dissenting judgment of Eveleigh LJ in *Floor v Davis (Inspector of Taxes)* [1978] 2 All ER 1079, [1978] Ch 295 (*Floor*).

The facts of all the cases now before this court have certain common features. In each of them there has been a disposition by the taxpayers of assets to one or more companies, followed by a disposition of those assets by the company or companies to an ultimate purchaser. Save possibly in *Craven v White*, where this element is in dispute, the first disposition has had no commercial purpose other than that of tax avoidance. In none of the cases now before the court did there exist a contractual obligation to effect the second disposition at the time when the first was made. In each case the Crown, in reliance on the Ramsay principle, asserts that for the purpose of ascertaining their fiscal consequences the two steps or transactions involved should be treated as a single composite transaction under which there was a 'disposal' by the taxpayers in favour of the ultimate purchaser.

Section 19(1) of the Finance Act 1965, which introduced capital gains tax, provided:

'Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets.'

Since a 'disposal of assets' is the event which gives rise to the charge, the first inquiry must always be whether or not such a 'disposal' in the relevant sense has occurred. The 1965 Act contained provisions stating in effect that certain specifically defined events should or should not (as the case might be) be treated as involving a disposal of assets. However, it contained no comprehensive definition of the word 'disposal'. Accordingly, where an assessment to capital gains tax is under challenge and the transactions in

a question are not specifically covered by a particular statutory provision, the task of the court, in the final analysis, must always involve the identification of the relevant disposal or disposals of assets (if any). In deciding whether a disposal has occurred within the meaning of the statute, it may have to consider in particular (i) who were the parties to that disposal, (ii) what was its date and (iii) what were the assets disposed of.

b The identification of the relevant disposal or disposals was the essential issue before the court in *Dawson* and is the essential issue in each of these three appeals, though the second of them happens to concern disposals with reference to the Development Land Tax Act 1976 rather than the 1965 Act.

c There are many similarities (though the taxpayers would say essential differences) between the facts of the first and third appeals and the facts of *Dawson*. A brief reference to the facts of that well-known case will suffice for present purposes. The Dawsons held shares in two operating companies. They reached an agreement in principle with another company (Wood Bastow) that Wood Bastow would purchase all those shares. Before the sale took place, they entered into a scheme designed to defer the liability to pay capital gains tax to which the transfer of the shares to Wood Bastow would otherwise have given rise. To that end, with the concurrence of Wood Bastow, they arranged for their shares to be exchanged for shares in a company (Greenjacket) specially incorporated for the purpose in the Isle of Man. The final part of the scheme, which was implemented on 20 December 1971, involved two distinct steps, namely (a) a transfer by the Dawsons to Greenjacket of the shares in the operating companies and (b) a subsequent transfer of the same shares (on the same day) by Greenjacket to Wood Bastow. The thinking behind the scheme was that para 6 of Sch 7 to the 1965 Act would apply, so as to prevent the transfers by the Dawsons to Greenjacket from being chargeable disposals of the shares in the family companies.

e The facts of *Dawson* had at least four features in common with the facts of each of the three present appeals. They involved a transfer of assets by A to B, followed by a transfer of those same assets by B to C. The commissioners in each case accepted that the transfer by A to B was a genuine transaction: there was nothing sham about it in the sense that it purported to be something that it was not in fact. The commissioners in each case further accepted that the transfer by A to B had passed to B the full legal and beneficial ownership of the assets in question. In each of the four cases the Revenue has further sought to exact tax on the basis that for fiscal purposes there has been a disposal by A not in favour of B but in favour of C.

f There are, however, certain significant differences between the facts of *Dawson* and the present cases. In particular, in *Dawson* (unlike the present cases) at the time when the transfer of assets by A to B took place there existed, by virtue of the prearranged scheme, the practical certainty (albeit covered by no pre-existing legally binding contractual arrangements) that the transfer of the same assets by B to C would almost immediately follow. Whether or not this renders *Dawson* distinguishable on its facts is one of the important issues on each of the present appeals.

g On appeal by the Crown to this court from the decision of Vinelott J in *Dawson* [1982] STC 267, this court rejected the Crown's claim that there had been a disposal of the shares in the operating companies by the Dawsons in favour of Wood Bastow (see [1984] AC 474). All its members (of whom I was one) found difficulty in accepting the reanalysis of the relevant transactions for which the Crown contended, in such a way (in Oliver LJ's words) 'as to attribute to them, for fiscal purposes, a legal result which they did not have and which indeed they were specifically designed to avoid having' (see [1984] AC 474 at 483). Oliver LJ was also particularly concerned with the prospect of double taxation. He considered that, if the Crown's argument were right, when the taxpayers sold their shares in Greenjacket their value on the sale would, under Sch 7, fall to be measured by the asset content of Greenjacket, which would include the assets representing the proceeds of sale of the original shares in the operating companies (see [1984] AC 474 at 482); the gain on that transaction would then be computed under that schedule on the difference between that value and the acquisition cost of the original shares, which (on this hypothesis)

would already have been taxed. In my own judgment I referred to what seemed to me the conceptual difficulties involved in regarding a composite transaction embodying a transfer by A to B of the full legal and beneficial title to property and a subsequent transfer of the same property by B to C as giving rise to *three* disposals for capital gains tax purposes, namely a disposal by A in favour of B, a disposal by B in favour of C and a disposal by A in favour of C in each case of the same assets (see [1984] AC 474 at 505–506).

The House of Lords, however, in reversing the decision of this court in *Dawson*, concluded:

‘The result of correctly applying the *Ramsay* principle to the facts of this case is that there was a disposal by the Dawsons in favour of Wood Bastow in consideration of a sum of money paid with the concurrence of the Dawsons to Greenjacket. Capital gains tax is payable accordingly.’

(See [1984] 1 All ER 530 at 544, [1984] AC 474 at 528 per Lord Brightman.)

Their Lordships’ decision made it clear that the ‘three disposals’ point which had concerned me was, at least on the facts of that case, without substance. If in any given case the *Ramsay* principle applies, there will merely have been one disposal for fiscal purposes, namely a disposal by A to C; the introduction of B into the scheme will fall to be wholly disregarded for fiscal purposes (see [1984] 1 All ER 530 at 543, [1984] AC 474 at 527 per Lord Brightman). By parity of reasoning, the decision indicated that Oliver LJ’s fears of oppressive double taxation were not well founded on the facts of that case. As Lord Brightman put it ([1984] 1 All ER 530 at 541–542, [1984] AC 474 at 525):

‘If the Crown’s case were correct, there would be a disposal by the Dawsons to Wood Bastow on which capital gains tax would be payable. There could be no *additional* capital gains tax on the steps by which that disposal was achieved, namely the sale first to Greenjacket and then by Greenjacket to Wood Bastow, because it is the Crown’s case that the fiscal consequences of the introduction of Greenjacket are to be disregarded. The Crown cannot, and does not claim to, have it both ways.’ (Lord Brightman’s emphasis.)

This decision of the House of Lords has thus clearly established that, in the light of the *Ramsay* principle, and contrary to the views which I had expressed in this court, a composite transaction which embodies a transfer by A to B of the full legal and beneficial title to property and a subsequent transfer by B to C of the full legal and beneficial title to the same property is capable in certain circumstances of giving rise to a disposal by A to C for capital gains tax purposes. The task of this court on the first and third of the present appeals is to consider whether or not the facts are such as to produce this result.

The House of Lords in *Dawson*, while giving guidance in general terms, did not think it necessary or appropriate to attempt a comprehensive definition of the circumstances in which two such successive transfers of the same property may give rise to a disposal by A to C for fiscal purposes. As Lord Scarman observed, the law in the area of the *Ramsay* principle is in an early stage of development (see [1984] 1 All ER 530 at 533, [1984] AC 474 at 513–514). Nevertheless, a number of significant guidelines are to be found in their Lordships’ speeches.

Firstly, they contain expositions of the general nature of the *Ramsay* principle which was being applied. Lord Fraser, who had himself been a party to the *Ramsay* decision, explained it thus ([1984] 1 All ER 530 at 532, [1984] AC 474 at 512):

‘The true principle of the decision in *Ramsay* was that the fiscal consequences of a preordained series of transactions, intended to operate as such, are generally to be ascertained by considering the result of the series as a whole, and not by dissecting the scheme and considering each individual transaction separately. The principle was stated in the speech of Lord Wilberforce in *Ramsay* [1981] 1 All ER 865 at 871,

a [1982] AC 300 at 324, especially where his Lordship said: "For the commissioners considering a particular case it is wrong, and an unnecessary self-limitation, to regard themselves as precluded by their own finding that documents or transactions are not 'shams' from considering what, as evidenced by the documents themselves or by the manifested intentions of the parties, the relevant transaction is. They are not, under the *Duke of Westminster* doctrine [see *IRC v Duke of Westminster* [1936] AC 1, [1935] All ER Rep 259] or any other authority, bound to consider individually

b each separate step in a composite transaction intended to be carried through as a whole." (Lord Fraser's emphasis.)

Lord Brightman similarly explained the *Ramsay* principle by reference to Lord Wilberforce's speech in that case ([1984] 1 All ER 530 at 540, [1984] AC 474 at 523):

c "The fact that the court accepted that each step in a transaction was a genuine step producing its intended legal result did not confine the court to considering each step in isolation for the purpose of assessing the fiscal results. Lord Wilberforce said ([1981] 1 All ER 865 at 872, [1982] AC 300 at 325): "... viewed as a whole, a composite transaction may produce an effect which brings it within a fiscal provision." Lord Wilberforce added later ([1981] 1 All ER 865 at 873, [1982] AC 300 at 326): "To force the courts to adopt, in relation to closely integrated situations, a step by step, dissecting, approach which the parties themselves may have negated would be a denial rather than an affirmation of the true judicial process. In each case the facts must be established; and a legal analysis made; legislation cannot be required or even be desirable to enable the courts to arrive at a conclusion which corresponds with the parties' own intentions."

d

e Secondly, *Dawson* establishes that the *Ramsay* principle is capable of applying to what has been described in argument in the present appeal as 'linear transactions', as well as to 'self-cancelling transactions' such as those under consideration in *Ramsay* itself. In the latter case the respective taxpayers had adopted elaborate and artificial schemes which were designed to create a loss for tax purposes, capable of being set off against existing realised gains, but would nevertheless not leave the taxpayers out of pocket after the schemes had been carried through to completion. The actual decisions in *Ramsay* were

f that the schemes gave rise to no allowable loss (save a sum not exceeding £370 in one case). In *Dawson* [1984] 1 All ER 530 at 532, [1984] AC 474 at 512, as Lord Fraser pointed out, the scheme was much simpler and had enduring legal consequences. However, this was not a sufficient ground for failing to apply the *Ramsay* principle.

g Thirdly, however, the mere fact that a scheme which involves a series of stages is designed to avoid or mitigate tax does not by itself entitle the Revenue to charge tax by reference to the result of the series as a whole, without considering each individual stage separately. Lord Brightman, with whose speech the rest of their Lordships concurred, expressed, in the following crucially important passage the conditions which have to be satisfied if the *Ramsay* principle is to be applied in any given case ([1984] 1 All ER 530 at 543, [1984] AC 474 at 527):

h "The formulation by Lord Diplock in *Burmah* expresses the limitations of the *Ramsay* principle. First, there must be a preordained series of transactions, or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (ie business) end. The composite transaction does, in the instant case: it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*. Second, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax, not "no business effect". If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied." (Lord Brightman's emphasis.)

j

Fourthly (and this is allied to the third point), as Lord Brightman stated, in any case where the Revenue is seeking to invoke the *Ramsay* principle, the commissioners will be required to make two findings of fact, namely:

'first, whether there was a preordained series of transactions, ie a single composite transaction; second, whether that transaction contained steps which were inserted without any commercial or business purpose apart from a tax advantage. Those are facts to be found by the commissioners. They may be primary facts or, more probably, inferences to be drawn from the primary facts. If they are inferences, they are nevertheless facts to be found by the commissioners. Such inferences of fact cannot be disturbed by the court save on *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14 principles.'

(See [1984] 1 All ER 530 at 543, [1984] AC 474 at 527.)

Lord Wilberforce in *Ramsay* [1981] 1 All ER 865 at 871, [1982] AC 300 at 324 had referred to the duty of the commissioners as being to—

'find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction or a number of independent transactions.'

To the limited extent that he referred to this matter as being 'one of law', I think that, as Peter Gibson J pointed out in his judgment in *Craven (Inspector of Taxes) v White* [1985] 3 All ER 125 at 152, [1985] 1 WLR 1024 at 1031, Lord Wilberforce's opinion must be regarded as having been overruled by Lord Brightman's speech in *Dawson*, with which all their Lordships concurred.

For present purposes, the third of these four guidelines is of paramount importance. In two of the three appeals before us the schemes in question admittedly included steps which had no business purpose apart from the avoidance of a liability to tax. The principal argument in all three appeals has centred round the condition for the application of the *Ramsay* principle that 'there must be a preordained series of transactions, or, if one likes, one single composite transaction'. I will refer to this as the first *Ramsay* condition. The first appeal, however, also concerns the application of the condition that 'there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax'. I will refer to this as the second *Ramsay* condition.

In opening the appeals on behalf of the Crown, counsel rightly indicated that perhaps the most important point of principle which this court has to consider is the essential nature of the link between two or more transactions which will suffice to satisfy the first *Ramsay* condition and thus entitle the Revenue or the court to treat all the transactions as one single transaction for fiscal purposes. In the course of his forceful and able argument, he naturally put the point in different phraseology and with differing shades of emphasis. However, while it is expressed in slightly more qualified terms in its notices of appeal in the other cases, I think that the basic proposition which the Crown is concerned to establish is well and clearly reflected in its notices of appeal in the *Baylis* cases, as follows:

'(4) It is submitted that in order to prove a pre-ordained series of transactions which culminates in an ultimate disposal it is only necessary to prove that at the time of the first transaction it was intended by the taxpayer that the first transaction should be used as conveyancing machinery in order to achieve a final disposal of the asset if a disposal was ultimately made. It is submitted that provided the machinery by which the commercial end is to be achieved is pre-ordained, it is irrelevant that there remains a possibility that its execution may be frustrated by a failure to achieve the commercial end itself or that at the time of the first transaction there was no immediate prospect or intention of finally disposing of the asset.'

It will be convenient to consider in general terms this proposition, which I will call 'the Crown's basic contention', before turning to the particular facts of each appeal.

a While in *Dawson* the proposed price and other terms of the ultimate purchase by C had been negotiated, although not to the stage of commitment, in advance of the transfer of assets by A to B, this was not so in any of the cases now before the court. Counsel for the Crown accepted that, if the evidence shows that, in advance of the first transaction, the purchase price and terms were all known, that may be the best evidence of the existence of one single composite transaction. Nevertheless, he submitted, the *Ramsay* principle is not applicable only in a case where there existed at the time of the first transaction a known purchaser who was prepared to purchase at a known price and on known terms. Since, he submitted, the purpose of the *Ramsay* principle is to identify the real transaction in any given case, by ignoring artificially inserted steps, the actual identification of the purchaser and the price does not signify anything of critical importance. If A Ltd wishes to sell its land free of development land tax and fragments the land into five subsidiary companies which have not used their £50,000 free band, can it make any difference, he asked, whether at the time of the fragmentation A Ltd has found the purchaser and negotiated the terms of the purchase or whether it has listed the sale in an immediately impending auction at a modest reserve which will for all practical purposes ensure its sale?

d In the Crown's submission, the essential link required to enable the Revenue to treat two or more transactions as a single composite transaction within the first *Ramsay* condition does not depend on the identification at the first stage of the ultimate purchaser or the proposed terms of his purchase, or indeed on the likelihood or otherwise of the second transaction following the first. The essential link is the *intention* of the taxpayer at the time of the first transaction. If, it is said, he embarks on the first stage with a view to facilitating an ultimate sale of the asset by means of a second stage, and that ultimate sale eventuates, that is enough to satisfy the first *Ramsay* condition. In the submission of e counsel for the Crown, it suffices for this purpose even if, at the time of the transfer of assets by the taxpayer, A, to B, A has no present intention to sell but his intention is merely that the transfer shall serve as a convenient springboard in case at some future date it may be desired to sell. (In the course of his argument he referred to the initial transfer in such a case as an instance of 'strategic tax planning', and I will use the same convenient phrase hereafter in this judgment.) In the alternative, he submitted, it must f in any event suffice if, at the time of the transfer of assets by A to B, A has the present general intention to sell and intends that such transfer shall serve as a springboard for a sale when it eventuates.

g It would be quite wrong to dissect and apply every word of Lord Brightman's formulation of either the first or the second *Ramsay* condition as if it had statutory force. In due course, the House of Lords are themselves likely to give further guidance as to the circumstances in which the *Ramsay* principle is capable of applying to a linear transaction. In the mean time, however, I think that we in this court are both bound and entitled to apply Lord Brightman's careful and considered formulation of the limits of the *Ramsay* principle (which followed a similar formulation by Lord Diplock in *Burmah* and has the approval of all their Lordships) according to what we understand to be its true meaning and intent. Proceeding on this footing, I find myself unable to accept the Crown's basic h contention. In my judgment, for the reasons which I will now attempt to state, it would involve an unwarrantable extension of the *Ramsay* principle.

j Firstly, as Lord Brightman's speech makes clear, their Lordships in *Dawson* regarded the phrases 'a preordained series of transactions' and 'one single composite transaction' as synonymous. I would not regard either phrase as apt to describe two transactions, each of which, independently, undeniably had legal effect, unless (as in *Dawson*, *Ramsay* and *Burmah*) at the time when the first transaction was effected all the essential features (not merely the general nature) of the second transaction had already been determined by a person or persons who had the firm intention, and for practical purposes the ability, to procure the implementation of the second transaction. Special considerations might apply to a case where the second transaction consisted of a sale by auction which had been

arranged before the first transaction was effected. Normally, however, it seems to me that a transfer by A to B followed by a sale by B to C could not, on the ordinary meaning of words, be together described either as 'one single composite transaction' or as 'a preordained series of transactions' unless at the time of the first transfer C had been identified as a prospective purchaser, and all the main terms of the sale to him had at least in principle been agreed; if this is not so, they have to be regarded as independent transactions. I am fortified in the belief that the House of Lords, in their precise formulation of the first *Ramsay* condition, would not have accepted the Crown's basic contention by the second, third and fourth considerations to which I am about to refer. a

Secondly, in the particular circumstances of all of *Ramsay*, *Burmah* and *Dawson*, at the time when the first stage in the relevant scheme was carried through all the essential features of the second stage had in fact been determined by persons who had the firm intention and for practical purposes the ability to procure the implementation of the second stage. Furthermore, this point emerges more or less explicitly from many of the speeches in those decisions. b

As to the *Ramsay* scheme itself:

'It was reasonable to assume that all steps would, in practice, be carried out, but there was no binding arrangement that they should. The nature of the scheme was such that once set in motion it would proceed through all its stages to completion.' c

(See [1981] 1 All ER 865 at 874, [1982] AC 300 at 328 per Lord Wilberforce.) d

In the case of the *Rawling* scheme, one of the six Jersey companies concerned had actually contracted to procure the implementation of all the steps comprised in the scheme and was in a position to obtain the requisite co-operation of two of its associated companies (see [1981] 1 All ER 865 at 877, [1982] AC 300 at 332). Lord Wilberforce described the common features of the *Ramsay* and *Rawling* schemes thus: e

'First, it is the clear and stated intention that once started each scheme shall proceed through the various steps to the end; they are not intended to be arrested half-way . . . This intention may be expressed either as a firm contractual obligation (it was so in *Rawling*) or as in *Ramsay* as an expectation without contractual force.' f

(See [1981] 1 All ER 865 at 870, [1982] AC 300 at 322.)

Burmah raised the question whether certain transactions resulted in an allowable capital loss for the purposes of corporation tax on capital gains. Lord Fraser in his speech, with which all the rest of their Lordships agreed, referred to certain differences between the two-stage scheme there under consideration and the schemes in *Ramsay* and *Rawling* (see [1982] STC 30 at 36-37). One difference was that in those cases the taxpayers had been provided with a 'preconceived and ready-made plan', whereas in *Burmah* the plan, though preconceived, was specially tailor-made for *Burmah*. Again, in those earlier cases, it was the clear and stated intention that, once started, each scheme would proceed to completion and would not be arrested half way. In *Burmah* the first series of events, those occurring on 12 December 1982, could have stood on their own and need not have been followed by the second series on 18 December. However, as Lord Fraser pointed out ([1982] STC 30 at 37): g

'... it is clear that the events initiated on 18 December formed part of a single scheme and I have already quoted the finding by the Special Commissioners that they took place in the order and according to a time-table prepared in advance . . . No doubt the directors could have chosen, even at that stage, to abandon the scheme but the reality was that the decision had already been taken to carry it through to completion . . .'

In *Dawson*, though there was no pre-existing contract when the scheme began to be implemented, there was an equivalent practical certainty that all its steps would be carried through to the end. Lord Brightman described the manner in which the two sale h

a agreements had been exchanged on the very same day and referred to minutes of the board meetings of the companies concerned. He commented ([1984] 1 All ER 530 at 538, [1984] AC 474 at 520):

b 'These show that the whole process was planned and executed with faultless precision. The meetings began at 12.45 pm on 20 December, at which time the shareholdings of the operating companies were still owned by the Dawsons unaffected by any contract for sale. They ended with the shareholdings in the ownership of Wood Bastow. The minutes do not disclose when the meeting ended, but perhaps it was all over in time for lunch.'

c There are many other similar references in the speeches, in which the inevitability for practical purposes of the scheme proceeding from the first stage to the completion of the second stage is stressed. I do not think that the House of Lords would have been at such pains to emphasise this feature of the respective schemes if it had not regarded it as being of cardinal importance in deciding whether or not the various transactions could properly be treated as one composite transaction for fiscal purposes and whether or not the intermediate steps, inserted purely for the purposes of tax avoidance, could be disregarded for tax purposes, even though otherwise fully legally effective according to their terms.

d Thirdly, the Crown's basic proposition is, in my opinion, inconsistent with the whole rationale of the *Ramsay* principle, as explained by Lord Wilberforce in *Ramsay* [1981] 1 All ER 865 esp at 871, [1982] AC 300 esp at 323-324 and by Lord Brightman in *Dawson*, who explained it thus ([1984] 1 All ER 530 at 542-543, [1984] AC 474 at 526-527):

e 'In a preplanned tax saving scheme, no distinction is to be drawn for fiscal purposes, because none exists in reality, between (i) a series of steps which are followed through by virtue of an arrangement which falls short of a binding contract, and (ii) a like series of steps which are followed through because the participants are contractually bound to take each step seriatim. In a contractual case the fiscal consequences will naturally fall to be assessed in the light of the contractually agreed results. For example, equitable interests may pass when the contract for sale is signed. In many cases equity will regard that as done which is contracted to be done. *Ramsay* says that the fiscal result is to be no different if the several steps are preordained rather than precontracted. For example, in the instant case tax will, on the *Ramsay* principle, fall to be assessed on the basis that there was a tripartite contract between the Dawsons, Greenjacket and Wood Bastow under which the Dawsons contracted to transfer their shares in the operating companies to Greenjacket in return for an allotment of shares in Greenjacket, and under which Greenjacket simultaneously contracted to transfer the same shares to Wood Bastow for a sum in cash. Under such a tripartite contract the Dawsons would clearly have disposed of the shares in the operating companies in favour of Wood Bastow in consideration of a sum of money paid by Wood Bastow with the concurrence of the Dawsons to Greenjacket. Tax would be assessed, and the base value of the Greenjacket shares calculated, accordingly. *Ramsay* says that this fiscal result cannot be avoided because the preordained series of steps are to be found in an informal arrangement instead of in a binding contract. The day is not saved for the taxpayer because the arrangement is unsigned or contains the words "this is not a binding contract".'

j Thus, the whole rationale of the *Ramsay* principle is that no distinction falls to be drawn between case (i) and case (ii) referred to in this passage, 'because none exists in reality'. The whole of this reasoning presupposes that, in a case where there was no pre-existing contract but the *Ramsay* principle applies, all the steps in the preordained series of transactions would have been capable of being embodied in a binding contract before the first transaction was effected, though the persons having control of the scheme chose or omitted so to embody them. This in turn presupposes that, before the first transaction was effected, all the essential features of the second transaction were planned, intended and ascertained.

Fourthly, I think that, if the *Ramsay* principle were to be held to apply to transactions of which the connecting link is so tenuous as that suggested in the Crown's basic contention, formidable uncertainty and practical difficulties would arise in the administration of our tax law, which the House of Lords, in formulating and developing the *Ramsay* principle, did not contemplate and would not have intended. The whole essence of this principle when it applies is that the step inserted in the series of transactions which has no commercial purpose apart from the liability to tax falls to be wholly disregarded for fiscal purposes (see *Dawson* [1984] 1 All ER 530 at 543, [1984] AC 474 at 527 per Lord Brightman). But the step so inserted may well, by itself, have immediately and permanently altered the legal rights of the parties, for example by transferring the legal and beneficial title to assets from A to B. In the circumstances envisaged in the Crown's basic contention, a substantial interval of time may elapse before any transfer of those assets by B to C ensues and, indeed, in the event, no such transfer may ever take place. In the mean time the Revenue may well assess the interested parties to tax (*prima facie* quite properly) on the basis that there has been a disposal of assets by A to B, effective according to the tenor of the documents. (It can by no means be assumed that in the case of other tax saving schemes the first disposal will be wholly covered by a specific statutory exemption, such as was available in *Dawson*.) What are then to be the fiscal consequences if and when a sale of assets by B to C at last ensues? If the original scheme was designed to avoid or mitigate tax, it is to be assumed that, if it could properly do so in reliance on the *Ramsay* principle, the Revenue would subsequently wish to claim tax, on the basis of a disposal by A to C, when the sale to C eventuates. However, of one thing I am certain. The 1965 Act, on its true construction, does not permit one single transfer of assets by A to be treated for capital gains tax purposes both as a disposal of all those assets in favour of B and as a disposal of all those same assets in favour of C. Neither the House of Lords in *Dawson* nor counsel for the Crown in this court suggested to the contrary. What then is to be the status of the earlier assessment in such circumstances? Was it wrong when made or has it merely become wrong? If it cannot be said that it was wrong when made, how can the taxpayer escape oppressive double taxation in the absence of any relieving statutory provision? (No such provision has been drawn to our attention.) If the Revenue is to be entitled to claim tax on the basis of a disposal by A to C, what is to be regarded as the date of that disposal? What is to be regarded as the base value of the assets disposed of and at what date is it to be ascertained? The list of difficult practical and conceptual problems that could arise, if the Crown's basic contention were well founded, could be multiplied.

Though several of these problems were canvassed in some depth in argument before us, I cannot attempt to provide satisfactory answers to them and I do not think that counsel for the Crown, with due respect to his submissions, was able to do so. In drawing attention to them, I observe that, in cases where the scheme involves a preordained series of transactions, in the sense which I attribute to that phrase (as in *Dawson*, *Ramsay* and *Burmah*), there may be little practical likelihood of the problems arising, because there is no practical likelihood of a substantial 'limbo' period elapsing between the first and second stages of the series. In other cases, the problems might be real and serious.

Finally, before turning to the facts of the individual cases before us, I should mention that each of the notices of appeal before us includes, *inter alia*, the following ground:

'the effect of the learned judge's decision is that the *Ramsay* principle can be easily side-stepped by the simple expedient of the taxpayer taking the first step in the composite transaction (namely, the share exchange) prior to going into the market to find his purchaser ...'

While I appreciate the concern of the Revenue in this context, this ground, with due respect to the submission, seems to me to beg the very question which has to be decided, namely whether or not there has indeed been a composite transaction. It assumes that

a two transactions are together capable of constituting one composite transaction within the meaning of the first *Ramsay* condition even though at the time of the first transaction the persons having control of the matter had not yet gone into the market to find a purchaser and there was at that time no certainty whatever that an ultimate sale would eventuate. For the reasons which I have attempted to indicate, this assumption is, in my judgment, incorrect. This was not the sort of case which the House of Lords, in referring to 'one composite transaction' can have had in mind. Various fiscal statutes expressly
b state that the term 'disposition' includes a 'disposition effected by associated operations'. Simply for example, s 51(1) of the Finance Act 1975 (in the context of capital transfer tax) so provides; and s 44(1)(b) of that Act provides that 'associated operations' means 'any two operations of which one is effected with reference to the other, or with a view to enabling the other to be effected or facilitating its being effected . . .'. If the capital gains tax legislation had included similar provisions, the Crown's basic contention might have
c been easily sustainable. In my judgment, however, the gap cannot be filled by judicial legislation.

As things are, as a matter of general principle, I conclude that two successive transactions, each of which has legal effects, are not properly to be regarded as a preordained series or as a single composite transaction within the meaning of the first
d *Ramsay* condition as stated by the House of Lords unless, at the time when the first transaction was effected, all the essential features (not merely the general nature) of the second transaction had already been determined by a person or persons who had the firm intention, and for practical purposes the ability, to procure the implementation of the second transaction.

After these general observations, I turn to a separate consideration of the three appeals now before us.

e *Craven v Stephen White, Craven v Brian White*

In this case the Special Commissioners heard together appeals by three taxpayers, Archibald, Brian and Stephen White, against assessments to capital gains tax. They gave their decision allowing those appeals on 18 January 1984 ([1985] 3 All ER 125, [1985] 1
f WLR 1024), after the decision of the Court of Appeal in *Dawson* but before the decision of the House of Lords. The Crown appealed against the decision in each case, but the appeals which came before Peter Gibson J related only to Brian and Stephen White: by that time Archibald White had died.

I gratefully adopt, more or less verbatim, Peter Gibson J's summary of the basic facts of the case, merely adding a few references to certain additional points which counsel for the Crown drew to our attention. Archibald, Brian and Stephen White, until 19 July
g 1976, owned all the issued share capital of S White & Sons (Queensferry) Ltd (Queensferry), which owned and operated about a dozen supermarkets. They respectively held 701, 700 and 2,101 £1 ordinary shares.

In 1973, on the advice of Queensferry's accountant, Mr Clarke, they decided that they would either merge Queensferry with a similar business or they would sell it. Between
h 1973 and the summer of 1976 they sought without success to achieve one or the other result.

Early in 1976 Stephen White approached Mr Humphreys of Cee-N-Cee Supermarkets (Cee-N-Cee) with a view to resuming talks about a possible merger between Queensferry's business and that of Cee-N-Cee. In February or March 1976 Mr Clarke initiated talks with Manx lawyers, Messrs Kneale & Co (Kneales), about establishing a holding company
j in the Isle of Man as a vehicle for such a merger.

At about the same time as discussions were resumed with Mr Humphreys, a company called Oriol Foods Ltd (Oriol) asked Mr Clarke if Queensferry was still up for sale. Oriol itself had been acquired by RCA Corp of America (RCA) in 1974. A subsidiary of Oriol was Morris & David Jones Ltd (Jones). Once Oriol's inquiry was received, negotiations with Cee-N-Cee were set aside and negotiations with Oriol were pursued. In May 1976

broad agreement on price had been reached, that is to say that, if a sale went through, the consideration would probably exceed £2m and be paid in cash. a

In June 1976 the Whites were alarmed by trade press reports that RCA was disenchanted with its food operations. A meeting with Oriol on 17 June to find out how the proposed sale to Oriol stood left Brian and Stephen White and Mr Clarke feeling despondent. They had exhausted other potential purchasers and trading prospects for Queensferry were not good. They went back to Cee-N-Cee, which was willing to resume talks. b

On 21 June 1976 Mr Clarke arranged with Kneales to acquire an off-the-shelf company, Millor Investments Ltd (Millor), as a holding company for the projected merger with Cee-N-Cee. Millor then had a £2 issued share capital, its two £1 shares being held by two advocates' clerks from Kneales. In evidence before the commissioners Mr Clarke and Stephen White insisted that the sole purpose of acquiring Millor was to act as a holding company for the shares of Queensferry and Cee-N-Cee and any other company which might join the group. The commissioners did not accept that this was the sole purpose of the acquisition. They put the matter thus ([1985] 3 All ER 125 at 142): c

‘The view we have formed is that Stephen White’s approach to Mr Humphreys early in 1976 was made as a final resort after repeated unsuccessful attempts since 1973 to dispose of [Queensferry]. We infer, from the fact that so soon as Oriol reappeared as a possible purchaser the talks with Mr Humphreys were set aside, that Stephen White and Brian White regarded a deal with Oriol as a more desirable target than a merger with Cee-N-Cee.’ d

Nevertheless, I think it clear that the commissioners accepted as a fact that a subsidiary purpose of acquiring Millor was that it should act as a holding company if the sale to Jones did not happen but a merger between Queensferry and Cee-N-Cee should eventuate. e

On 23 June 1976 Millor increased its authorised share capital with a view to issuing 3,502 Millor shares in exchange for the Whites’ Queensferry shares on a one for one basis. On 24 June Mr Clarke sent to Kneales a draft which he had prepared of a contract between the Whites and Millor. f

Meanwhile, on 21 June 1976 Oriol had asked Mr Clarke for a further meeting on 25 June. That meeting was held at the offices of Oriol’s solicitors. Oriol asked if a draft contract for the acquisition of Queensferry could be sent to the Whites’ solicitors and were told that the draft should be sent to Kneales as lawyers for Millor. Oriol’s solicitors sent the draft to Kneales. The commissioners found that following the meeting of 25 June negotiations for the acquisition of Queensferry by Oriol ‘resumed more strongly and continued, albeit not always smoothly, towards the execution of the agreement on 9 August’ (see [1985] 3 All ER 125 at 142). Nevertheless, notwithstanding the increased purposefulness of these negotiations, the talks with Cee-N-Cee also continued. g

On 9 July 1976 Queensferry’s authorised share capital was increased and 3,502 new ordinary shares were issued to the Whites on renounceable letters of allotment while the existing ordinary shares were converted into deferred ordinary shares with diminished rights. The commissioners found that the purpose of this reorganisation of share capital was, on the advice of Kneales, to effect stamp duty savings should the contract for the sale to Jones by Millor be entered into. h

On or before 14 July Millor offered to acquire the issued share capital of Queensferry. It offered to buy the deferred ordinary shares for 50p each and to exchange one Millor share for each Queensferry ordinary share, the offer to remain open until 9 August. On 19 July the Whites entered into an agreement with Millor (the July agreement) accepting Millor’s offer, and the Whites held shares in Millor in the same proportions as they had held shares in Queensferry. j

On 20 July the Queensferry board approved and registered the transfers of the deferred ordinary shares to Millor and agreed that, when the renounced letters of allotment for

the ordinary shares were received, registration would be completed in accordance with the forms of renunciation.

On 9 August there was a meeting between representatives of Oriel and Jones on the one hand and Stephen and Brian White and Mr Clarke and the two directors (both from Kneales) of Millor on the other. That meeting was stormy: at one stage Stephen White and his party walked out. But agreement was in the end reached and Millor and Jones entered into a written agreement (the August agreement) whereby Jones agreed to purchase the whole of the issued share capital of Queensferry for a consideration of £2.2m subject to adjustment. That consideration was apportioned as to 50p for each deferred ordinary share and the balance to the ordinary shares. Payment of the consideration was to be by instalments, £1.8m on completion and then two other payments of adjustable amounts. In the event, £2,459,493 was paid by Jones.

Following completion and between 25 March 1977 and 6 October 1981 Millor made several interest-free loans to the Whites. In all £275,000 was lent to Stephen White, but of that £50,000 was repaid on 30 September 1981; £145,000 was lent to Brian White and £100,000 to Archibald White; £1,500 was expended on acquiring options on three Manx companies, and the balance lent interest-free to those companies.

Assessments to capital gains tax were raised against each of Archibald and Brian White in the sum of £490,000 for 1976-77 and in the sum of £27,000 for 1977-78, and against Stephen White in the sum of £1,475,000 for 1976-77, and in the sum of £80,000 for 1977-78. At the hearing of their appeals before the Special Commissioners it was submitted on their behalf that the only disposals by them were the disposals of their Queensferry shares to Millor and that of those disposals only the sale of the deferred ordinary shares to Millor was a disposal for capital gains tax purposes, the exchange of the Queensferry ordinary shares for the Millor shares being, by the combined effect of paras 4(2) and 6 of Sch 7 to the 1965 Act, no disposal for such purposes. On the other hand, in reliance on the *Ramsay* principle, the Crown submitted that the Whites had for such purposes disposed of all their shares in Queensferry to Jones, on the grounds that the transfer of their shares to Millor should be treated as a fiscal nullity. Alternatively, it was submitted, the Whites fell to be assessed on the amounts which they received from Millor by way of loans and at the time when the loans were made.

The commissioners found that before the July agreement with Millor was entered into the Whites and Mr Clarke had reached an understanding that, if a sale to Jones transpired, arrangements could be made for the Whites to have the use of the proceeds of sale, either directly or indirectly, for their own purposes. Nevertheless, they pointed out that this understanding was 'of a different nature from the carefully thought out, and dovetailed, arrangements reflected in the transactions considered in *Floor* and in *Dawson*' (see [1985] 3 All ER 125 at 144). Without spelling out their understanding of the nature of a 'composite transaction', they said:

'We consider that we are constrained by authority to look at the transactions as a whole (*Ramsay*). We have found that the primary objective of the [Whites] was to conclude a sale of [Queensferry's] shares to Jones. That objective was achieved, and the agreements of July and August are to be looked upon as parts of a composite transaction comprising those two agreements, if no more; it is irrelevant that the terms of the August agreement were not finally settled until the day it was executed.'

Nevertheless, following the decision of the majority of this court in *Floor*, on what was described as the first stage of the transaction in that case, the commissioners held that the July and August agreements were real transactions, that Millor acquired the Queensferry shares as a principal and that accordingly the Whites could not be regarded as having disposed of their shares direct to Jones. They therefore held that there was no disposal for capital gains tax purposes of the Queensferry ordinary shares effected by the July agreement. However, they also held that on each of the occasions when one of the Whites received a loan he must be deemed to have made a part disposal of the shares which he formerly owned in Queensferry.

By the time that Peter Gibson J heard the Crown's appeal against the rejection of the commissioners' argument that the Whites had made a disposal for capital gains tax purposes of their Queensferry shares to Jones, the views of the majority of this court in *Floor* had been held by the House of Lords in *Dawson* to have been wrong and the dissenting judgment of Eveleigh LJ in *Floor* had been reaffirmed as correct. It was submitted to Peter Gibson J that the scheme employed by the Whites was exactly the same as that in *Dawson* and that, given the finding of the composite transaction by the commissioners, the court should hold that the only true reasonable conclusion, on the facts found by them, was that the transfer of the Queensferry shares to Millor had no commercial purpose other than the avoidance of tax. It was therefore submitted that, by virtue of the *Ramsay* principle, the real transaction was the sale by the Whites of their Queensferry shares to Jones for the moneys which they caused to be paid to Millor and that the taxpayers were liable to capital gains tax.

Counsel for the Crown submitted to Peter Gibson J, as he did before us, that the important characteristic of each step forming part of a 'composite transaction' is that it should be intended by the taxpayer to be one step in a series of steps. For this he particularly relied on Lord Wilberforce's words in *Ramsay* [1981] 1 All ER 865 at 871, [1982] AC 300 at 323:

'If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine [of *IRC v Duke of Westminster* [1936] AC 1, [1935] All ER Rep 259] to prevent it being so regarded . . .'

However, in the next paragraph, Lord Wilberforce referred to the 'intentions of the parties' which, in Peter Gibson J's view, suggested that he may not have regarded the intentions of the taxpayer alone as sufficient for determining what the relevant transaction was (see [1985] 3 All ER 125 at 152, [1985] 1 WLR 1024 at 1031). Furthermore, Lord Wilberforce went on to say ([1981] 1 All ER 865 at 871, [1982] AC 300 at 324) that the commissioners—

'are not, under the *Duke of Westminster* doctrine or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole. This is particularly the case where (as in *Rawling*) it is proved that there was an accepted obligation, once a scheme is set in motion, to carry it through its successive steps. It may be so where (as in *Ramsay* or in *Black Nominees Ltd v Nicol (Inspector of Taxes)* [1975] STC 372) there is an expectation that it will be so carried through, and no likelihood in practice that it will not.'

Peter Gibson J observed ([1985] 3 All ER 125 at 153, [1985] 1 WLR 1024 at 1032):

'Lord Wilberforce in the passage cited refers to two classes of case to which the *Ramsay* principle has or may have application and which correspond to the contractual and non-contractual arrangements to which Lord Brightman referred in giving the rationale of the *Ramsay* principle. It is to be noted that to the non-contractual class of case Lord Wilberforce applies the description that it is where there is an expectation that the series of steps will be carried through once a scheme is set in motion and there is no likelihood that it will not. The practical certainty, to adopt the phrase of counsel for the taxpayers, that the series of steps will be completed once started is a feature of the rationale of the *Ramsay* principle as expounded by Lord Brightman and is well exemplified in all the cases in which the principle has been held to apply. The justification for equating the non-contractual arrangement with the contractual is that, looking at the realities of a preplanned tax-saving scheme where every step has been arranged, there is no distinction between the two: both will in practice be carried through to their intended conclusion. Contrast the case where in reality there is a distinct possibility that a

a planned series of steps may not be completed as planned; in those circumstances the real position is not the equivalent of a contractual arrangement capable of being enforced.'

b Peter Gibson J ([1985] 3 All ER 125 at 153, [1985] 1 WLR 1024 at 1032) recognised that the commissioners had attempted to make a finding of a composite transaction for the purpose of the application of the *Ramsay* principle and that, having regard to what had been said in *Dawson*, this was a finding of fact which was reviewable on the principles of *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14. Having referred to this and other findings of fact by the commissioners, he commented ([1985] 3 All ER 125 at 153-154, [1985] 1 WLR 1024 at 1033):

c 'It would appear from these findings that what the Special Commissioners regarded as the essential quality of a composite transaction was that the taxpayer (with his advisers) should at the time the first step in the composite transaction was taken have planned the steps in the series that made up the composite transaction, regardless of whether the means of achieving all the steps lay within the control of the taxpayer or of whether there was otherwise any practical certainty that all the planned steps would be completed. Thus, although I do not doubt that the Special Commissioners were attempting to make a finding of a composite transaction for the purpose of the application of the *Ramsay* principle, to my mind they have not directed themselves correctly in law. The case would have to be remitted to the Special Commissioners, as counsel for the Crown submitted it should, unless there was only one true and reasonable conclusion on the facts as found or there was some other point decisive of the appeals.'

e However, looking at the primary facts found by the commissioners, he concluded that, at the time when the July agreement was made, there was no 'practical certainty' that the sale to Jones would be completed; on the contrary there was a live possibility that it would not. In those circumstances, he concluded that it was impossible to say that the July agreement and the August agreement were parts of a composite transaction, so as to satisfy the first *Ramsay* condition. He considered that the commissioners had f misdirected themselves in law because they—

'regarded as the essential quality of a composite transaction . . . that the taxpayer (with his advisers) should at the time the first step in the composite transaction was taken have planned the steps in the series that made up the composite transaction, regardless of whether the means of achieving all the steps lay within the control of the taxpayer or of whether there was otherwise any practical certainty that all the planned steps would be completed.'

g (See [1985] 3 All ER 125 at 153, [1985] 1 WLR 1024 at 1033.)

h As a second, further ground of his decision Peter Gibson J held that, in any event, the second *Ramsay* condition was not satisfied, because it could not properly be said that the July agreement had no commercial purpose other than the avoidance of a liability to tax (see [1985] 3 All ER 125 at 154, [1985] 1 WLR 1024 at 1034). He therefore held that the *Ramsay* principle, as formulated by the House of Lords, had no application to the case. It was common ground that if the July agreement did not fall to be disregarded the provisions of paras 4 and 6 of Sch 7 were applicable, so that the transfers of the ordinary shares in Queensferry by the taxpayers to Millor were to be treated as not being disposals for capital gains tax purposes. He therefore dismissed the Crown's appeals.

i In relation to the first of the two main grounds of Peter Gibson J's decision, counsel for the Crown submitted to us that the judge erred in holding that the commissioner's finding of a composite transaction was insupportable on *Edwards (Inspector of Taxes) v Bairstow* principles. On the contrary, he contended, Peter Gibson J himself, in applying the 'practical certainty' test referred to above, applied the wrong test: he confused

certainty as to the series of steps by which a particular commercial end is to be achieved with certainty as to the achievement of the end itself. It was irrelevant, in counsel's submission, that, at the time of the July agreement, there remained a possibility that the sale to the Whites would not ultimately be achieved: the crucial point was that, at that time, the taxpayers had a firm intention that, if a sale to the Whites should be achieved, it would be routed through the interposed company, Millor. a

In any event, even if contrary to his submission, the 'practical certainty' test were the correct one, counsel for the Crown suggested that it was satisfied on the facts. At the time of the first transfers of the shares in Queensferry on 19 July 1976, the negotiations for the ultimate sale had advanced a long way. The proposed purchaser, Jones, was identified. The approximate likely consideration (in excess of £2m) had been known since May 1976. From that time onwards, the taxpayers had been striving towards the object of an ultimate sale to Jones. These negotiations faltered between 17 and 21 June. However, from that time on they continued, according to the commissioners' findings, with increased purposefulness until the contract with Jones was finally concluded on 9 August; this contract had been in draft form since 25 June 1976. In counsel's submission, the fact that Jones may not have had any settled intention to purchase as at 19 July 1976 was irrelevant; Peter Gibson J erred in considering that the intentions of the contemplated purchaser are relevant in deciding whether or not there is one composite transaction in any given case: the intentions of the taxpayer are the only relevant intentions. b
c
d

As a matter of legal analysis, I would for my part prefer to express the first *Ramsay* condition by reference to the test suggested at the end of the first section of this judgment, rather than by reference to the 'practical certainty' test adumbrated and applied by Peter Gibson J. It seems to me, with respect, that the former test perhaps reflects more accurately both the wording of the phrase 'a preordained series of transactions, ie a single composite transaction' and the essential rationale which enables such a composite transaction to be regarded as involving a disposal by A to C, rather than a disposal by A to B for tax purposes. Nevertheless, both tests come to much the same thing. Unless, at the time when the first transaction in the series is effected, all the essential features of the second transaction have already been determined by persons who have the firm intention, and for practical purposes the ability, to procure the implementation of the second transaction, there will be no practical certainty that the second transaction will be effected. e
f

I agree with Peter Gibson J that, on the basis of the facts found by the commissioners, they could not in law properly have found that the July and August agreements constituted a single composite transaction so as to satisfy the first *Ramsay* condition. As at the date of the July agreement, the Whites, though hoping and intending that the sale to Jones would go through if they could achieve it, did not have the practical ability to ensure this result. Their ability to do so depended on what Jones might finally be willing to contract with Millor on terms which the Whites regarded as acceptable. (This, I think, is the relevance of Jones's intentions.) The final decision of Jones was still unpredictable. As is indicated by the 'stormy' meeting which took place on 9 August 1976, only at the last moment was there any practical certainty that the August agreement would be concluded. As the taxpayers' counsel cogently submitted in their skeleton argument: g
h

'Acceptance of the [Crown's] submission [that the first *Ramsay* condition was satisfied] would mean that the status of the share exchange with Millor could not be known on 19 July 1976, being contingently disregardable depending on whether a sale to Jones eventuated. Since the sale to Jones did take place on 9 August 1976, that period of uncertainty was only 21 days. But suppose the sale had not been concluded as quickly or possibly at all? The intention to create such uncertainty, especially in the context of taxation, should not be imputed to their Lordships.'

i

In my judgment, this appeal should fail because the first *Ramsay* condition is not satisfied. In these circumstances, it is unnecessary to reach any conclusion in regard to Peter Gibson J's view that the second *Ramsay* condition is not satisfied. I will only make

- these brief comments in this context. Though it is clear that the steps involving the interposition of Millor in the series of transactions had business effect, the relevant question is whether or not, on the commissioner's findings of fact, it could properly be said that the interposition of Millor had 'no commercial (business) purpose apart from the avoidance of a liability to tax'. Having studied these findings, I think that a proper reading of them indicates that the commissioners (a) regarded the primary purpose of both the acquisition of Millor and the subsequent transfer of the Queensferry shares to
- a Millor as being to avoid the tax which would otherwise have been immediately payable on the ultimate sale to Jones, if that sale were eventually to take place, (b) accepted that a subsidiary purpose of both that acquisition and that transfer was that Millor should act as a holding company of the Queensferry shares if a sale to Jones did not happen but a merger between Queensferry and Cee-N-Cee eventuated, (c) nevertheless, regarded the primary objective of the taxpayers at all material times as being to conclude a sale to
- b Jones.

- In these circumstances, I see the force of the submission made on behalf of the taxpayers that it cannot properly be said that the interposition of Millor had no commercial purpose apart from the avoidance of a liability to tax. Nevertheless, I would find some difficulty in accepting that the mere existence of what may be described colloquially as a 'long-stop' purpose, such as mentioned in (b) above, can prevent the
- d second *Ramsay* condition from being satisfied in a case where the *Ramsay* principle would otherwise apply on the facts. Such a conclusion would at present appear to me contrary to the true intent of the *Ramsay* and *Dawson* decisions.

However, I find it unnecessary to express any concluded view on this point. For the reasons stated, relating to the first *Ramsay* condition, I would dismiss this appeal.

- e *IRC v Bowater Property Developments Ltd*

This appeal concerns the Development Land Tax Act 1976, which imposed new tax on the realisation of the development value of land. Section 1, so far as material, provided as follows:

- f '(1) A tax, to be called development land tax, shall be charged in accordance with the provisions of this Act in respect of the realisation of the development value of land in the United Kingdom.

- (2) Subject to the provisions of this Act, a person shall be chargeable to development land tax on the realised development value, determined in accordance with this Act, which accrues to him on the disposal by him on or after the appointed day of an interest in land in the United Kingdom . . .

- g Section 4(1) provided:

- 'Subject to the following provisions of this Act, the realised development value accruing to a person on the disposal by him of an interest in land shall be the amount (if any) by which the net proceeds of the disposal exceed the relevant base value of that interest.'

- h Section 4(3) defined 'the net proceeds of the disposal of an interest in land', and s 5 defined 'relevant base value'. Section 12, as amended, gave an exemption for the first £50,000 of development value. It provided, inter alia:

- i '(1) Subject to the provisions of this section, if the total amount of realised development value which accrues to any person in a financial year and on which, apart from this section, that person would be chargeable to development land tax does not exceed £50,000, development land tax shall not be chargeable on any of that realised development value.

- (2) If subsection (1) above does not apply to any person in respect of a financial year, then, subject to the following provisions of this section, the sum of £50,000

shall be deducted from the amount of realised development value on which, apart from this subsection, that person would be chargeable to development land tax in that financial year . . .'

Section 20(1) provided that a disposal of an interest in land by a member of a group of companies to another member of the group should be treated for the purposes of the 1976 Act as a disposal and acquisition for which no consideration was given.

The respondent to this appeal by the Crown is Bowater Property Developments Ltd (BPD), a company in the group of which Bowater Corp plc is the parent. Another of the subsidiaries in the Bowater group is Bowater United Kingdom Paper Co Ltd (BUKP). By November 1978 agreement had been reached between BUKP and a company outside the Bowater group, Milton Pipes Ltd (MPL), subject to contract, for the sale to MPL of 23 acres of land near Milton Regis in Kent, known as Crafts Marsh, for a sum of £202,500. In these negotiations, it had also been agreed that the contract would be conditional on planning permission being obtained for the uses to which MPL wished to put the land. On 7 March 1979 BPD exercised an option to purchase Crafts Marsh from BUKP and thus became its owner. At about that time, one of Bowater's taxation advisers lined up a number of Bowater subsidiaries willing to take undivided shares in Crafts Marsh, a fragmentation exercise designed to make maximum use of the exemption under s 12. At that date the exemption level stood at only £10,000 and no fewer than 18 subsidiaries were involved. Draft deeds were sent to MPL on 9 March 1979 which indicated that a disposal in favour of the 18 subsidiaries was contemplated as a prelude to the sale to MPL. However, by 25 March 1980, no contract had yet been concluded with MPL because of uncertainties relating to planning and other matters.

I now take up the story, more or less verbatim, from the judgment of Warner J ([1985] STC 783). On 25 March 1980 BPD contracted to sell Crafts Marsh for £180,000 to five other companies (the five companies) in the Bowater group as beneficial tenants in common in equal shares. It is not in dispute that that transaction (the first transaction) had no business purpose. The five companies were selected because none of them had used any part of its £50,000 exemption from development land tax under s 12 of the 1976 Act as amended. The sole object of the first transaction was to avoid the liability to development land tax which would otherwise fall on BPD if the sale to MPL went through. At the time of the first transaction there was, as the Special Commissioners found, a firm expectation on the Bowater side that that sale would go through, but the chances of MPL being willing to sign a contract on or about 25 March 1980 were nil.

On 22 May 1980 Mr Goodger, a group legal adviser in Bowater Corp's legal department, during the course of what the commissioners describe as 'a somewhat desultory correspondence' between himself and the solicitors acting for MPL, sent to them, to replace an earlier draft, a revised draft contract, conditional on MPL obtaining planning permission. In this draft the five companies were of course named as vendors. On 7 July 1980 MPL's solicitors wrote to Mr Goodger in these terms:

'Dear Sir,

Land at Crafts Marsh

We thank you for your letter of the 22nd May. We are sorry to tell you that the present economic situation with its direct effect on the concrete making industry has compelled our Clients to give up the proposal to purchase your Company's land. We enclose the various documents which you have sent us.'

It appeared to those concerned on the Bowater side that the sale had fallen through for good. During the ensuing months it remained their general policy to sell Crafts Marsh, but they had no other potential purchaser in mind and they did not actively seek one. Early in February 1981, circumstances having changed, particularly from the planning point of view, the solicitors who had been acting for MPL telephoned Bowater Corp's legal department to say that MPL was interested in Crafts Marsh again. Negotiations

- were thereupon reopened. They resulted in the exchange on 23 October 1981 of unconditional contracts for the sale of Crafts Marsh by the five companies to MPL for £259,750 (the second transaction). The sales were completed on 23 November 1981. On 13 February 1984 the Revenue, in reliance on the *Ramsay* principle, assessed BPD to development land tax on the footing that the second transaction should be treated for tax purposes as a disposal by BPD. The Special Commissioners held that, on the facts of this case, that principle did not apply and they discharged the assessment.
- b* In this case it was undisputed that the second *Ramsay* condition was satisfied. The submissions made before Warner J concerned the first *Ramsay* condition and are to be found summarised in his judgment (see [1985] STC 783 at 796–798). It will be seen that, following the lines of what I have called the Crown's basic contention, they involved a submission by its counsel that the *Ramsay* principle applies whenever it is found that a step has been taken with a view to avoiding tax in a certain event and that event actually occurs. Warner J said (at 796):
- c*

‘Thus, [counsel for the Crown] says, in the present case, what matters is the expectation or intention of those concerned on behalf of the Bowater group at the time of the first transaction. They at that time expected the sale of Crafts Marsh to go through and their purpose in causing the first transaction to take place was to avoid development land tax on that sale. Therefore, the *Ramsay* principle applies, and the break in the negotiations between the Bowater group and [MPL] that occurred from July 1980 to February 1981 was irrelevant.’

- d* Warner J rejected these submissions of the Crown. He expressed himself in entire agreement with the reasoning that led Peter Gibson J to hold in *Craven v White* that the first *Ramsay* condition was not satisfied. He expressed the ratio of his final conclusion as follows (at 800):
- e*

‘The crucial fact, to my mind—a fact of which the events of May and July 1980 are but evidence—is that it had not been preordained or prearranged, at the time of the first transaction, that the second transaction would follow. Applying the test suggested by Lord Wilberforce’s words, it could not be said at that time that there was “no likelihood in practice” that the second transaction would not follow. When it followed, 19 months later, it followed as an independent transaction.’

- f* The Revenue’s case on this appeal, as I see it, stands or falls on the Crown’s basic contention. For the reasons which I have given in the first section of this judgment, I think that that contention is not well founded and that the relevant test for the purpose of the first *Ramsay* condition is that which I have indicated in that section. On the facts of this case, that test is not satisfied. It cannot conceivably be said that, at the date of the first transaction (25 March 1980), all the essential features of the second transaction (which ultimately took place on 23 October 1981) had already been determined by a person who had the firm intention, and for practical purposes the ability, to procure the implementation of that second transaction. If the ‘practical certainty’ test is to be preferred, that test likewise is not satisfied.
- g*
- h*

- Further detailed reference to the facts is unnecessary, but I mention a few points drawn to our attention by counsel for BPD as illustrating the difficulties (to my mind insuperable) of holding that on 23 October 1981, either in substance or in reality, or within the meaning of the 1976 Act, there was a disposal of the land by BPD in favour of MPL. (1) At the time of the second transaction the five companies, *not* BPD, had been the legal and beneficial owners of the land for some 19 months. (2) BPD was not a party to the contract of sale of 23 October 1981. (3) BPD was not a party to the negotiations which led to that contract and did not receive any of the proceeds of sale. (4) BPD had no control over the land through the five companies. The Bowater group holding company controlled both BPD and the five companies, but BPD had no control, directly or indirectly, of the five companies.
- j*

It is common ground that the first transaction was effected without any commercial or business purpose, apart from a tax advantage. Nevertheless, on the facts found by them, I do not think it would have been open to the commissioners properly to find that the first and second transactions were one single composite transaction. Warner J, in my view, was plainly right in deciding that, when the second transaction followed, it did so as an 'independent' transaction in the sense of that phrase as used by Lord Wilberforce in *Ramsay* [1981] 1 All ER 865 at 871, [1982] AC 300 at 324.

Various other matters were canvassed in the course of argument, in particular suggested possibilities of double taxation. I do not find it necessary to deal with these matters. More generally, I would, with respect, associate myself with the following observations of Warner J ([1985] STC 783 at 798):

'Counsel for the Crown argued that, unless his submissions were accepted, the application of the *Ramsay* principle in the "linear" or bilateral type of case would be haphazard. A well-advised taxpayer need never be affected by it, because he could always ensure that the tax avoiding transaction was carried out before any deal with the other party was clinched. That argument would be very convincing if it were legitimate to regard the *Ramsay* principle as a judge-made anti-tax-avoidance rule, which it was open to the courts to mould and develop in the light of their experience of tax avoidance devices. Indeed counsel for the Crown went so far as to suggest that I should so regard it. In my opinion, however, that would be nothing short of unconstitutional. Under our constitution the imposition of taxation is a matter for Parliament. Indeed within Parliament itself it is a matter in which the House of Commons has a predominant role. The only function of the courts in this sphere is to interpret and apply the legislation enacted by Parliament in accordance with relevant legal principles. Among the relevant legal principles is the principle that the courts are bound to seek to ascertain the true nature of a transaction and to give effect to it. That, to my mind, is the real basis of the *Ramsay* principle. (I choose the phrase "true nature", but other expressions such as "reality" or "substance"—in the sense in which I understand the latter term to have been used by Lord Bridge in *Furniss v Dawson*—will do just as well.)'

To call the true nature of the series of transactions in the present case a disposal made on 23 October 1981 in favour of MPL by BPD would appear to me to involve a travesty of the facts.

I would dismiss this appeal.

Baylis v Gregory, Baylis v Gregory and Weare

The decision of Vinelott J ([1986] 1 All ER 289, [1986] 1 WLR 624) which is under appeal by the Crown in this case was given on appeals by the Crown against two related decisions of the Special Commissioners. These decisions had discharged assessments to capital gains tax respectively on Mr R F Gregory and on Mr Gregory and Mr J B Weare (the trustees) jointly as trustees of the estate of Joseph Gregory deceased. They arose out of a transaction, or series of transactions, concerning the shares of a company called Planet Gloves (Industrial) Ltd (PGI) in which Mr Gregory and the trustees held shares. There were then other shareholders of PGI. All were members of Mr Gregory's family, trustees of family settlements or employees of PGI, except Mr Weare. He was the company's accountant and held a few shares in his own right. Appeals by the Crown against the discharge of assessments on the other shareholders had been held over pending Vinelott J's decision on the appeals before him.

Once again, I will gratefully adopt, more or less verbatim, the greater part of Vinelott J's summary of the facts found by the commissioners.

PGI carries on a clothing business. At all material times Mr Gregory was its managing director. He also, through his personal and trustee holdings, had voting control of PGI. In 1973 he negotiated, on behalf of all the shareholders, a sale of the entire issued share

a capital of PGI to an investment company, Cannon Street Investments Ltd (Cannon). In the course of the negotiations it was suggested to Mr Gregory that liability to capital gains tax could be indefinitely deferred if the shares of PGI were exchanged for shares of a holding company incorporated in the Isle of Man, which would sell them on to Cannon thus, it was hoped, obtaining the benefit of the relief afforded by paras 6 and 4 of Sch 7 to the 1965 Act. It was also suggested that there would be no fiscal penalty if the proceeds of sale were later lent by the holding company to the shareholders rateably in proportion to their shareholdings. Mr Gregory arranged for a private unlimited company called PG Holdings (Holdings) to be incorporated in the Isle of Man. Early in 1974, before shares of PGI were exchanged for shares of Holdings, Cannon wrote to say that it could not proceed with the purchase. Mr Gregory and the other shareholders decided that they would none the less proceed with the share exchange. There was no disadvantage in doing so. The exchange would be carried out by means of the issue and renunciation of the holdings of bonus shares of PGI on which no stamp duty would be payable. The machinery would be there for use if a sale of the shares of PGI were subsequently negotiated. The exchange was duly completed on 11 March 1974 pursuant to an agreement made that same day.

b There matters rested for some time. Mr Gregory took no steps to find a purchaser. Then, in the late spring of 1975, he learnt by chance that another company, Hawtin Ltd (Hawtin), might be interested in acquiring the shares. Discussions in May and June 1975 came to nothing. However, in November 1975 Hawtin approached him again. The renewed negotiations bore fruit, and on 30 January 1976 an agreement was concluded between Holdings and Hawtin for the sale of all the shares of PGI for £1.75m to be satisfied by a down payment of £1m, a further payment of £550,000 on 31 December 1979 and an issue of convertible loan notes for the face value of £200,000. The agreement was completed on the same day in the Isle of Man.

c As a result of advice given by counsel the proposal that the proceeds of the sale should be lent to the shareholders of Holdings was deferred for a year save that £50,000 was lent to Mr Gregory. The commissioners found that 'a more general withdrawal of funds, to take place in March 1977, was in contemplation at the date of the Sale Agreement' (see [1986] 1 All ER 289 at 294). In the mean time the balance of the £1m was invested. In March loans totalling £945,000 were made. Further loans were made after the deferred consideration of £550,000 had been paid (the payment of this sum having been by agreement deferred for a further six months). Although the Crown at one time contended that the loans were gains accruing to the shareholders, that claim was not pursued before the commissioners.

f The question whether these transactions gave rise to a liability to capital gains tax was the subject of correspondence between a Mr Rothwell, district inspector of taxes for the Pontypridd district, and Mr Weare starting in 1978. In March 1980 Mr Rothwell arranged for assessments to be made on all the shareholders for the year 1973-74. In March 1982 Mr Rothwell decided that alternative assessments should be made for the year 1975-76. On 15 March 1982 he wrote to Mr Weare's firm to say that alternative assessments would be made for the year 1975-76.

g Mr Weare's firm was only concerned with the tax affairs of the trustees and one of the taxpayers. Alternative assessments for the year 1975-76 were against all the shareholders, including Mr Gregory personally, for that year; though Mr Rothwell had asked a subordinate to issue an assessment for 1975-76 to the trustees, the subordinate regrettably made an assessment (dated 15 March 1982) expressed to be for the fiscal year to 6 April 1974-5 April 1975. At the same time he issued a notice of assessment bearing the same date, also expressed to be for that fiscal year.

j Mr Weare's firm appealed against all the assessments. In the case of the trustees, their letter (dated 8 April 1982) read:

'We refer to Capital Gains Tax assessment dated 15th April 1982 marked 1974-

75. Please take this letter as formal appeal. Our appeal is based on Paragraph 6 of the 7th Schedule of the 1965 Finance Act. We are requesting full postponement of Tax.'

At this stage Mr Rothwell noticed the error. He also noticed that, as 5 April 1982 had passed, it was too late to make an assessment for the year 1975-76. So on 26 April 1982 he marked in his records on a standard form opposite the calculation of 'Total Chargeable Gains—(Estimated) £155,000', in the column headed 'Amendment' the words 'Vacated' and 'Raised in Error'. Then, opposite the calculation of the tax payable at 30% (£46,500) appear the words 'Tax discharged—£46,500', and at the foot the tax payable as amended is stated to be 'Nil'. Mr Rothwell notified the collector of taxes of this change but not Mr Weare.

When preparing the appeals to the commissioners the taxpayers' solicitors wrote to the inspector of taxes, Pontypridd, and enclosed a schedule of appeals (24 in all: two for each taxpayer). In that schedule two assessments are shown as made on the trustees, one for 1973-74 and one for 1975-76.

In substance, three issues have been argued on these appeals, namely: (A) since 26 April 1982, when the assessment made against the trustees expressed as an assessment for 1974-75 was 'vacated', has that assessment been capable of having any legal effect at all? (B) if the answer to question (A) is Yes, can the last-mentioned assessment be treated as a good assessment for the fiscal year 1975-76, either by virtue of s 114 of the Taxes Management Act 1970 or otherwise? (C) does the *Ramsay* principle entitle the Revenue to claim that there have been disposals by the trustees and by Mr Gregory personally in favour of Holdings? I will deal in turn with these issues, of which the first and second do not concern Mr Gregory in his personal capacity.

Issue A

The recent decision of this court in *Honig v Sarsfield (Inspector of Taxes)* [1986] STC 246 has established that, for the purpose of applying the time limit imposed by s 40(1) of the Taxes Management Act 1970, as amended, an assessment is made at the time when the inspector, authorised to make such an assessment, signs the certificate in the assessment book, not when notice of the assessment is served on the taxpayer.

By what he has suggested is parity of reasoning, counsel for the trustees has submitted that an inspector can effectively vacate or nullify an assessment merely by making an appropriate entry in his records, unilaterally and without any notice to the taxpayers. When Mr Rothwell marked in his records the words 'Vacated' and 'Raised in Error', this, it was submitted, ipso facto nullified the assessment made against the trustees.

Though for the purpose of the relevant time limits an assessment can be made in the privacy of the inspector's office, it will have little, if any, other effect until notice of it is served on the person assessed. Until such service, such person is under no liability to pay; nor does the right of appeal conferred by s 31 arise. However, once notice of the assessment has been served, the position entirely alters. The taxpayer can get rid of the assessment by means of a successful appeal under s 31. Section 50 provides for the reduction or increase of an assessment in the case of an appeal. Section 54 provides for the settling of appeals by agreement. Section 32(1) contains express provisions for the vacation of an assessment in specified circumstances. It reads:

'If on a claim made to the Board it appears to their satisfaction that a person has been assessed to tax more than once for the same cause and for the same chargeable period, they shall direct the whole, or such part of any assessment as appears to be an overcharge, to be vacated, and thereupon the same shall be vacated accordingly.'

However (and this, in my judgment, is the crucial point) the 1970 Act confers no general powers on an inspector to vacate an assessment. Significantly, s 29(6) specifically provides:

'After the notice of assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts.'

In the present case, therefore, s 29(6) would, in my opinion, have clearly precluded Mr Rothwell from altering the relevant assessment so as to reduce the sum assessed to a nominal sum. It is perhaps more debatable whether s 29(6) on its true construction would itself have prohibited him from withdrawing or vacating an assessment. Nevertheless, counsel for the Crown was, in my judgment, right in submitting that (a) the vacation of an assessment has to be effected properly if it is to be valid and (b) in the absence of any statutory authority for the purported 'vacation' by Mr Rothwell, his entry in the assessment book which purported to record a vacation was not properly made and had no legal effect.

In agreement with Vinelott J, I would therefore reject the trustees' contentions on issue A.

Issue B

As did Vinelott J, I regard the next issue as more difficult. In this context I should begin by dealing with what seems to have been a new line of argument raised by counsel for the Crown in this court and not canvassed in the court below. He pointed out that the assessment against the trustees related to capital gains tax, not income tax, and that, while income tax is payable in respect of income actually or notionally received over a period of time, capital gains tax is payable in respect of actual or notional disposals. In the latter case, as he put it, a particular time does not ordinarily have to be identified by the Revenue beyond identifying the year in which the event took place. In the present case there were only two possible relevant events, namely the share exchange which took place in the fiscal year 1973-74 (11 March 1974) and the sale to Hawtin which took place in the fiscal year 1975-76 (30 January 1976). Accordingly, there were only two fiscal years in which the relevant disposal could have taken place, that is to say 1973-74 or 1975-76. On 15 March 1982 Mr Rothwell had written to Mr Weare's firm to say that (following the assessments already made for the year 1973-74) alternative assessments would be made for the year 1975-76. On that same day the Revenue made an assessment against the trustees, which it marked with the year 1974-75, and sent out a notice of assessment marked with the same year. The notice was one of a bundle of 12 assessments all directed to the same transaction. The other assessments and notice of the assessments were duly marked with the year 1975-76. In these circumstances, counsel submitted, no one concerned believed that the assessment issued against the trustees and marked with the year 1974-75 was intended as anything other than an assessment for the year 1975-76. It was plainly intended to relate to the disposals which had taken place on 30 January 1976. In all the circumstances, it was submitted, the assessment was an assessment for the year 1975-76 and the Crown does not have to rely on s 114 of the 1970 Act.

I have some sympathy with this argument because it would seem to me that Mr Weare's firm (or their clients), on receipt of the notice of assessment marked 1974-75, could not in all the circumstances, after proper thought, have reasonably believed that either the notice of assessment, or the assessment to which it referred, was intended by the Revenue to relate to any year other than 1975-76. Nevertheless, apart from s 114, to which I will revert, I find it impossible to hold that the assessment either was or took effect as an assessment for 1975-76. Contrary to the submissions of counsel for the Crown, as I understood them, the year of assessment is of critical importance in relation to capital gains tax. This is illustrated by s 19(3) of the 1965 Act, which provided:

'... a tax, to be called capital gains tax, shall be assessed and charged for the year 1965-66 and for subsequent years of assessment in respect of chargeable gains accruing in those years ...'

Section 113(3) of the Taxes Management Act 1970 provides:

'Every assessment . . . [or] notice of assessment . . . required to be used in assessing, charging, collecting and levying tax shall be in accordance with the forms prescribed from time to time in that behalf by the Board . . .'

The printed prescribed form of notice of assessment, which was employed by the Revenue in the present case, predictably has a heading in the top left-hand corner: 'Capital gains tax. Year ending 5 April 19 . . '. The body of the notice begins with the words: 'This notice gives particulars of an assessment made on you for the year shown above' (the emphasis is mine). All these matters illustrate that the year of assessment is an essential element of the assessment itself. *The assessment is what is written in the assessment book.* Section 114 apart, I find it is impossible to say that an assessment for one specified fiscal year can ever be or take effect as an assessment for another fiscal year. Section 114 apart, the fact that the taxpayer may have appreciated that a mistake has been made on receiving the notice of assessment is, to my mind, irrelevant in this context.

I now turn to s 114, which provides:

'(1) An assessment, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

(2) An assessment shall not be impeached or affected—(a) by reason of a mistake therein as to—(i) the name or surname of a person liable, or (ii) the description of any profits or property, or (iii) the amount of the tax charged, or (b) by reason of any variance between the notice and the assessment.'

Vinelott J took the view that s 114 will enable an assessment expressed to be for one year to be treated and take effect as an assessment for another year provided that the Crown can show that there was a genuine mistake and that in all the circumstances there was no real possibility that the taxpayer was in any way misled. While I again have some sympathy with this view (which was supported by counsel for the Crown in this court by way of alternative submission), I do not find myself able to concur in it, since I do not think it is warranted by the wording of the section.

Subsection (2) has no application to the facts of this case. The only words of sub-s (1) which can possibly be relied on by the Revenue are the following:

'An assessment . . . which purports to be made in pursuance of any provision of the Taxes Acts shall not . . . be affected by reason of a mistake . . . if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts . . .'

The assessment in the present case, which the Crown asserts is 'not [to] be affected', is an assessment for 1974–75. Counsel for the trustees accepted and contended that, as an assessment for that fiscal year, it would not be affected by reason of a mistake if the other conditions specified in s 114(1) were satisfied. However, as he pointed out, the subsection does not provide for rectification of an assessment; it is not the equivalent of the 'slip rule'. The relevant fiscal year of assessment is an integral, fundamental part of the assessment itself. I, for my part, find it impossible to read the wording of s 114(1), wide though it is, as justifying in any circumstances the treatment of an assessment made for one fiscal year as an assessment made for another fiscal year. If the Revenue make an assessment for the wrong year, their proper course is to issue a new assessment for the correct year. It is pertinent to observe that s 29(6) of the 1970 Act would preclude them

from themselves amending an assessment by substituting a reference to one fiscal year for another.

- a** In the course of argument, three authorities relating to the effect of s 114 were cited: *British Estate Investment Society Ltd v Jackson (Inspector of Taxes)* (1956) 37 TC 79, *Fleming (Inspector of Taxes) v London Produce Co Ltd* [1968] 2 All ER 975, [1968] 1 WLR 1013 and *Hart (Inspector of Taxes) v Briscoe* [1978] 1 All ER 79, [1979] Ch 1. I did not derive any great assistance from these authorities, since the judgments in those cases were directed to facts very different from those of the present case. However, in a passage in his judgment in *Fleming's* case [1968] 2 All ER 975 at 987, [1968] 1 WLR 1013 at 1027 (which judgment primarily concerned the statutory predecessor of s 114(2)) Megarry J made the general observation that he would be slow to accept that the subsections 'provide an impervious coverlet for gross errors'. Vinelott J in the present case was not persuaded that gross error must be absent before what he described as the 'dispensing power in s 114' can be exercised (see [1986] 1 All ER 289 at 306, [1986] 1 WLR 624 at 629). I would merely make this comment. As I am sure Vinelott J appreciated, s 114, where it applies, does not strictly confer a 'dispensing power'. In a case where it applies, it gives the Revenue or the taxpayer, as the case may be, the statutory right to claim that the assessment, warrant or other proceeding in question shall not be affected by reason of a mistake etc. If, contrary to my view, this statutory right has any relevance in relation to an assessment which has been made for the wrong year, I think it unlikely that the legislature would have intended that it would be exercisable where the error was a gross one, as in the present case I think it must have been. To sum up, however, in my judgment, neither s 114 nor any other statutory provision provides an escape route for the Revenue if they issue an assessment for the wrong fiscal year. This is something they must get right.
- e** For all these reasons, I think that the assessment made against the trustees cannot be treated as an assessment for the year 1975-76. It is common ground that, if it is to be regarded as an assessment for 1974-75, it can give rise to no legal liability on the part of the trustees.

Issue C

- f** Even if my conclusion on issue (B) is correct, this does not dispose of the disputes relating to the assessment made against Mr Gregory personally. I must therefore proceed to consider issue (C).

The Crown's contention is that the exchange of the shares of PGI for the shares of Holdings and the subsequent sale of the PGI shares to Cannon constituted one single composite transaction which, on an application of the *Ramsay* principle, is to be treated for fiscal purposes as involving a disposal by the taxpayers of the PGI shares to the ultimate purchaser, Hawtin. I propose to deal with this contention very shortly, because I think that the reasons for which I would reject the Crown's similar claims in the two earlier appeals apply a fortiori on the facts of the present cases.

- h** Attention, however, should be drawn to a few particularly significant facts. In these cases, as the commissioners found, by the time when the shares of PGI were exchanged for shares of Holdings on 11 March 1974, the previously contemplated sale to Cannon had fallen through. The commissioners found as facts that—

'The incorporation of Holdings and the share-exchange which followed . . . were . . . not made without an appreciation of the possible value of having taken those steps if, at some future date, the [taxpayers] decided to sell the PGI shares to an outside purchaser. But at that time an intention of selling (or of procuring a sale) was absent: it came into being not earlier than the summer of 1975.'

(See [1986] 1 All ER 289 at 297-198.)

On these findings, the transfer of the PGI shares to Holdings (though, as the commissioners found, it passed the full legal beneficial interest to Holdings) was made

solely by way of what has been referred to in the opening section of this judgment as 'strategic tax planning'. At that time no sale at all was in contemplation. The highest it could be put on behalf of the Crown is that the parties intended that the interposition of Holdings should serve as a convenient springboard (convenient for tax purposes) in case at some future date it might be desired to sell the shares in PGI.

There is no dispute that the second *Ramsay* condition is satisfied. In the circumstances, however, I agree with Vinelott J that it is impossible to say the same of the first *Ramsay* condition. The Revenue's case is again founded on the Crown's basic contention referred to in the opening section of this judgment. In the court below particular reliance appears to have been placed on Lord Wilberforce's reference in *Ramsay* [1981] 1 All ER 865 at 871, [1982] AC 300 at 323 to 'a transaction . . . intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole'. The exchange of the PGI shares, it was postulated, could properly be regarded as a transaction so intended, within Lord Wilberforce's words. Therefore, it was submitted, the first *Ramsay* condition was satisfied. I much doubt the correctness of the premise of this submission. Even accepting the premise, however, I do not think the conclusion would follow. Lord Wilberforce's words now fall to be read in the light of what Lord Diplock subsequently said in *Burmah* and what Lord Brightman said in *Dawson* in the authoritative formulation of the first *Ramsay* condition. In my judgment, that condition does not come near to being satisfied on the facts of the present case. It cannot properly be said that the share exchange and the subsequent sale of the shares to Cannon were a preordained series of transactions or a single composite transaction because, at the date of the share exchange, so far from the essential features of a sale to Cannon or any other purchaser having already been determined, no one had the intention, still less the practical ability, to implement a sale to Cannon, or indeed to any other purchaser.

Vinelott J referred to the greater conceptual difficulties involved in treating the shareholders in PGI as if they had entered into a tripartite arrangement for the sale of the shares in PGI to Hawtin, in a case such as this, where the sale on by the interposed company, Holdings, had not been arranged at the time of the share exchange. He also made some cogent comments in relation to double taxation. I do not, however, find it necessary further to explore these points.

For the reasons which I have already stated, I would dismiss these appeals.

PARKER LJ. For the purposes of this judgment I shall first state the essential facts of the three appeals in the shortest possible form and indicate how the issues for determination arise.

Craven v Stephen White, Craven v Brian White

On 19 July 1976 Stephen, Brian and Archibald White, who at that time owned 100% of the shares in S White & Sons (Queensferry) Ltd (Queensferry), exchanged such shares for shares in Millor Investments Ltd (Millor). Millor thereby acquired control of Queensferry.

But for the provisions of paras 4 to 6 of Sch 7 to the Finance Act 1965, this would undoubtedly have been a disposal by the Whites of their shares in Queensferry, not least because s 22(3) of the Act, Pt III of which creates capital gains tax, provides:

'Subject to subsection (6) of this section, and to the exceptions in this Part of this Act, there is for the purposes of this Part of this Act a disposal of assets by their owner where any capital sum is derived from assets . . .'

Subsection (9) of s 22 provides that in that section 'capital sum' means any money or money's worth.

As a result the Whites would, by virtue of ss 19(1) and (3) and 20 of the Act, have been chargeable to capital gains tax in respect of any chargeable gains accruing to them on such disposal.

a By virtue of the provisions of paras 4 and 6 of Sch 7 to the Act, however, such an exchange is not to be treated as a disposal of the Queensferry shares or an acquisition of the Millor shares.

This being so, the Whites were not chargeable to capital gains tax in respect of that transaction viewed alone. They would, however, of course, be chargeable in respect of a subsequent disposal of the Millor shares.

b Three weeks later, Millor, the owner of the Queensferry shares, sold them to Morris & David Jones Ltd (Jones) for £2.2m subject to adjustment. Viewed alone, this was plainly a disposal of the Queensferry shares by their owner, Millor, from which Millor derived a capital sum.

The Crown, however, contends that, for fiscal purposes, the share exchange should be ignored and that the two transactions together constitute a disposal by the Whites of their shares in Queensferry to Jones from which the purchase price accrues to the Whites.

c On the face of it, this contention is somewhat remarkable. By s 19(1) capital gains tax is to be charged in respect of chargeable gains accruing to a person on the disposal of assets, and it is clear from s 22(3) that the person chargeable is their owner. In law the only disposal of assets by the Whites was when they exchanged shares but this is not to be treated as a disposal. Thereafter, Millor disposed of the shares of which it was the legal and beneficial owner and derived a capital sum from the disposal, but the Whites did not.

d The contention is, however, advanced on the basis (1) that the sole purpose of the share exchange, which for present purposes I shall assume is correct, was to avoid, or more strictly to defer, the payment of capital gains tax which, but for the schedule, would have resulted had the Whites sold the Queensferry shares to Jones and (2) that, this being so, the combined result of *W T Ramsay Ltd v IRC* [1981] 1 All ER 865, [1982] AC 300 (Ramsay), *IRC v Burmah Oil Co Ltd* [1982] STC 30 (*Burmah*) and *Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530, [1984] AC 474 (*Dawson*) is that the Whites are chargeable on the basis that the capital sum derived by Millor from the sale to Jones accrued to them.

Baylis v Gregory, Baylis v Gregory and Weare

f The basic facts are very similar save as to the dates. In this case the share exchange was effected on 11 March 1974, ie in the 1973-74 year of assessment, and the sale on to a purchaser 22 months later in the 1975-76 year of assessment. The Crown's contention is the same. In this case it is even more remarkable. Mr Gregory and Mr Weare are thus said to have disposed in 1976 of shares in which they had had no legal or beneficial interest since March 1974.

g Before turning to the remaining appeal, I pause to observe that, in each of the foregoing cases, the question is whether, on the true construction of the relevant provisions of the Finance Act 1965, there was, on the facts, a disposal resulting in a chargeable gain accruing to the taxpayer. This observation may appear to be entirely superfluous but I make it because it seemed to me, during the course of the arguments presented to us on the scope and effect of the *Ramsay* principle, that it has been to some extent overlooked.

h It is of importance to bear it in mind. This is because taxing Acts must be construed according to well-known principles by which this court is bound no less than it is bound by the decisions of the House of Lords in *Ramsay, Burmah* and *Dawson*.

IRC v Bowater Property Developments Ltd

j In this case the asset concerned was land and not shares and the relevant statute is the Development Land Tax Act 1976.

On 25 March 1980 Bowater Property Developments Ltd (BPD), which was a subsidiary of Bowater Corp plc, sold to each of five other subsidiaries of the corporation a one-fifth undivided share in 23 acres of land known as Crafts Marsh for £180,000. By virtue of s 20(1) of the 1976 Act each of these five sales is to be treated as a disposal and acquisition

for which no consideration was given. There was thus on any one of these transactions no question of any charge to development land tax arising. The transfers would, however, have the result that, if, as was contemplated, the land were thereafter sold by the five companies to a purchaser outside the group, each would have available the free allowance provided for by s 12. a

None of the five purchaser companies was controlled by BPD. The sales to them occurred in the 1979–80 year of assessment. Nineteen months later in the next year of assessment the five companies joined together in selling the land to a company outside the group for a total purchase price of £259,000. Viewed alone, this was clearly a disposal by them of their interests in Crafts Marsh. b

At that date the land was neither legally nor beneficially owned by BPD, the five companies were not controlled by BPD and no part of the proceeds of sale accrued legally, beneficially or 'really' to BPD.

The Crown, however, again contends that the two transactions should be treated as one and regarded as a disposal by BPD resulting in realised development value accruing to BPD. c

This contention is even more remarkable than the contention in the other two appeals. Again, the question is one of construction of a taxing Act.

I turn therefore to the basic statutory provisions. d

The Finance Act 1965

'19.—(1) Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets . . .

(3) Subject to the said provisions, a tax, to be called capital gains tax, shall be assessed and charged for the year 1965–66 and for subsequent years of assessment in respect of chargeable gains accruing in those years, and shall be so charged in accordance with the following provisions of this Part of this Act. e

20.—(1) Subject to any exceptions provided by this Act, a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom, or during which he is ordinarily resident in the United Kingdom . . . f

22 . . . (3) Subject to subsection (6) of this section, and to the exceptions in this Part of this Act, there is for the purposes of this Part of this Act a disposal of assets by their owner where any capital sum is derived from assets notwithstanding that no asset is acquired by the person paying the capital sum, and this subsection applies in particular to—(a) capital sums received by way of compensation for any kind of damage or injury to assets or for the loss, destruction or dissipation of assets or for any depreciation or risk of depreciation of an asset, (b) capital sums received under a policy of insurance of the risk of any kind of damage or injury to, or the loss or depreciation of, assets, (c) capital sums received in return for forfeiture or surrender of rights, or for refraining from exercising rights, and (d) capital sums received as consideration for use or exploitation of assets . . . g

(9) The amount of the gains accruing on the disposal of assets shall be computed in accordance with Part I of Schedule 6 to this Act, and subject to the further provisions in Schedules 7 and 8 to this Act, and in this section "capital sum" means any money or money's worth which is not excluded from the consideration taken into account in the computation under the said Part I of Schedule 6 to this Act. h

(10) Every gain accruing after 6th April 1965 shall, except so far as otherwise expressly provided by this Part of this Act, be a chargeable gain, but subject to the provisions of Part II of Schedule 6 to this Act (which restricts the amount of chargeable gains accruing on the disposal of assets owned on 6th April 1965). i

- There is no definition of 'disposal' in the definition section but this is not surprising.
- a Subsection (3) of s 22 which I have set out, the other subsections of that section, in particular sub-s (5), and the provisions of Schs 6, 7 and 8 contain detailed provisions as to what is and what is not to be regarded as a disposal and as to what persons are or are not to be treated as making a disposal. It would have been quite impossible to embody these detailed provisions in any paragraph which began 'For the purposes of this Part of this Act "disposal" means . . .' What, as it seems to me, Parliament has plainly done is to create
- b a very detailed and elaborate set of provisions to make it clear what transactions were or were not to be disposals and who was to be chargeable. Section 22(5) is a good example of making chargeable a person beneficially entitled albeit the disposal was made by the legal owner, and s 22(6) and paras 4 and 6 of Sch 7 provide examples of cases which are not to be regarded as disposals.

c *The Development Land Tax Act 1976*

'1.—(1) A tax, to be called development land tax, shall be charged in accordance with the provisions of this Act in respect of the realisation of the development value of land in the United Kingdom.

- d (2) Subject to the provisions of this Act, a person shall be chargeable to development land tax on the realised development value, determined in accordance with this Act, which accrues to him on the disposal by him on or after the appointed day of an interest in land in the United Kingdom, and shall be so chargeable whether or not he is resident (for purposes of income tax or otherwise) in the United Kingdom . . .

- e 4.—(1) Subject to the following provisions of this Act, the realised development value accruing to a person on the disposal by him of an interest in land shall be the amount (if any) by which the net proceeds of the disposal exceed the relevant base value of that interest.

(2) In this Act, in relation to a disposal of an interest in land, "the chargeable person" means the person making the disposal.

- f (3) References in this Act to the net proceeds of the disposal of an interest in land are references to the consideration for the disposal, less the incidental costs to the chargeable person of making the disposal . . .

Again, disposal is not defined but, again, there are elaborate and detailed provisions as to what is and is not to be treated as a disposal and as to the persons to be chargeable. I give as examples ss 2, 20 and 28 and Pt I of Sch 1.

- g In one sense, the question to be determined here is, in two cases, whether the taxpayer disposed of shares to the ultimate purchaser and whether, thereby, a chargeable gain accrued to him within ss 19 and 20 of the 1965 Act. In the other case, it is whether the taxpayer disposed of Crafts Marsh to the ultimate purchaser and whether, thereby, realised development value accrued to it within ss 1 and 2 of the 1976 Act. This, however, is, in my view, a gross over-simplification. The true question is, in each case, whether, on
- h the true construction of any of the other provisions of the respective Acts, the taxpayer is, on the facts, brought within the charging sections.

- i In searching for the answer to this question I shall deal first with well-settled principles before I examine in any detail the three decisions which together form the *Ramsay* principle. Lest it be thought that in so doing I am reluctant to escape from the ghosts or shackles of the past, I should perhaps make it clear that I do so because they were reiterated by Lord Wilberforce in *Ramsay* and because Lord Diplock stated in *Burmah* that the new approach in *Ramsay* did not involve overruling previous decisions of their Lordships' House. Since in *Ramsay* Lord Russell, Lord Roskill and Lord Bridge agreed with Lord Wilberforce, and since in *Burmah* Lord Scarman, Lord Roskill and Lord Brandon agreed with Lord Diplock, I regard myself as bound to do so.

I take those principles from the speech of Lord Wilberforce in *Ramsay* [1981] 1 All ER 865 at 870-871, [1982] AC 300 at 323-324. a

Principle no 1

'A subject is only to be taxed on clear words, not on "intendment" or on the "equity" of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle.' b

Lord Wilberforce then continued:

'What are "clear words" is to be ascertained on normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded: see *Inland Revenue Comrs v Wesleyan and General Assurance Society* [1946] 2 All ER 749 at 751 per Lord Greene MR and *Mangin v Inland Revenue Comr* [1971] 1 All ER 179 at 182, [1971] AC 739 at 746 per Lord Donovan. The relevant Act in these cases is the Finance Act 1965, the purpose of which is to impose a tax on gains, less allowable losses, arising from disposals.' c

It is not entirely clear at first sight how, if intendment is to be excluded, 'purpose' is to be included. I can myself derive no assistance on the point from Lord Greene MR's judgment, for his observations on construction related to the construction of a document. He did, however, on the same page make some general observations of relevance to the present appeals. He said: d

'In dealing with income tax questions it frequently happens that there are two methods at least of achieving a particular financial result. If one of those methods is adopted, tax will be payable. If the other method is adopted, tax will not be payable. It is sufficient to refer to the common case where property is sold for a lump sum payable by instalments. If a piece of property is sold for £1,000 and the purchase price is to be paid in ten instalments of £100 each, no tax is payable. If, on the other hand, the property is sold in consideration of an annuity of £100 a year for ten years, tax is payable. The net result, from the financial point of view, is precisely the same in each case, but one method of achieving it attracts tax and the other method does not. There have been cases in the past where what has been called "the substance of the transaction" has been thought to enable the court to construe a document in such a way as to attract tax. That doctrine was, I hope, finally exploded by the decision of the House of Lords in *Inland Revenue Comrs. v. Westminster (Duke)* ([1936] AC 1, [1935] All ER Rep 259).' e

On the particular point Lord Donovan's judgment in *Mangin v IR Comr* does not assist either, but again it is of value on the general ambit of Principle no 1. Lord Donovan said ([1971] 1 All ER 179 at 182, [1971] AC 739 at 746): f

"... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. *Nothing is to be read in, nothing is to be implied.* One can only look fairly at the language used." (Per Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Comrs* [1921] 1 KB 64 at 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v Regem* [1945] 2 All ER 499 at 507, [1946] AC 119 at 140). Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. *If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.* Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.' (My emphasis.) g

In connection with the first principle I cite two further passages from speeches in their Lordships' House. In *Partington v A-G* (1869) LR 4 HL 100 at 122 Lord Cairns said:

'... as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'

And in *Tennant v Smith* (*Surveyor of Taxes*) [1892] AC 150 at 154 Lord Halsbury LC said:

'In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed.' (My emphasis.)

When Lord Wilberforce referred to the purpose of the 1965 Act being to impose a tax on gains less allowable losses, arising from disposals, he was, as it seems to me, stating the 'purpose' within those limits mentioned by Lord Halsbury LC.

In this limited sense the purpose does not appear to be of any assistance in the present appeal, for the detailed and elaborate provisions of the Act make it clear that the purpose was to tax some people and not others in respect of certain transactions and not others, and one can only determine which people and which transactions by looking at the words of the sections.

Principle no 2

'A subject is entitled to arrange his affairs so as to reduce his liability to tax. The fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides. It must be considered according to its legal effect.'

This principle is stated by Lord Wilberforce without qualification. The first sentence is a paraphrase of what Lord Tomlin said in *IRC v Duke of Westminster* [1936] AC 1 at 19, [1935] All ER Rep 259 at 267. The remainder appears to me to summarise the effect of the rest of Lord Tomlin's speech but, in view of later developments, it is desirable that Lord Tomlin's statements should be seen in context. He said ([1936] AC 1 at 19-20, [1935] All ER Rep 259 at 267-268):

'... it is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called "the substance of the matter," ... This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting "the uncertain and crooked cord of discretion" for "the golden and straight metwand of the law." (4 Co Inst 41.) Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine

of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable . . . The matter was put accurately by my noble and learned friend Lord Warrington of Clyffe when as Warrington L.J. in *In re Hinckes, Dashwood v. Hinckes* ([1921] 1 Ch 475 at 489, [1921] All ER Rep 558 at 565) he used these words: "It is said we must go behind the form and look at the substance . . . but, in order to ascertain the substance, I must look at the legal effect of the bargain which the parties have entered into." (My emphasis.)

Principle no 3

'It is for the fact-finding commissioners to find whether a document, or a transaction, is genuine or a sham. In this context, to say that a document or transaction is a "sham" means that, while professing to be one thing, it is in fact something different. To say that a document or transaction is genuine, means that, in law, it is *what it professes to be*, and it does not mean anything more than that.' (My emphasis.)

Principle no 4

'Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance.'

As to this principle Lord Wilberforce said ([1981] 1 All ER 865 at 871, [1982] AC 300 at 323-324):

'This is a cardinal principle but it must not be overstated or over-extended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect *as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole*, there is nothing in the doctrine to prevent it being so regarded; to do so is not to prefer form to substance, or substance to form. It is the task of the court to *ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence* and if that emerges from a series or combination of transactions, *intended to operate as such*, it is that series or combination which may be regarded. For this there is authority in the law relating to income tax and capital gains tax: see *Chinn v Collins (Inspector of Taxes)* [1981] 1 All ER 189, [1981] AC 533 and *Inland Revenue Comrs v Plummer* [1979] 3 All ER 775, [1980] AC 896. For the commissioners considering a particular case it is wrong, and an unnecessary self-limitation, to regard themselves as precluded by their own finding that documents or transactions are not "shams" from considering what, *as evidenced by the documents themselves or by the manifested intentions of the parties, the relevant transaction is*. They are not, under the *Duke of Westminster* doctrine or any other authority, bound to consider individually each separate step in a *composite transaction intended to be carried through as a whole*. This is particularly the case where (as in *Rawling*) it is proved that there was an accepted obligation, once a scheme is set in motion, to carry it through its successive steps. It may be so where (as in *Ramsay* or in *Black Nominees Ltd v Nicol (Inspector of Taxes)* [1975] STC 372) there is an expectation that it will be so carried through, and no likelihood in practice that it will not. In such cases (which may vary in emphasis) the commissioners should find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction or a number of independent transactions.' (My emphasis.)

I confess to finding some difficulty in appreciating how one can arrive at the conclusion

a that the *legal* nature of a series of transactions is something which in law it is not. It appears to me that this is preferring substance to form and this certainly appears to have been the view of both Lord Roskill and Lord Bridge in their speeches in *Dawson*. I shall return to this question later. First I shall consider whether, on any construction of any provision of either of the two Acts here in question, it can be said, within the four principles, that the taxpayers disposed of their shares or their land to the ultimate purchaser and thereby made a chargeable gain or realised development value. In my view, the answer must plainly be No. It would only be possible to arrive at such a result by implying some elaborate proviso in para 6 of Sch 7 to the 1965 Act and s 20 of the 1976 Act.

b In the one case such a proviso would have to be on the following lines: 'Provided that, if the sole purpose of the exchange is to avoid the tax which would have resulted had the original holding been sold to a third party and the shares are thereafter sold to a third party, then the sale to the third party shall be treated as if it were a disposal by the original owner to the third party and the proceeds of sale shall be treated as a capital sum derived from the disposal by the original owner.'

c The implication could not, however, stop there, or so it seems to me. The original owner would still be possessed of the new holding and provision would need to be made as to what was to happen if and when he disposed of the new holding, for, in the absence of such a provision, the position of the new holding is unascertainable. If one is to ignore the exchange, does one also ignore the acquisition and the subsequent disposal of the new holding?

d In the third case also there would have to be some provision, equally elaborate, to achieve the result contended for by the Crown. The contention is only made because the fragmentation resulted in the five companies having greater free allowances than the original owner. What then must be read in? There are clearly many possibilities, none of them being expressed. Whatever solution were adopted it would seem to involve elaborate implication. If Lord Donovan in *Mangin v IRC* [1971] 1 All ER 179 at 182, [1971] AC 739 at 746 was right, nothing is to be implied. If intentment and equity are excluded, there is, in any event, no warrant for reading in anything. If motive does not invalidate, the share exchanges and the fragmentation stand. If the legal results of genuine documents are looked at there is no question of the taxpayers being chargeable. If the parliamentary purpose is looked at it appears to be clear. In the two share cases it was that there should be no tax on the disposal constituted by the change but tax on a subsequent disposal of the new holding by the original owner. In the development land case it was similar.

e Unless, therefore, the *Ramsay* principle is wide enough to override, but without overruling, the four principles, the Crown's case must fail.

f I turn, therefore, to this aspect of the case. In *Ramsay* and in *Burmah* the question was whether the taxpayers had succeeded in creating an allowable loss and it was held that they had not.

I find it unnecessary to examine further the speeches in that case, for in *Burmah* the House of Lords defined the ratio of the case and it is with that that this court is concerned.

h Lord Fraser, with whose speech all other members of the House agreed, said ([1982] STC 30 at 37-38):

i 'The ratio of the decision in *Ramsay* is to be found in the speech of Lord Wilberforce ([1981] 1 All ER 865 at 873, [1982] AC 300 at 326) where he said this: "The capital gains tax was created to operate in the real world, not that of make-belief. As I said in *Aberdeen Construction Group Ltd v Inland Revenue Comrs* [1978] 1 All ER 962 at 996, [1978] AC 885 at 893, it is a tax on gains (or I might have added gains less losses), it is not a tax on arithmetical differences. To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that [at] the end of what was bought as,

and planned as, *a single continuous operation*, [there] is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function.” In the same case I said with reference to the cases of *IRC v Plummer* [1979] 3 All ER 775, [1980] AC 896 and *Chinn v Collins (Inspector of Taxes)*: “The essential feature of both schemes was that, when they were completely carried out, they did not result in any actual loss to the taxpayer. The apparently magic result of creating a tax loss that would not be a real loss was to be brought about by arranging that the scheme included a loss which was allowable for tax purposes and a matching gain which was not chargeable.” (See [1981] 1 All ER 865 at 881, [1982] AC 300 at 337.) The question in this part of the appeal is whether the present scheme, when completely carried out, did or did not result in a loss such as the legislation is dealing with, which I may call for short, a real loss. In my opinion it did not.’ (All emphasis is mine.)

Apart from defining the ratio of *Ramsay, Burmah* is, in my view, principally of importance for a passage in the speech of Lord Diplock, with whose speech Lord Scarman, Lord Roskill and Lord Brandon agreed. Lord Diplock said ([1982] STC 30 at 32):

‘It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume, that *Ramsay’s* case did not mark a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transactions (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable. The difference is in approach. It does not necessitate the overruling of any earlier decisions of this House; but it does involve recognising that Lord Tomlin’s oft-quoted dictum in *IRC v Duke of Westminster* [1936] AC 1 at 19, [1935] All ER Rep 259 at 267, “Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be”, tells us little or nothing as to what methods of ordering one’s affairs will be recognised by the courts as effective to lessen the tax that would attach to them if business transactions were conducted in a straightforward way.’ (My emphasis.)

This passage is of importance for three reasons: (i) it defines the subject matter to which the significant new approach in *Ramsay* is to be applied; (ii) it states that the difference in approach does not involve overruling any earlier decisions of the House of Lords; (iii) it accepts specifically Lord Tomlin’s dictum in *IRC v Duke of Westminster* but states that the new approach does involve recognising that the dictum is silent or at least nearly silent as to its scope or ambit.

As to the first of these matters, the definition goes further than *Ramsay* because it includes cases where the series of transactions includes the achievement of a legitimate commercial end. It is, however, much more specific than *Ramsay*, for it appears to limit the cases to which the new approach is to be applied to those in which there are (i) a series of transactions, which (ii) are preordained, and into which (iii) there are inserted steps which have no commercial purpose apart from the avoidance of a liability to tax which, in the absence of those particular steps, would have been payable.

It is important to realise that Lord Diplock is not saying that, given these elements, the tax which the inserted steps are designed to avoid is payable. He is saying only that, given those elements, it is a proper case for the new approach. That approach is one in which one must look for the real loss or gain.

In my view, he could not have been going further than I have indicated, for ultimately the question is one of construction of a taxing Act and, previous decisions not being overruled, they as well as the *Ramsay* principle must be applied. He cannot, therefore, have been saying that, given the elements mentioned, the result follows *whatever the language*.

a I now come to *Dawson*, which clearly extended the *Ramsay* principle. The facts were very different. The transactions were only two in number, were not self-cancelling or circular and included the achievement of a legitimate commercial end. In essence, those transactions consisted in the transfer from A to B Ltd of shares in X Ltd in exchange for shares in B Ltd and the sale by B Ltd of the shares in X Ltd to C.

b The transactions, as transactions, were, therefore, in essence the same as the transactions here under consideration, although the fiscal advantages sought were different. Here in the two share exchanges the advantage was, as in *Dawson*, sought by the taxpayers themselves by way of tax deferment. In the case of the Crafts Marsh transactions, however, the advantage was a group advantage in the availability of the five companies' free allowances. Although the *Dawson* transactions were the same, the nature of the operation was markedly different in that case to the operations in the present cases.

c Lord Brightman described the *Dawson* operation thus ([1984] 1 All ER 530 at 537-538, [1984] AC 474 at 520):

d "There are very full minutes of the board meeting of one of the operating companies and similar minutes exist in the case of the other company. These show that the whole process was *planned and executed with faultless precision*. The meetings began at 12.45 pm on 20 December, at which time the shareholdings of the operating companies were still owned by the Dawsons unaffected by any contract for sale. They ended with the shareholdings in the ownership of Wood Bastow. The minutes do not disclose when the meeting ended, but perhaps it was all over in time for lunch.' (My emphasis.)

e And Lord Bridge said that the purpose of the scheme was to ensure that for a 'scintilla temporis' the beneficial interest in the shares was held by Greenjacket (B Ltd) (see [1984] 1 All ER 530 at 536, [1984] AC 474 at 518).

f The two transactions were thus carried out within a very short space of time, they were plainly preordained and the purpose of the first was solely to defer payment of tax which would have been payable on a direct sale.

I have ventured to say a little about the facts in *Dawson* before investigating the legal effect of the decision, for it is, in the present appeals, important to bear them in mind. To ascertain the legal effect requires, I fear, an examination in some detail of the speeches delivered by their Lordships. I take them in the order in which they were delivered.

g Lord Fraser, who had in *Burmah* identified the ratio of *Ramsay*, now identified its principle. He said ([1984] 1 All ER 530 at 532, [1984] AC 474 at 512-513):

h "The true principle of the decision in *Ramsay* was that the fiscal consequences of a preordained series of transactions, intended to operate as such [my emphasis], are generally to be ascertained by considering the result of the series as a whole, and not by dissecting the scheme and considering each individual transaction separately. The principle was stated in the speech of Lord Wilberforce in *Ramsay* [1981] 1 All ER 865 at 871, [1982] AC 300 at 324 especially where his Lordship said: "For the commissioners considering a particular case it is wrong, and an unnecessary self-limitation, to regard themselves as precluded by their own finding that documents or transactions are not "shams" from considering what, as evidenced by the documents themselves or by the manifested intentions of the parties, the relevant transaction is [Lord Fraser's emphasis]. They are not, under the *Duke of Westminster* doctrine . . . or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole." . . . The series of two transactions in the present case was *planned* as a single scheme, and I am clearly of opinion that it should be viewed as a whole [my emphasis]. The relevant transaction, if I may borrow the expression used by Lord Wilberforce, consists of the two transactions or stages taken together. It was a disposal by the

taxpayers of the shares in the operating company for cash to Wood Bastow Holdings Ltd. I would allow the appeals.' a

The acceptance of the *Duke of Westminster* doctrine is to be noted, as also Lord Fraser's reference to 'the fiscal consequences of a preordained series of transactions, intended to operate as such'.

Lord Scarman made some observations which deal with the general approach but also accepted the *Duke of Westminster* principle. He said ([1984] 1 All ER 530 at 533, [1984] AC 474 at 513-514): b

'What has been established with certainty by the House in *Ramsay's* case is that the determination of what does, and what does not, constitute unacceptable tax evasion is a subject suited to development by judicial process. The best chart that we have for the way forward appears to me, with great respect to all engaged on the map-making process, to be the words of Lord Diplock in *IRC v Burmah Oil Co Ltd* [1982] STC 30 at 32 which my noble and learned friend Lord Brightman quotes in his speech. These words leave space in the law for the principle enunciated by Lord Tomlin in *IRC v Duke of Westminster* [1936] AC 1 at 19, [1935] All ER Rep 253 at 267 that every man is entitled if he can to order his affairs so as to diminish the burden of tax. The limits within which this principle is to operate remain to be probed and determined judicially. Difficult though the task may be for judges, it is one which is beyond the power of the blunt instrument of legislation. Whatever a statute may provide, it has to be interpreted and applied by the courts; and ultimately it will prove to be in this area of judge-made law that our elusive journey's end will be found.' c

I pause to observe that I find some difficulty in reconciling this approach with the well-established principle that the subject is only to be taxed by clear words. d

By contrast with those who had gone before him, Lord Roskill, referring to *IRC v Duke of Westminster*, said ([1984] 1 All ER 530 at 533-534, [1984] AC 474 at 515): e

'1936, a bare half century ago, cannot be described as part of the Middle Ages but the ghost of the Duke of Westminster and of his transaction, be it noted a single and not a composite transaction, with his gardener and with other members of his staff has haunted the administration of this branch of the law for too long. I confess that I had hoped that that ghost might have found quietude with the decisions in *Ramsay* and in *Burmah*. Unhappily it has not. Perhaps the decision of this House in these appeals will now suffice as exorcism.' (My emphasis.) f

Lord Bridge appears to have taken the view that the *Duke of Westminster* doctrine is only applicable in the case of a single transaction. He said ([1984] 1 All ER 530 at 535, [1984] AC 474 at 516-517): g

'Of course, the judiciary must never lose sight of the basic premise expressed in the celebrated dictum of Lord Tomlin in *IRC v Duke of Westminster* [1936] AC 1 at 19, [1935] All ER Rep 259 at 267, that— "Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be." . . . The strong dislike expressed by the majority in the *Westminster* case [1936] AC 1 at 19, [1935] All ER Rep 259 at 267 for what Lord Tomlin described as the "doctrine that the Court may ignore the legal position and regard what is 'called the substance of the matter'" is not in the least surprising when one remembers that the only transaction in question was the duke's covenant in favour of his gardener and the bona fides of that transaction was never for a moment impugned. When one moves, however, from a single transaction to a series of interdependent transactions designed to produce a given result, it is, in my opinion, perfectly legitimate to draw a distinction between the substance and the h

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a form of the composite transaction without in any way suggesting that any of the single transactions which make up the whole are other than genuine. This has been the approach of the United States federal courts enabling them to develop a doctrine whereby the tax consequences of the composite transaction are dependent on its substance not its form. I shall not attempt to review the American authorities, nor do I propose a wholesale importation of the American doctrine in all its ramifications into English law. But I do suggest that the distinction between form and substance is one which can usefully be drawn in determining the tax consequences of composite transactions and one which will help to free the courts from the shackles which have for so long been thought to be imposed on them by the *Westminster* case. I shall attempt no exhaustive exposition of all the criteria by which, for the purpose I suggest, form and substance are to be distinguished. Once a basic doctrine of form and substance is accepted, the drawing of precise boundaries will need to be worked out on a case by case basis.'

c I come finally to the speech of Lord Brightman, with which all other members of the House agreed. Having examined in some detail the judgments in *Floor v Davis* (*Inspector of Taxes*) [1978] 2 All ER 1079, [1978] Ch 295 and the judgments both at first instance and in this court in *Dawson* itself (see [1982] STC 267; [1984] AC 474 at 477), gently chiding those who delivered them for what appeared to him to be a determination to resist any inroads into the principles of the *Duke of Westminster* case, he said ([1984] 1 All ER 530 at 543, [1984] AC 474 at 527):

e 'The formulation by Lord Diplock in *Burmah* expresses the limitations of the *Ramsay* principle. First, there must be a preordained series of transactions, or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (ie business) end. The composite transaction does, in the instant case: it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*. Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax, not "no business effect". If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.' (Lord Brightman's emphasis.)

This last quotation, in my view, embodies the limits of the *Ramsay* principle. The limitations of the principle therein stated are such that, in my view, the Crown must fail in the present cases, for in none of them can the ultimate transaction be considered as part of a preordained series, but in my view *Dawson* leaves many questions unanswered. Taking the last two sentences of the quotation, the question arises as to the consequences of disregarding the share exchanges and land fragmentation for fiscal purposes when the effect of the transactions has already been stated by Parliament to have no immediate fiscal results. What happens when the new holdings are ultimately sold? What would have happened on the land fragmentation if it had resulted in realised development value not offset by BPD's free allowance? How can one look at the end result and then see how the end result is to be taxed when the terms of the taxing statute do not apply to the real legal result unless *IRC v Duke of Westminster* and indeed the four principles are overruled? How does one reconcile the fact that what finally attracted tax, according to the Crown, was the sale to the ultimate purchaser which neither legally, beneficially nor in reality was made by the taxpayer? I would find it easier to follow if the result were said to be that the taxpayer lost the advantage of the share exchange or the fragmentation as the case may be, but this would be to give it fiscal consequences, not to deny it such consequences. The merit would, however, be that one would not be left in a situation where, in the share cases, the taxpayer has in his hands the new holdings which would attract tax if there were a gain on disposal.

More generally, if it is to remain the case that the subject is chargeable only by statute and only by clear and express words, how can it be right to say that taxing the subject is not suitable to be dealt with by the blunt instrument of statute but must be probed and developed by judicial decision? a

All these questions will no doubt be answered by their Lordships when they deal, as it seems inevitable that they will, with appeals from this court. For myself, I am unable to answer them and am thankful that it is unnecessary for me to do so. One way or another it appears to me that the ghost of the pre-*Duke of Westminster* doctrine which that case sought to lay to rest would, if the present appeals are to succeed, have to be resurrected. At present, I am of the clear view (1) that the Crown's contention in these cases is, to borrow Lord Tomlin's words, 'nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable' (see [1936] AC 1 at 20, [1935] All ER Rep 259 at 267-268), (2) that to extend the *Ramsay* principle to the present cases would involve substituting "the uncertain and crooked cord of discretion" for "the golden and straight metwand of the law" (see [1936] AC 1 at 19, [1935] All ER Rep 259 at 267) and (3) that for the commissioners to determine the fiscal end result of a series of transactions and then apply the statute is a process which involves determining that a taxable transaction has occurred before looking at the language of the statute instead of seeing whether any and which words of the statute can fairly be read as applying to what has taken place. Where every step is artificial as in *Ramsay* and *Burmah* I find no difficulty in understanding that the statute cannot be read as covering the so-called loss thereby created. Where, as in *Dawson*, the transactions are conducted so that the first survives only for a 'scintilla temporis', I find it less easy to understand but do not need to, for I am bound by the decision in *Dawson*. It may be that *Dawson* can be further extended but I do not think that this court can extend it to cover these cases. The House of Lords can, of course, do so but, as presently advised, I cannot see how it can be done without overruling, at least to some extent, many of its previous decisions. b
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On the detailed analysis of the facts and all other points I agree with and have nothing to add to the judgments of Slade and Mustill LJ, which I have had the opportunity to read in draft. f

I too would dismiss the appeals.

MUSTILL LJ. I also agree that these appeals should be dismissed. A study of the speeches delivered in *W T Ramsay Ltd v IRC*, *Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300 (*Ramsay*), *IRC v Burmah Oil Co Ltd* [1982] STC 30 (*Burmah*) and *Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530, [1984] AC 474 (*Dawson*) would appear to warrant the following propositions. g

(1) The fiscal consequences of a transaction or group of transactions are to be determined by applying the words of the taxing statute to the facts of the individual case. If the outcome of the transaction, properly understood, falls within the words of the statute, also properly understood, the appropriate fiscal consequence will follow. Otherwise it will not. h

(2) When considering the application of the statute to the facts of the individual case the court must view both the language of the statute and the components of the transaction in a broad fiscal perspective, and must not confine itself to the narrower focus which would be appropriate if the purpose was to elucidate and enforce the private rights created by the documents in which the transaction is embodied. i

(3) Nevertheless, the determining factor will always be the language of the statute. The subject is not to be taxed on the intentment or the equity of the Act.

(4) Unless the enactment specifically so provides, a transaction which falls properly into one fiscal category is not to be transferred to another simply because the motive or one of the motives for embarking on it is to obtain a fiscal advantage.

a (5) A document is not to be treated as a sham unless it is intended to convey to third parties or the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations which the parties intend to create.

b (6) If the transaction under scrutiny consists of a single element the court will look behind the language of the relevant document only for the purpose of considering whether or not it is a sham. If it is not, its fiscal consequences will be ascertained solely by reference to its legal effect.

c (7) If, however, it is contended that the relationship between the taxpayer and the other relevant parties is of a composite nature consisting of a number of linked transactions, the inquiry does not end at the point when the fact-finding tribunal has concluded that none of the documents which embody the relevant elements can be discarded as a sham. The court must, it is true, recognise that these documents may have lasting legal consequences in the sense (for example) that they create enforceable contractual rights, or effect a transfer of title, or alter the capital structure of a company. But the process of matching the facts to the words of the statute is not necessarily confined to an examination of these consequences. The fact-finding body must also look to see whether there stands behind the legal relationships a unitary business relationship by reference to which the application of the fiscal statute ought to be determined.

d (8) A business relationship may be regarded as unitary notwithstanding that the performance of all its stages was not assured by contractual obligations already in existence when the first of the steps was put in train.

e (9) If it is found that the individual elements did together create a unitary business relationship, and if it is necessary to decide what account should be taken of this relationship when applying the taxing statute, it is material to consider whether any of the individual elements which are said to make it up was taken with a view to the avoidance of tax, and without any other business purpose.

f (10) The question to be considered when applying the last-stated proposition is whether the step in question had a business purpose. The inquiry is not limited to whether it had any enduring business or legal consequence.

g The problem raised by the present group of appeals is to determine the breadth of the concept which, in the propositions just stated, has for the moment been indicated by the word 'unitary'. (I have made use of this word to avoid begging any of the questions which may be raised by concentrating on a single one of the expressions which are found in the reported cases.) Do the principles of *Ramsay* and *Dawson* extend to a case where the multiple transactions take the same general shape as was intended when the first step was embarked on, but where there is an unforeseen interruption in the execution of the series, or where the later stages are carried through in different terms, or with different parties, from what had originally been planned? If the tests for the application of the principle are satisfied, is the outcome in a fiscal sense limited to the disregarding of the steps which have no business purpose, or are there other consequences? What is the status of the steps which are ultimately disregarded, at a time when the plan is in suspense or is being reformulated?

h Understandably, much of the argument before this court concentrated on the expression 'a preordained series of transactions' and 'a single composite transaction', for these and other closely related formulations are stamped with authority by the speeches in the three leading cases. I believe, however, that this direct approach must be adopted with some caution. On one side, there may be an inclination to read the various formulae as if they formed part of the taxing statute itself. Too minute a scrutiny of the bare words may cause their context to be overlooked. Thus, at one stage of the argument, it was proposed that there should be recourse to a dictionary, to ascertain the precise meaning of 'preordained'. This cannot be the right method. On the other hand, if too much regard is paid to the context, the reader may be led to believe that the new principles apply only to situations on a par with those discussed in *Ramsay* and *Dawson*. The speeches delivered

in *Dawson* make it plain how misguided this would be. In these circumstances I believe that it is useful to begin by looking at the way in which the law has arrived at its present state, and then going on to consider the practicability of applying one reading rather than another to transactions, different from those under examination in *Ramsay* and *Dawson*, which may commonly arise in practice. a

Accordingly, I think it appropriate to begin by identifying the steps by which the doctrine has evolved. In *Ramsay* itself the chain of relevant dealings began at a time when a transaction had already been concluded in 'the real world' with consequences which were fiscal as well as contractual, namely the taxpayers had made a chargeable gain. Nothing in what followed was designed to modify this transaction in any way. Instead, the intention was to conjure up a new situation in which the taxpayers would, without in reality making a gain or suffering a loss, have attributed to them a loss which could for fiscal purposes be set against the existing chargeable gain. Since the two aspects were entirely separate, it was possible for the House of Lords to concentrate on the later dealings (which alone were carried out with tax avoidance in mind), to view them in the round, and to recognise that, because their elements nullified each other, they were entirely sterile in the result, even if possessing transient legal effects when viewed in isolation. This feature made it possible for the House to disregard the second group of transactions in their entirety, so far as their fiscal consequences were concerned. b

The position in *Burmah* was in one important respect the same, namely that before the tax avoidance manoeuvres were set in train there had been anterior transactions with real fiscal as well as contractual consequences. In fact, there had been two such transactions. In one the taxpayers had realised gains which were assessable to corporation tax. In the other they had suffered a loss in the shape of a bad debt owed by Holdings, which was not allowable against the liability for corporation tax. The difference between this case and *Ramsay* was that, whereas in the latter the self-cancelling tax avoidance transactions were entirely distinct from the dealing which had brought about the gain, the scheme in *Burmah* was intended to convert the fiscal outcome of the second anterior transaction from a bad debt owed by Holdings into an allowable loss on the realisation of the taxpayer's shares in Holdings. Notwithstanding this difference, it was possible to focus on the later group of transactions, and to recognise that, when viewed in the round, they did not lead to any disposal of the real asset (the BP shares) or any real loss in the sense contemplated by the statute. The essence of the decision was that the tax avoidance dealing could be disregarded for fiscal purposes, and it is, in my view, significant that Lord Diplock referred to the intermediate circular book entries as being 'ignored' (see [1982] STC 30 at 33). c

When the House came to consider *Dawson* it was faced with a very different situation. No longer was there a free-standing anterior transaction which could remain intact once the tax-avoidance dealings had been stripped away. Instead, the integrated plan had a genuine commercial object, namely the disposition of the asset by the taxpayer (A) and its acquisition by a third party buyer (C). The tax avoidance element was introduced, not after the genuine transaction was complete, but by the interpolation into the planned future transaction of a commercially superfluous party, in the shape of Greenjacket Investments Ltd (B). These two elements were knitted together in the scheme, so that the nullification of the artificial tax avoidance aspects, with the consequent exposure of its true fiscal implications, could not be achieved simply by treating the redundant dealings as if they had never occurred; for, if the transfers from A to B, and thence from B to C were ignored, there would be nothing left to bridge the gap between A and C. The process of reasoning in *Dawson* was therefore different from that of the two earlier cases. Instead of merely *subtracting* the commercially meaningless steps by ignoring them, the court had to give effect to an *additional* underlying fiscal reality which was not reflected in the documents actually executed, viz a direct transfer from A to C, for which the consideration was furnished by C to B, at the request of A. *Dawson* demonstrates that, in what has been called a 'linear' as distinct from a 'circular' transaction, the court must d

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carry out the following exercise: (i) consider whether all the dealings under scrutiny
a form part of a single transaction; (ii) consider whether any of the steps have no commercial purpose; (iii) discard those that have no such purpose; (iv) identify what Lord Brightman called the end result of the single transaction. Precisely how the end result is to be taxed will then depend on the terms of the taxing statute which it is sought to apply.

It is against this background of a developing doctrine that the tests formulated in
b *Ramsay and Burmah*, and reiterated in *Dawson*, must properly be understood. In *Dawson*, as in the other two cases, the documents creating the inserted steps were not a sham. It follows that they did have real legal effects. They created obligations which were enforceable in law; they effected transfers of legal or equitable interests which were valid as against third parties; they brought about real changes in the capital structure of the various companies. Moreover, their nature was such that, at least when considered in
c isolation, they were capable of having fiscal consequences of their own. Yet they had to coexist with another underlying transaction which gave rise to different fiscal consequences. This caused no practical problems in *Dawson*. The scheme went through in a short space of time exactly as planned. A precisely specified outcome had been contemplated at the outset, and precisely this outcome had been achieved by the end. No
d lasting rights were created by the intermediate dealings. Moreover, any fiscal consequences which may have theoretically flowed from these dealings were so transient that they could have caused no problems in practice. Their replacement by the fiscal consequences of taxing A as on a direct transfer to C took place so quickly that the problem of the way in which the dispositions from A to B and B to C should be taxed could never directly arise.

The same ready solution is not, however, available when in timing or execution there
e is a discontinuity between the stages by which the end result is reached. Here, the earlier steps may possess in the real world fiscal as well as legal consequences of their own, which are not so easily disregarded when the later stages come to be performed. It seems to me that an understanding of the language used in *Ramsay*, *Burmah* and *Dawson* must take account of the apparent tension between the two or more sets of legal and fiscal
f consequences, and that the words of the speeches should not be read as extending the principle to situations where these consequences cannot genuinely coexist.

By way of illustration, one may take a hypothetical case much pressed in argument. Imagine that the taxpayer (A) envisages that on some future occasion he may wish to dispose of an asset, or engage in some other commercial transaction, with an independent third party, of whose identity he has at present no idea. He recognises that, if the
g transaction ever does take place, there will be a fiscal advantage if it is channelled through an intermediary (B). Against this contingency he decides to carry out the transaction with B straight away, and does so, with consequences which are reflected by entries in registers of title or shares, and by appropriate debits and credits in the accounts of the two companies. Assume also that the dealing with B has a fiscal consequence so far as A
h is concerned, whether by way of chargeable gain, or allowable loss, or in some other manner. At this stage, there can be no ground on which the Revenue could abstain from assessing, or the taxpayer from paying, the relevant kind of tax by reference to the transaction as actually carried out. Ex hypothesi the transaction is not a sham. Nor, consistently with the principles set out by Lord Wilberforce, could the argument for the Crown be carried to the length of suggesting that (in the absence of express statutory warrant) the existence of an ulterior motive could be a ground for taking the transaction
j fiscally otherwise than at its face value. Unless it falls into an exempted category, the outcome of the transaction will fall to be brought into account as loss or gain, or in some other way, when A's overall tax position is computed. Indeed, if the interval of time is long enough, his liability may be actually assessed and paid. Let it now be assumed that, after a substantial interval, A decides to implement the original scheme by causing B to carry out with C a transaction of the type which A had contemplated from the outset. In

their argument on the present appeal, the Crown asserted that the *Ramsay/Dawson* principle requires A to be retaxed on the basis of a direct disposition from himself to C. But, if this is so, what is to be the fiscal status of the concluded transaction between A and B, and of the crystallised version of A's overall tax position founded on it? Counsel for the Crown suggested that the fiscal position might be reconstituted by means of an appeal by one party or the other against the original assessment. But an appeal could succeed only if the original tax return by A and the assessment based on it could properly be treated as erroneous, and apt for correction. Yet there seems no sense in which it is possible to say that the return and assessment were wrong when made, and counsel was unable to cite any authority in support of the notion that they could be retrospectively invalidated when the transaction with C went through. As an alternative, counsel suggested that the whole matter could be disentangled by reworking A's accounts for the current and earlier years on the basis that the transaction with B had never taken place, and then by extra-statutory concession giving credit for any tax actually paid in respect of the transaction in earlier years against the assessment which brings into account a notional transfer direct from A to C. With due respect to the resourceful arguments of counsel for the Crown, this expedient seems to me only to paper over the intellectual difficulties which arise from trying to force this situation into the mould of a doctrine conceived by the House of Lords in quite different circumstances. The only link between the two dealings is the common fiscal purpose. It is, however, quite plain from the authorities that this alone is not enough. It must also be possible to treat the dealings as part of a single transaction. In the example stated there are, to my mind, two transactions, not one.

Another example may be given. Imagine that the plan made by A contemplates that the sale by B to C will be made on terms which may be labelled X. After the transaction between A and B has been completed, a difficulty is encountered, as a result of which it is possible to complete the second stage only if its terms are changed to Y. If it is held that, in the real world, there is a triangular transaction between A, C and B, what are its terms? The transfer away from A was never on terms Y; the transfer to C was never on terms X. So also if the example is varied to make the breakdown in the plan relate to the identity of the purchase, rather than the terms on which he buys; the essence of the problem is the same.

I must emphasise that the purpose of these examples, and they are only examples, is not to repeat the argument over double taxation which was disposed of by Lord Brightman in *Dawson*. The problems arising from the Crown's argument on the present appeals are of a different nature. Still less is there any intention to hint that the clock should be set back to where it was before *Ramsay*. The principle is firmly established and, if its application within its necessary limits gives rise to problems, these must be solved. It is, however, legitimate to recognise that such limits do exist. The House has entrusted to the courts the task of elaborating this doctrine, which is still in a state of evolution. When considering its thrust and effect, and working out how to apply it in new situations, an examination of the circumstances in which the House has held that it can successfully be applied, and of the practical difficulties of applying it in other circumstances, must surely help to arrive at an understanding of what the speeches were intended to convey.

Approaching the matter in this way, I would conclude that the doctrine cannot have been intended to have the wide compass for which the Crown contends. This is indeed the opinion which I would have formed simply by reading the language used by their Lordships in what would seem to be its natural sense. Given the importance of the issue, it may be permissible to set out at a little length the expressions actually used. Taking the speeches in the order in which they were delivered, we find: 'a nexus or series of transactions'; 'a series or combination of transactions, intended to operate as such'; 'a composite transaction intended to be carried through as a whole'; 'a composite transaction'; 'an indivisible process'; '[a scheme] planned as a single continuous operation'; 'each step . . . so closely associated with other steps with which it formed part of a single

a scheme'; 'a complete prearranged scheme'; 'a complete scheme'; 'inter-connected transactions'; '[a transaction] planned as a single scheme'; 'a series of interdependent transactions'; 'interlocking, interdependent and predetermined transactions'; 'one single composite transaction'. In view of the weight of argument directed to the precise meaning of 'preordained' in the authoritative formulation by Lord Brightman in *Dawson* [1984] 1 All ER 530 at 543, [1984] AC 474 at 527, it is important to register that his Lordship treats the expression 'a preordained series of transactions' as interchangeable with 'a single composite transaction'.

b It is, of course, essential to avoid the mistake of confusing a description of the case before the court with a definition of the principle to be applied in future cases, but I confess that, quite apart from the practical considerations already mentioned, I can see nothing in any of the speeches to sustain the Crown's proposition that the *Ramsay* principle extends to all cases where an initial step is taken with an ultimate tax advantage in mind, and there is subsequently, after whatever interval and in whatever precise form, another step of the kind originally envisaged.

c Against this background I turn to the individual appeals. These have already been discussed in detail by Slade LJ, and I may therefore deal with them very shortly. In each case the start and finish must be the words of the statute. I believe that a valuable touchstone was furnished by Lord Diplock and Lord Fraser in *Burmah* [1982] STC 30 at d 33, 38–39 when they spoke of 'the real' loss and by Lord Scarman when he spoke of the need to determine 'where the profit, gain, or loss is really to be found' (at 39). Of the three appeals, *Craven v Stephen White* offers the most scope for debate, since at the time when the first stage of the transaction was carried out a sale by Millor to Jones was on the cards, and such a sale did take place, within a relatively short time-span on terms which were, at least as to price, not dissimilar to those originally contemplated. Nevertheless, e I cannot find in the events leading up to the sale any ground for holding that 'the real disposal' by the taxpayers was to Jones rather than Millor. At the time when the shares ceased to be the property of the taxpayers they were destined for Millor and nowhere else; there was then no formulated plan fixing the identity of the ultimate recipient, or the terms on which the shares would be transferred; nor any settled intention on the part f of Oriel or Jones that the latter should participate in a triangular dealing such as was revealed by the House in *Dawson*. Whatever the precise boundaries of the word 'preordained', it cannot, in my view, be stretched to cover a series of dealings so intermittent in execution and so unformed at the outset. In my judgment, there was not here a single composite transaction or operation, but two distinct transactions, and the fiscal implications of the two stages ought to be ascertained by reference to the legal effect g of the contracts from which they sprang.

I have reached the same conclusion in relation to *IRC v Bowater Property Developments Ltd*. As subsequent events demonstrated, there was a hope and an expectation, at the time when the land was transferred to the five companies, but there was in no sense a practical certainty, that an onward sale would be made to Milton Pipes on the terms negotiated a few months previously by BUKP. In the event, the sale did ultimately go through, but h on different terms, and after a lapse of 20 months. This discontinuity must, in my view, rule out any treatment of the dealings as an indivisible whole, or the treatment of the sale by BPD to their affiliates as if (in a fiscal sense) it had never happened. So far from being preordained, the transaction might well have never happened at all, or, if it had happened, might have been concluded between different parties, if another buyer had come forward before the change of mind by Milton Pipes.

i For my part, I would regard the *Baylis v Gregory* cases as the plainest of the three appeals, so far as concerns the issue which is common to all. On 11 March 1974, when the exchange with PG Holdings took place, not only was Hawtin Ltd not visible on the horizon as a potential purchaser, but there was no sale to anyone presently in contemplation. For the reasons already stated, I cannot follow how, on any understanding of what was said in the three leading cases, events which occurred nearly two years later

could retrospectively convert the share exchange into one element in a composite transaction of which the timing, terms, parties and even existence were at that stage quite unpredictable. *Ramsay* and its successors demand that dealings which have none but a fiscal purpose should not be allowed to camouflage an underlying transaction which exists in the real world, but this is no warrant for compressing into a supposed unity two transactions which are in truth distinct. In my judgment, the disposal was to Holdings, and to Holdings alone. It is true, as was emphasised in argument, that this opinion carries with it the consequence that an operation performed for reasons of what has been called 'strategic tax planning', by which the first stage of a linear series of transactions is carried out in isolation in the expectation that it may prove useful in the future, will escape the taxation net if it is followed at some later stage by a dealing of the type envisaged. Certainly the *Ramsay* principle is open to elaboration: its frontiers are not yet determined. But I would regard the argument advanced by the Revenue as involving not simply an expansion of the principle, but a striking-out into a whole new field of judicial legislation in a manner inconsistent with the constraints announced at the time when the doctrine itself was being propounded.

As to the other two issues arising on the appeal from the decision of Vinelott J, I have nothing to add to what has been said by Slade LJ, with whose conclusions I respectfully agree.

For these reasons, therefore, I also would dismiss all these appeals.

Appeals dismissed. Leave to appeal to House of Lords in Craven v Stephen White and Craven v Brian White granted on terms as to costs. Leave to appeal to House of Lords in IRC v Bowater Property Development Ltd, Baylis v Gregory and Baylis v Gregory and Weare refused.

16 July. The Appeal Committee of the House of Lords gave leave to appeal in *IRC v Bowater Property Ltd* and *Baylis v Gregory* on condition as to costs.

Solicitors: Solicitor of Inland Revenue; Berwin Leighton (for the Whites and the trustees); C W S Goodger (for BPD).

Diana Brahams Barrister.

a Wormell v RHM Agriculture (East) Ltd

COURT OF APPEAL, CIVIL DIVISION

DILLON, NICHOLLS LJ AND SIR FREDERICK LAWTON

20, 21 MAY 1987

- b** *Sale of goods – Implied condition as to fitness – Instructions – Recommendation for use – Warning against use after stated time – Farmer purchasing herbicide to kill wild oats infesting crops – Instructions containing warning that use after specified growth stage of crops not recommended – Herbicide ineffective after specified growth stage of crops – Farmer misunderstanding warning – Farmer understanding warning to mean only that late use might cause damage to crops – Whether herbicide fit for purpose for which supplied – Sale of Goods Act 1979, s 14(3).*

c

The plaintiff, an experienced farmer, asked the defendants, who were suppliers of agricultural products, to recommend a weedkiller which would be effective at a late stage in the growing season to destroy the wild oats infesting his crop of winter wheat. The defendants recommended a particular herbicide which the plaintiff then purchased from the defendants. The instructions on the cans of herbicide stated, under 'Time of application', that the herbicide should only be applied to winter wheat within specified growth stages of the crop and that if it was applied later the wheat might be damaged. The instructions did not say anything about the effectiveness of the herbicide if it was applied after the specified growth stage but they did state that 'SPRAYING AFTER THESE . . . GROWTH STAGES IS NOT RECOMMENDED'. The plaintiff understood the instructions to mean that the only risk from late application of the herbicide would be possible damage to his wheat crop, a risk which he was prepared to take, and he assumed that late application of the herbicide would still be fully effective to destroy the wild oats. The plaintiff's application of the herbicide, which was made after the specified growth stage, proved to be ineffective to destroy the wild oats. He brought an action against the defendants claiming damages for breach of the term implied by s 14(3)^a of the Sale of Goods Act 1979 that the herbicide would be reasonably fit for the purpose for which it was supplied, namely to destroy the wild oats. The judge upheld the plaintiff's claim on the ground that the herbicide was unfit for the purpose for which it was supplied because the instructions were misleading since they could reasonably be understood to mean that late application of the herbicide would still be effective to destroy wild oats. The defendants appealed.

g

Held – Although instructions as to the use of goods had to be taken into account in considering whether the goods were fit for the purpose for which they were supplied, as required by s 14(3) of the 1979 Act, if the instructions gave a clear warning that the goods should not be used after a particular time the plaintiff could not complain that the instructions had rendered the goods unfit for their purpose merely because he had misunderstood the effect of that warning. Since the instructions on the cans contained a clear warning that spraying after the specified time was not recommended they put the plaintiff on notice not to use the herbicide after that time and he could not complain that his own misunderstanding of the consequences of ignoring the warning had rendered

j

- a** Section 14(3), so far as material, provides: 'Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known—(a) to the seller . . . any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller . . .'

the herbicide unfit for the purpose for which it was supplied. The appeal would therefore be allowed (see p 77 *f g*, p 80 *d g* to *j* and p 81 *c j* to p 82 *a d* to *f*, post).

Decision of Piers Ashworth QC [1986] 1 All ER 769 reversed.

Notes

For implied terms as to quality or fitness of goods sold, see 41 Halsbury's Laws (4th edn) paras 691–692, and for cases on the subject, see 39(2) Digest (Reissue) 200–230, 1512–1801.

For the Sale of Goods Act 1979, s 14, see 49 Halsbury's Statutes (3rd edn) 1115.

Cases cited

Vacwell Engineering Co Ltd v BDH Chemicals Ltd [1969] 3 All ER 1681, [1971] 1 QB 88; *rvsd* [1970] 3 All ER 553, [1971] 1 QB 111, CA.

Willis v FMC Machinery and Chemicals Ltd (1976) 68 DLR (3d) 127, PEI SC in banc.

Appeal

The defendants, RHM Agriculture (East) Ltd, appealed from the judgment of Piers Ashworth QC sitting as a deputy judge of the High Court on 6 December 1985 ([1986] 1 All ER 769) whereby he gave judgment for the plaintiff, Peter Roydon Wormell, for the sum of £12,936.91 in his action against the defendants for breach of contract in respect of the sale by the defendants to the plaintiff in March and April 1983 of a quantity of 'Commando' weedkiller, on the ground that the weedkiller was not of merchantable quality or alternatively was not fit for the purpose for which it was supplied. The facts are set out in the judgment of Dillon LJ.

William Barnett QC and *Adrienne Page* for the defendants.

Anthony Hidden QC and *Richard Rundell* for the plaintiff.

DILLON LJ. This is an appeal by the defendants in the action, RHM Agriculture (East) Ltd, against a judgment in the sum of £12,900-odd awarded to the plaintiff at the trial of the action by Piers Ashworth QC sitting as a deputy judge of the High Court ([1986] 1 All ER 769). The sum awarded represented damages and interest thereon under s 14(3) of the Sale of Goods Act 1979 in respect of a sale by the defendants to the plaintiff of some weedkiller known as Commando.

Section 14(3) provides that where a seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller (and then there is an alternative which is not relevant) any particular purpose for which the goods are being bought there is an implied condition that goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied. It is not in doubt that the plaintiff, as buyer, did rely on the skill or judgment of the defendants as sellers.

The plaintiff put forward an alternative claim under s 14(2) of the 1979 Act, to the effect that the goods supplied were not of merchantable quality, but it was conceded in the court below, as in this court, that if the plaintiff could not succeed under sub-s (3), he could not succeed under sub-s (2), and accordingly we have not heard any argument under sub-s (2).

It is as well to have in mind that the claim to damages is not founded on misrepresentation; nor is it founded on the tort of negligence. It is founded on s 14(3) of the 1979 Act.

The defendants were the suppliers of the goods. They have been backed throughout this litigation by the manufacturers, Shell Chemicals. In fact, nothing in this appeal turns on any distinction between supplier and manufacturer.

The plaintiff is an experienced farmer. He has been farming land at Abberton, east of Colchester in Essex, for some 25 years and more. That is heavy clay land, London clay,

a prone to be cold and wet in winter. For that reason he often sowed winter wheat rather than seeking to rely on spring sowing, and in the autumn of 1982, which is the beginning of the time with which we are concerned, he had sowed nearly 600 acres of his land with winter wheat. He was concerned to control the weed known as wild oats, which he had found infested his land, and in the early part of 1983 he was concerned to see what could be done about the wild oats. This would have been in the middle of March, when it was already apparent that there was a cold and wet season, and spring was likely to be late. By b that time he knew that it was too late for him to use certain well-known wild oat weedkillers; accordingly he spoke to a Mr Fuller, who was the manager of the defendants' depot at Whittlesford. Mr Fuller had been known to the plaintiff for some ten years; Mr Fuller also knew the nature of the plaintiff's land, which he had on occasion visited.

c The evidence which the plaintiff gave of his conversation with Mr Fuller, which was by telephone, was to the effect that he asked Mr Fuller what there was on the market which he, the plaintiff, could still use at that relatively late stage for wild oats in that season, and Mr Fuller's reply was, 'There's only one thing left, and that's Commando.' In the upshot the plaintiff bought a consignment of Commando from the defendants; it was delivered on 24 March 1983 and, after a second telephone conversation with Mr Fuller, the plaintiff bought a second, and larger, consignment which was delivered on 15 April.

d Unfortunately the spring of 1983 continued to be cold and wet. The plaintiff sprayed two fields, amounting to about 80 acres, with the Commando on 5 and 11 May. It did not do any good, probably because the land was still too wet and cold. He sprayed the rest of his land with the Commando in fine and warm weather over some four or five days starting on 3 June 1983. Unfortunately, it did virtually no good.

e The plaintiff accordingly puts forward his claim that the goods were not reasonably fit for the purpose of controlling the wild oats on his land, which he had made known to the defendants.

f These are goods which both Mr Fuller and the plaintiff knew would be supplied with detailed instructions, and both of them expected that the plaintiff would read the instructions. Plainly the instructions have to be taken into account in considering whether the goods were fit for the purpose. The plaintiff cannot simply say that the weedkiller was not reasonably fit for its purpose of killing wild oats if it would have been fit for that purpose if used in accordance with the instructions. If the plaintiff says that it did not work, then *prima facie* at any rate, it is an answer in such a case as this for the defendants to say, 'Oh, but you didn't follow the instructions; if you had, it would have worked.'

g The judge's finding of fact was that there was nothing wrong with this batch of weedkiller, and it would indeed have been fit for its purpose if used in the conditions envisaged by the instructions and at the stage of plant growth specified in the instructions, that is to say with winter wheat at the stage between leaf sheath erection and the fourth node becoming detectable.

h As it happened, the spring of 1983 was so cold and wet that there never was a time that spring when the weather was warm enough, and the land dry enough, for the weedkiller to be used before the crop growth had passed the latter limit. But the weather conditions cannot, by themselves, render the weedkiller not reasonably fit for its purpose. To take an instance put forward by Sir Frederick Lawton in the course of argument, if a customer buys a packet of runner bean seeds knowing that there will be instructions on the packet, and sees that the instructions on the packet say that the seed is to be planted on open ground during the last fortnight in May, the seed is not rendered unfit for its purpose if it turns out that the last fortnight in May is so continuously wet that it is quite impossible to plant bean seeds in the ground.

j Effectively, the plaintiff has not sought just to rely on the weather: he has relied also on a provision in the instructions. The instructions are printed on the canister in which the Commando weedkiller is supplied. The front of the canister sets out the name

'COMMANDO FOR THE CONTROL OF WILD OATS IN WHEAT AND BARLEY', and describes it as a 'weedkiller'; it gives its contents, and says that it is 'FOR USE ONLY AS AN AGRICULTURAL HERBICIDE'. There are instructions on both the sides and on the back of the canister; they go into considerable detail on many points, and I do not need to read anything like all of them. On the right-hand side as you look at the canister, under the name 'COMMANDO' printed on a diagonal, this is said: a

'Do not apply to wheat or barley crops beyond the recommended crop growth stage. Damage may occur to crops sprayed after the recommended growth stage. Damage may result unless all recommendations are followed. Do not spray crops which for any reason whatsoever are under stress . . .'

That is followed by a few more sentences which I need not read.

On the back, in the centre column there is a reference to 'COMPATIBILITY' in relation to the sequential application of Commando and broad-leaved weedkillers. This sets out that there is evidence that applying Commando and some broad-leaved weedkillers without the interval specified in the instructions reduces the activity of Commando against wild oats; it then goes on to say what intervals should be allowed where a broad-leaved weedkiller is being used in the spraying programme. c

In the right-hand column there is a reference to 'Growth regulators for wheat'; it says: d

'It is recommended that growth regulators be tank mixed with COMMANDO but where growth regulators are applied at early crop growth stages the sequential use of COMMANDO may result in some loss of wild oat control.'

In the left-hand column, under the heading 'Rate of application' certain quantities per hectare are given, in a specified water dilution, and it is said that— e

'Vigorous growth and crop competition is essential for optimum control . . . Where there is less vigorous growth or crop competition . . . the rate of application should be increased . . .'

Further down the left-hand column, under the heading 'Time of application', the following is set out: f

'The best control of wild oats will be achieved when both the crop and wild oats are growing strongly under optimum conditions, i.e. a period of fine, warm moist growing weather, not for instance a series of sunny days interspersed with cold/wet or frosty nights resulting in low soil/air temperatures. Do not apply COMMANDO where the crop and wild oats are not growing actively due to adverse conditions as stated above or in situations of mineral deficiency, waterlogging, drought, etc.'

I interpose to say that it was probably because of the unsatisfactory nature of the conditions as there indicated that the May applications were unsuccessful. h

The instructions go on:

'Application timing is dictated by crop growth stages and not by the size of wild oat. Provided crop growth stages allow, COMMANDO will give the best level of wild oat control at the later stages of application consistent with application during the above good growing conditions which are more likely to occur at this time.'

Then, for winter wheat, the instructions are: i

*'Commence Spraying At leaf sheath erection.
Stop Spraying Before fourth node detectable.'*

a There is then a comment that some wheat varieties may not produce four nodes and that therefore spraying should stop before flag leaf ligule is visible. Then, in capital letters at the foot of the column is stated: 'SPRAYING AFTER THESE LATTER GROWTH STAGES IS NOT RECOMMENDED.'

The judge conveniently set out in his judgment how Commando works, and I gratefully adopt his description. He said ([1986] 1 All ER 769 at 771-772):

b 'When sprayed over the crop, which includes both the wheat and the wild oats, Commando has an effect on the wild oats, stopping the upward growth within 24 hours, but the wheat or barley continues to grow. This additional plant growth is an important part of the control of the wild oats, as the leaves of the crop reduce the amount of light reaching the wild oats, in effect the plant smothers the wild oats. The active ingredient in Commando is converted by the wild oat plant into an active acid which inhibits growth and kills the cells in the growing points of the plant. This conversion from the ester into an active acid is most rapid when there is good, active, upward growth of both wild oat and crop. Under poor growing conditions the production of acid is slower, resulting in only partial destruction of the plant. In wheat and barley the ester is only converted into the active acid at a very slow rate which is easily broken down by the plant, leaving it unaffected. If Commando is applied when there is little further crop growth to be achieved, the crop will not compete with the wild oat, and the herbicide treatment will be substantially less effective.'

In his pleadings the plaintiff contended that he had applied the Commando in strict accordance with the growth stages recommended or prescribed by the instructions and before the fourth node was detectable. But the judge found as a fact (indeed it seems to have been virtually accepted by the end of the trial) that in truth when he carried out his main spraying in the first week of June, the plaintiff's crop had got beyond the crop growth stages referred to in the instructions; it had passed the 'stop spraying' point. The plaintiff says, however, that he deduced from the instructions that even if he sprayed after the instructions said 'stop spraying', the weedkiller would still work. He deduced that he would be running a risk of damaging his crop, but not a risk that the weedkiller would not work. He made these deductions from the passage which I have read from the side of the canister, in particular the two sentences:

'Do not apply to wheat or barley crops beyond the recommended crop growth stage. Damage may occur to crops sprayed after the recommended growth stage.'

g He deduced that the only reason why Commando should not be applied beyond the recommended crop growth stage was that damage might occur to the crops, and he decided that he was prepared to take the risk of damage to his crops because he wanted to destroy the wild oats, and in particular to avoid the possibility that wild oats would seed over his land and infest his crop in the following year.

h The evidence given by the Shell representative, Mr Richardson, explained the statement in the sentences to which I have just referred, namely that damage may occur to crops sprayed after the recommended growth stage; he said:

i 'If one applies Commando when the head is coming up in the crop, in boot, you are liable to shorten that last bit of stalk, which can leave the head partly trapped in the sheath, which then stops it from ripening properly. This varies from variety to variety and growth conditions pertaining at the time. That is why we talk about damage.'

But a little earlier in his evidence Mr Richardson had said this in relation to the warnings on the side of the canister; he was asked: 'What would happen to the crop if you spray late?', and his answer was: 'It varies.' But then he said:

'First of all, I would like to make it clear that we do not recommend not spraying later than the recommended stages for damage alone, by any means. We have plenty of proof to prove that the wild oat control drops off dramatically because competition no longer exists between the two crops.'

The competition no longer exists because the growth of the crop slows down and thus the crop stops offering the competition to the wild oat which the Commando takes advantage of in killing the wild oat. The plaintiff says that although Mr Richardson says that the efficacy of the Commando drops off dramatically, they, neither the defendants nor Shell, ever told him in the instructions that after what were called the recommended stages the Commando would not work.

So be it; the plaintiff did deduce that. So be it also that, as the judge found, it was a reasonable deduction for a man to make, if he was not a scientist and did not know how the chemical worked. But in my judgment it is not what the instructions told him. They say very clearly on the side: 'Do not apply to wheat or barley crops beyond the recommended crop growth stage.' On the back they say:

'Provided crop growth stages allow, COMMANDO will give the best level of wild oat control at the later stages of application consistent with application during the above good growing conditions . . .'

The final stage for spraying is described as 'Stop Spraying', and then it says in capitals: 'SPRAYING AFTER THESE LATTER GROWTH STAGES IS NOT RECOMMENDED.' The evidence is that even if there was late spraying there could be some benefit, in that the lower panicles of the wild oat might be killed and the amount of seed might thus be reduced. But in the plaintiff's case that benefit was minimal.

The judge found the instructions to be misleading (see [1986] 1 All ER 769 at 779). He accordingly held the defendants liable on the footing that they and Shell were under a duty to warn anyone who bought Commando, ie to explain that it would not work after reaching the 'stop spraying' stage, when the fourth node had become detectable. Duty to warn has been mentioned in some of the cases to which we have been referred; they were cases in which the facts were a considerable distance away from the facts of the present case. But I think it important to have in mind that the cause of action relied on is not a cause of action in negligence and is not founded on a duty of care. It is about whether the goods are reasonably fit for a specified purpose. The warning comes in merely in this respect, that, if a clear warning is given, a customer who ignores it has no basis for complaining. But in the present case the instructions set out in clear terms the period within which spraying should take place; nobody would suppose that with a sophisticated weedkiller you could reasonably expect to be able to go on spraying at any season of the year. For my part, I do not see that the manufacturers are required to spell out in greater detail why it is not recommended that spraying should take place after the 'stop spraying' growth stages have been reached, or to explain how the chemical works, or to give any further warning of the reasons why the direction is given not to apply Commando to wheat or barley crops beyond the recommended crop growth stage. The plaintiff chose to take a chance; that is a matter for him. But he cannot say that the weedkiller was not reasonably fit for its purpose, when it would have been had weather conditions allowed it to be used within the limits and in the conditions prescribed by the instructions. For that, had the season not been so adverse (and that was not the defendants' fault), there would have been ample time after the weedkiller had been supplied to the plaintiff by the defendants.

Accordingly, I would allow this appeal and set aside the judgment which was awarded by the judge.

a A separate point was raised on the matter of costs, in that the judge allowed the plaintiff, on the footing of his success, 90% of the costs of the action. The reason why he did not get the whole of his costs was that a good deal of time had been directed to the originally pleaded case, that the plaintiff had carried out his June spraying within the permitted spraying period under the instructions, and on that the plaintiff was wrong. It was argued for the defendants that the reduction in costs, a mere 10%, was so much too little that the exercise of the judge's discretion was flawed. On the basis, however, that

b we are setting aside the judgment which was awarded, it is unnecessary to express any further view on this point as to costs.

NICHOLLS LJ. I agree.

c The manufacturers of Commando have printed on the back of the can in which they supply the product what they describe as 'RECOMMENDATIONS FOR USE'. In the first column, under the paragraph bearing the bold heading 'Time of application', these instructions state explicitly the crop growth stages within which alone application of Commando is recommended. Against the reference to 'WINTER WHEAT', in the column headed 'Commence Spraying', appear the words 'At leaf sheath erection', and in the next column, headed 'Stop Spraying', there appear the words 'Before fourth node detectable'. Below the table there

d appear in capital letters the words 'SPRAYING AFTER THESE LATTER GROWTH STAGES IS NOT RECOMMENDED'.

The latter growth stage had not been reached when the second of the two quantities of weedkiller that are in question in the present case was ordered by the plaintiff and supplied to him. Another month, or thereabouts, remained before the 'stop spraying' stage would be reached with the plaintiff's crop of winter wheat. In the event, May 1983

e was wet, and most of the plaintiff's fields could not be worked until about early June. By then the winter wheat had got just beyond the recommended growth stage. The judge found that in the main the weedkiller was applied by the plaintiff when his wheat had probably gone slightly beyond the recommended stage of growth for application, or at the very best the crop was on the borderline.

f In consequence, the application of the weedkiller on the oats did not produce a satisfactory result. The weedkiller had some effect, but only a limited effect. The judge found that the probable reason why the Commando did not work very well on the plaintiff's crops was that it was applied too late.

So what is the basis on which the plaintiff has mounted his claim that Commando was not reasonably fit for the purpose for which it was supplied? The main thrust of the plaintiff's argument was that the instructions on the can were misleading, because the recommendation regarding the time of application, which appears on the back of the can, is naturally to be read, or could reasonably be read, in conjunction with the warning printed on one side of the can. There, immediately following the warning 'Do not apply to wheat or barley crops beyond the recommended crop growth stage' there appear the sentences: 'Damage may occur to crops sprayed after the recommended growth stage.'

g

h Damage may result unless all recommendations are followed'.

Therefore, it was submitted, a farmer who reads these instructions as a whole would understand, or might reasonably understand, that the only drawback in applying Commando outside the recommended period would be that this might damage his crops. He would not understand that late application would be unsatisfactory in killing the wild oats. Indeed, this farmer read the instructions in that way; so did his expert, and

j so did the judge. The judge concluded that the instructions were positively misleading (see [1986] 1 All ER 769 at 779).

With great respect to the judge, I am unable to accept this. The wording on the can might have been expressed more clearly, but any reasonable farmer reading these instructions would know, as did the plaintiff, that spraying winter wheat after the fourth

node was detectable was outside the period recommended by the manufacturers. He would know that if he sprayed at that time he would not be wholly following the manufacturers' instructions. The instructions, or recommendations, put the user on notice not to use the product at that time. a

In my view the defendants, who are supported in this action by the manufacturers, are entitled to treat that as the clear starting point in these instructions. The starting point is that unsatisfactory results following from, and caused by, the use of a product otherwise than in accordance with the manufacturers' recommendations are not, without more, results which should surprise a user, or results of which he can reasonably complain. b

From there one comes to the express warning of the risk of crop damage, which appears on one side of the can in close juxtaposition to the warning not to apply the weedkiller beyond the recommended growth stage. In my view, the existence of the specific warning of possible damage to crops if the weedkiller is applied late does not entitle a user to assume that the weedkiller will still be as effective for its intended purpose, namely to kill the wild oats, if it is applied outside the recommended period, as it would be if applied within the recommended period; or even, if not as effective, that it would at least still be reasonably effective to kill the wild oats. If a farmer proposes to spray outside the recommended times, being prepared to take the risk of damage to his crops, but not being prepared to take the risk of the weedkiller being ineffective, it must be for him to check first with the supplier that the product will still produce a reasonable result if applied late. c

I too would allow this appeal. d

SIR FREDERICK LAWTON. I too would allow the appeal, for the reasons that have been given by Dillon and Nicholls LJ. e

Appeal allowed.

Solicitors: *Metson Cross & Co* (for the defendants); *Jackson & Partners*, Colchester (for the plaintiff).

Wendy Shockett Barrister.

Re AE Realisations (1985) Ltd

CHANCERY DIVISION

VINELOTT J

3, 4, 19 DECEMBER 1986

- b* Company – Voluntary winding up – Disclaimer of onerous property – Lease – Vesting order – Lease of business premises to company for term of 25 years – Surety agreeing to take lease of premises if lease disclaimed by company – Company underleasing premises at same rent and subject to same covenants – Underlessee depositing security for performance of covenant – Company going into liquidation and liquidator disclaiming lease – Lessor calling on surety to take lease of property – Surety applying for vesting order of lease and underlease together with benefit of agreement between company and underlessee – Whether court should make vesting order – Companies Act 1985, ss 618, 619, Sch 20.

d In 1982 the landlord's predecessor in title granted a lease of the ground and first floor of an office block to the tenant. The lease was for 25 years and payment of the rent was guaranteed by a company (the surety) which also executed the lease and covenanted that if the lease was disclaimed by the tenant it would be required by the landlord to take a lease of the premises for the unexpired term of the lease. In 1984 the tenant leased the premises to an underlessee for ten years, the underlease containing the same covenants as in the lease. As part of the underleasing arrangement, the underlessee deposited with the tenant's solicitors the sum of £25,000 as security for the performance by the underlessee of the covenants in the underlease. The freehold of the property was subsequently transferred to the landlord. In June 1985 the tenant went into liquidation and the liquidator obtained leave under s 618^a of the Companies Act 1985 to disclaim the lease originally entered into with the landlord's predecessor in title. The landlord thereupon called on the surety to take a new lease of the property under its covenant to do so. The surety applied under s 619^b of and para 4^c of Sch 20 to the 1985 Act for an order that the existing lease along with the underlease between the tenant and the underlessee be vested in it, together with the benefit of the agreement whereby the underlessee had deposited £25,000 as security for performance of the covenants. The underlessee did not wish to take a vesting order and was anxious to vacate the premises.

- g* *a* Section 618(1) provides: 'Where any part of the property of a company which is being wound up consists of land (of any tenure) burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding its possessor to the performance of any onerous act or to the payment of any sum of money, the liquidator may, with the leave of the court and subject to the provisions of this section and the next, disclaim the property.'

- h* *b* Section 619, so far as material, provides:
'... (5) The court may, on an application by a person who either claims an interest in disclaimed property or is under a liability not discharged by this Act in respect of disclaimed property, and on hearing any such persons as it thinks fit, make an order for the vesting of the property in or its delivery to any persons entitled to it, or to whom it may seem just that the property should be delivered by way of compensation for such liability, or a trustee for him, and on such terms as the court thinks just.'

- j* (6) On such a vesting order being made, the property comprised in it vests accordingly in the person named in that behalf in the order, without conveyance or assignment for that purpose...

- c* Paragraph 4 provides: 'If there is no person claiming under the company who is willing to accept an order [under s 619]... the court has power to vest the company's estate and interest in the property in any person liable (either personally or in a representative character, and either alone or jointly with the company) to perform the lessee's covenants in the lease, freed and discharged from all estates, incumbrances and interests created therein by the company.'

Held – If an underlessee did not apply under s 619 of the 1985 Act for a vesting order with respect to property which a company in liquidation had been allowed to disclaim under s 618 but an application for a vesting order was made by other parties entitled to do so under that section, the underlessee, if he was before the court, would be put to his election either to apply for a vesting order himself or to accept exclusion from all interest in the property. If following an election by him to be excluded from all interest in the property a vesting order was made in favour of someone other than the underlessee, the order destroyed the underlessee's interest in the property so that he no longer had any right of occupation and was not obliged to pay the rent or perform any of the covenants. It followed therefore that, since the underlessee had indicated that he did not wish to have the lease vested in him, the only effect of an order vesting the property in the surety would be to destroy the interest of the underlessee, ie his right to remain in occupation. A vesting order would therefore achieve nothing that would not be achieved by the grant of a new lease to the surety and if a vesting order were made the surety would not take subject to the benefit of the underlease. The surety's application for a vesting order would therefore be dismissed (see p 92 c to f and p 94 a, post).

Re Cock, ex p Shilson (1887) 20 QBD 343, *Re Finley, ex p Clothworkers' Co* (1888) 21 QBD 475 and *Re Thompson and Cottrell's Contract* [1943] 1 All ER 169 considered.

Notes

For disclaimer of onerous property by a liquidator, see 7 Halsbury's Laws (4th edn) paras 1343–1344, and for cases on the subject, see 10 Digest (Reissue) 996, 6040–6042.

For disclaimer on bankruptcy and liquidation, see 3 Halsbury's Laws (4th edn) para 703 and 27 *ibid* paras 455–456, and for cases on the subject, see 5 Digest (Reissue) 1009–1015, 8101–8156.

For the Companies Act 1985, ss 618, 619, Sch 20, para 4, see 8 Halsbury's Statutes (4th edn) 585, 586, 781.

As from 29 December 1986 provision for the disclaimer of onerous property by the liquidator of a company is made by ss 178 to 182 of the Insolvency Act 1986.

Cases referred to in judgment

Carter and Ellis, Re, ex p Savill Bros [1905] 1 KB 735, CA.

Cock, Re, ex p Shilson (1887) 20 QBD 343, DC.

Finley, Re, ex p Clothworkers' Co (1888) 21 QBD 475, CA.

Hill v East and West India Dock Co (1884) 9 App Cas 448, HL.

Parker and Parker, Re, (No 1) ex p Turquand (1884) 14 QBD 405.

Smalley v Hardinge (1881) 7 QBD 524, [1881–5] All ER Rep 734, CA.

Stacey v Hill [1901] 1 KB 660, CA.

Tempany (Maurice) v Royal Liver Trustees Ltd [1984] BCLC 568, Ir HC.

Thompson and Cottrell's Contract, Re [1943] 1 All ER 169, [1943] Ch 97.

Walton, Ex p, re Levy (1881) 17 Ch D 746, [1881–5] All ER Rep 548, CA.

Warnford Investments Ltd v Duckworth [1978] 2 All ER 517, [1979] Ch 127, [1978] 2 WLR 741.

Summons

By a summons dated 30 September 1986 by Gold Case Travel Ltd (formerly known as Ellerman Travel and Leisure Ltd) (Gold Case) applied for, orders under s 619 of the Companies Act 1985 that (a) the headlease dated 24 February 1982 relating to the premises at and known as Aviation House, 1–7 Sussex Road, Haywards Heath, Sussex, disclaimed by the liquidator of AE Realisations (1985) Ltd (formerly Air Exchange (UK) Ltd) (Realisations) by notice of disclaimer filed on 21 August 1986 should vest in Gold Case and (b) the liquidator should pay to Gold Case £25,000 held by him as security for rent payable under an underlease of the premises by Realisations to Roy Thomas Ward dated 24 February 1982 to be held by Gold Case with the same rights and subject to the

a same obligations in relation thereto as those of the company prior to disclaimer or on such other terms as might be just. The facts are set out in the judgment.

Andrew Walker for Gold Case.

A W H Charles for Mr Ward.

b The liquidator did not appear.

Cur adv vult

19 December. The following judgment was delivered.

c **VINELOTT J.** This application gives rise to a short but important question concerning the effect of the disclaimer of a lease on an underlease granted by the lessee.

The facts can be shortly stated. On 24 February 1982 Bell International Ltd (which I will call 'Bell') granted a lease of the ground and first floor of a new office building in Haywards Heath to a company then called Air Exchange (UK) Ltd. That company is now called AE Realisations (1985) Ltd (I will refer to it as 'Realisations'). It went into a members' voluntary winding up in June 1985. The members' voluntary winding up was d later superseded by a creditors' voluntary winding up.

The lease was for a term of 25 years from 25 December 1981 at a rent, subject to upwards only review, of £13,000. Another company, then called Ellerman Travel and Leisure Ltd, which has since changed its name to Gold Case Travel Ltd (and which I will call 'Gold Case'), joined in the lease as surety. It covenanted that Realisations would pay the rent reserved by the lease and perform and observe its covenants under the lease and e that, in the event of default by Realisations, it would pay and make good on demand all loss and damage thereby arising. It also agreed that in the event of the lease being disclaimed by Realisations, under any statutory or other power, it would take from the landlord (if so required by the landlord by written notice to the surety within three months after such disclaimer) a grant of another lease of the demised premises for the residue of the term unexpired at the date of such disclaimer, at the same rent as was f payable thereunder at the date of such disclaimer, and subject to the like covenants and provisos as were therein contained, and, at the expense of the surety, on the execution of such further lease to execute and to deliver to the landlord a counterpart thereof.

The reason for requiring Gold Case to enter into an obligation to take a direct lease in substitution for the lease granted to Realisations in the event of the disclaimer of that g lease in the winding up of Realisations is to be found in the decision of the Court of Appeal in *Stacey v Hill* [1901] 1 KB 660, where it was held that the disclaimer of a lease by the trustee of a bankrupt lessee under s 55 of the Bankruptcy Act 1883 brought to an end the obligations of a surety for the payment of rent and the performance of the other covenants entered into by the lessee.

By an underlease dated 24 February 1984 Realisations demised the same premises to h one Roy Thomas Ward for a term of ten years from 27 January 1984 at the same rent, subject to upward review on the same dates as in the lease (so far as falling within the term granted by the underlease). The covenants on the part of the underlessee were the same as those entered into by Realisations in the lease. Both the lease and the underlease contained the usual covenant for quiet enjoyment. The underlease also contained a covenant by Realisations to enforce certain covenants on the part of Bell to insure and j repair the premises and a covenant that Realisations would itself observe and perform the covenants in the lease to pay the rent thereby reserved and perform all other covenants and conditions on its part contained in the lease. That is all I need to say about the lease and the underlease.

Shortly before the underlease was executed, an agreement under hand, dated 28 January 1984, was entered into between Realisations and Mr Ward. It recited that the

underlease was about to be entered into. It was agreed that a sum of £25,000, paid by Mr Ward to Realisations (the receipt of which Realisations acknowledged), would be held by Realisations' solicitors as security for the due performance by Mr Ward of the covenants in the underlease, and that, if anything should become due from Mr Ward to Realisations by way of rent or in respect of any breach of covenant, Realisations might pay the sums due out of the £25,000 (which I will call 'the deposit'). The deposit was to be repaid at the expiry of the fifth year of the term, save for a sum equal to six months' rent. The deposit was to be kept in a deposit account and the interest paid annually to Mr Ward. He agreed to pay any further sums necessary to maintain the deposit at £25,000. It was to be repaid to Mr Ward if he should assign the benefit of the underlease. The agreement was expressed to be made between 'the lessor' and 'the lessee', which expressions were defined as in the lease and the underlease to include the successors in title of the companies or persons so described.

Finally, Bell transferred its freehold title to the office block to the present lessor, English National Investment Co plc (which I will call 'English National'). It seems that at some stage the deposit was repaid to Mr Ward. However, in October 1985 that sum was repaid to the solicitors acting for the liquidator of Realisations. They undertook not to pay it to the liquidator, except with the consent of Mr Ward or unless the security should become due under the agreement.

On 7 March 1986 the liquidator applied for leave to disclaim the lease. In his affidavit in support he said the lease was not a profitable one. On 21 May 1986 the registrar made an order giving the liquidator leave to disclaim. Notice of disclaimer was given on 21 August 1986.

On 3 September 1986 English National's solicitors gave Gold Case notice calling on it to take a lease of the demised premises. Following that notice, on 30 September 1986 Gold Case issued the application for a vesting order which is now before me.

Evidence has been filed on behalf of Gold Case to the effect that it would be difficult, if not impossible, to relet the demised premises at the same rent as that reserved by the lease. That is not accepted by Mr Ward, but I do not think that anything turns on the point. It was accepted by the registrar that the lease was onerous property when he gave the liquidator leave to disclaim and that order is not challenged.

The question raised by Gold Case's application is, on the face of it, whether the court can, and if it can whether it should, make an order vesting firstly the lease and secondly the benefit of the agreement in Gold Case. However, the underlying question is whether, if an order is made vesting the lease in Gold Case, Gold Case will be placed in the same position as Realisations was before the disclaimer, that is that Gold Case will take subject to and with the benefit of the underlease in just the same way as if the lease had been assigned to it immediately before the disclaimer. If a vesting order would not have that effect, that is if the effect of the disclaimer was to destroy the underlease, the vesting order would achieve nothing that would not be achieved by the grant of a new lease. On the other hand, it is not in dispute that, if a vesting order would operate as, in effect, a statutory assignment of the lease, the court would have power, on making the vesting order, to make an ancillary order vesting the benefit of the agreement in Gold Case.

At the time when this application was made, the disclaimer of onerous property by the liquidator of a company and the power of the court to make a vesting order were governed by ss 618 and 619 of and Sch 20 to the Companies Act 1985. They are now, or will shortly be, governed by ss 178 to 182 of the Insolvency Act 1986. The 1985 Act was a consolidating Act. Sections 618 and 619 and Sch 20 re-enacted s 323 of the Companies Act 1948; s 618 re-enacted sub-ss (1) and (2) of s 323 and s 619 re-enacted sub-ss (3) to (7) of s 323 except the proviso to sub-s (6), which was set out separately in Sch 20. Section 323 in turn re-enacted s 267 of the Companies Act 1929. The 1929 Act introduced provisions for the disclaimer of onerous property into the winding up of a company for the first time. It was modelled on and reproduced with immaterial modifications the provisions in s 54 of the Bankruptcy Act 1914 which in turn re-enacted s 55 of the Bankruptcy Act 1883. Decisions on the 1883 Act and on the 1914 Acts are therefore of

direct authority on the construction of s 267 of the 1929 Act and its successors. However, in order to understand the machinery introduced by s 55, it is necessary to go back one further stage to the Bankruptcy Act 1869 (see s 23).

Vaughan Williams LJ explained the change introduced in 1869 in *Re Carter and Ellis, ex p Savill Bros* [1905] 1 KB 735 at 743 in this way:

'Now at common law, if there were a lease and a sub-lease, and for any reason whatever the lease became extinguished, the sub-lease also disappeared: the branch fell with the tree. But the Legislature stepped in to some extent I think, although I am not quite sure about it, in the reign of George IV.; but, at all events, by s. 9 of the [Real Property Act 1845], provision was made for preserving the rights of the sub-lessee in cases in which a voluntary surrender of the lease had been accepted by the lessor. By the Bankruptcy Acts prior to 1869 no particular provision was made for disclaimer. The assignee in bankruptcy was not bound to accept a *damnosa hereditas*, and leases were left outside the property which passed to the representative of the creditors. This led to a great deal of complication and difficulty and litigation, and by the Bankruptcy Act, 1869, further provision was made for the disclaimer of leases by the trustee in a bankruptcy. To put it shortly, the disclaimer was by s. 23 of that Act expressly made to operate as if there had been a voluntary surrender of the lease on the date of the order of adjudication.'

The opening words of s 55 (1) of the Bankruptcy Act 1883 were similar to the opening words of s 23. However, s 23, unlike s 55 (1), provided that, in the event of disclaimer, a lease should 'be deemed to have been surrendered on' the date of the disclaimer. Section 9 of the Real Property Act 1845 (which is reproduced in s 139 (1) of the Law of Property Act 1925), provided that on the surrender of a lease the next estate conferring a vested right to the land should be deemed the reversion of the lease for the purpose of preserving the incidents and obligations affecting the reversion that had been surrendered. It soon became apparent that, on a literal construction, s 23 in conjunction with s 9 would work grave injustice.

In *Smalley v Harding* (1881) 7 QBD 524, [1881-5] All ER Rep 734 a lessee who had granted a sublease became bankrupt and his trustee disclaimed the lease. The lessor sought to recover possession. It was held by the Court of Appeal that the disclaimer operated in the same way as a voluntary surrender and that accordingly the reversion expectant on the lease 'became the reversion expectant upon the under-lease for the purpose of preserving the incidents and obligations annexed to it' (see 7 QBD 524 at 528 per Baggallay LJ). That case was decided on 31 March 1881.

Some three months later, on 12 May 1881, *Ex p Walton, re Levy* 17 Ch D 746, [1881-5] All ER Rep 548 came before the Court of Appeal. The facts were as follows. Lessors demised property to two lessees for ten years from 25 December 1878 at a rent of £70. On 29 August 1879 the lessees granted a sublease for 9½ years less seven days, from 24 June 1879 at a premium of £100 and at a rent of £55. The lessees became bankrupt and the master gave leave to disclaim. The lessors appealed from that decision. The ground of the appeal was that on a literal construction of s 23 the effect of a disclaimer and a consequent deemed surrender would be to impose on the landlord a lease, the underlease, at a rent of £55 in place of a lease at a rent of £70. That this result would be, in the words of James LJ, 'the most grievous injustice, and the most revolting absurdity' (see 17 Ch D 746 at 757, [1881-5] All ER Rep 548 at 553) is readily apparent if, in place of the underlease of £55, is put the common mortgage by sub-demise at a peppercorn rent, the sub-demise containing no covenant to repair. The Court of Appeal, while upholding the decision of the master, avoided this injustice by construing s 23 as meaning no more than—

'that the property is to be disclaimed *inter se*, so as not to interfere with the rights of third parties, and only for the benefit of the bankrupt and his estate; so far, that is, as respects any rights and liabilities in relation to it as between the trustee and the

person who is entitled to the benefit of those obligations which attach to the property; so far only as is necessary in order to relieve the bankrupt and his estate and the trustee from liability.' a

(See 17 Ch D 746 at 754; cf [1881-5] All ER Rep 548 at 551-552 per Jessel MR.) James LJ stated the effect of s 23 in a passage which has often been cited and which I should, I think, read in full (17 Ch D 746 at 756-757, [1881-5] All ER Rep 548 at 553):

'When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. Now, the bankruptcy law is a special law, having for its object the distribution of an insolvent's assets equitably amongst his creditors and persons to whom he is under liability, and, upon this *cessio bonorum*, to release him under certain conditions from future liability in respect of his debts and obligations. That being the sole object of the statute, it appears to me to be legitimate to say, that, when the statute says that a lease, which was never surrendered in fact (a true surrender requiring the consent of both parties, the one giving up and the other taking), is to be deemed to have been surrendered, it must be understood as saying so with the following qualification, which is absolutely necessary to prevent the most grievous injustice, and the most revolting absurdity, "shall, as between the lessor on the one hand, and the bankrupt, his trustee and estate, on the other hand, be deemed to have been surrendered."' b
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Lush LJ, who was one of the Lords Justices who had heard the appeal in *Smalley v Hardinge*, alone referred to that decision and he said (17 Ch D 746 at 758; cf [1881-5] All ER Rep 548 at 553-554):

'The point was whether the disclaimer of the trustee had the effect of destroying the property of the underlessee, and no doubt some expressions may be found in our judgments treating the disclaimer as having the same effect as an actual surrender of the lease. But the point which has now arisen was not then present to our minds at all. Now, however, that it has arisen, we should still decide *Smalley v Hardinge* in the same way as we did then.' e
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The two decisions are clearly not in conflict although, as Lush LJ recognised, the ground of the decision in *Smalley v Hardinge* is too widely expressed.

The position under the 1869 Act as interpreted in *Ex p Walton, re Levy* was simply this. As between the lessor and the bankrupt lessee, the disclaimer operated as a surrender. As between the lessor and the underlessee, the lease was to be treated as still in existence. As the lease was to be treated as still in existence, the underlessee was entitled to remain in possession during the term of the underlease. However, the lessee retained his rights in rem, that is his rights to distrain for rent due under the lease and to forfeit for non-payment of rent or for breach of covenant. If the right to forfeit for non-payment of rent became exercisable, then (subject to the statutory power for the court to relieve against forfeiture) the underlease and the underlessee's right to continue in possession fell with it. g
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Counsel for Gold Case submitted that the proposition that, under s 23 of the 1869 Act, a disclaimer was to be treated as a surrender only so far as necessary to relieve the bankrupt and his estate from liability and did not affect the rights or liabilities of third parties had the consequence that the rights and liabilities of the underlessee were to be treated as unaffected and that the lessor was therefore to be treated as bound by and entitled to the benefit of the underlease. j

That result, in my judgment, is clearly inconsistent with the reasoning of the Court of Appeal. The relief of the bankrupt and his estate from liability clearly required the destruction of the underlease as between the bankrupt and the underlessee. There is no privity of estate or of contract between a lessor and an underlessee and the notional

a existence of the lease as between lessor and underlessee prevented s 9 from having any operation. Thus, the effect of the deemed surrender of the lease was that the underlease no longer bound the lessee and did not become binding on the lessor; it remained in existence only so far as necessary to support the underlessee's right to remain in possession during the term granted by the underlease and so long as the lease did not become liable to forfeiture.

b In *Hill v East and West India Dock Co* (1884) 9 App Cas 448 the assignee of a lease became bankrupt and the trustee disclaimed the lease. The question was whether the lessee remained liable under his covenant to pay rent which accrued after the disclaimer. The case thus raised in substance the same question as arose in *Ex p Walton, re Levy* whether the deemed surrender under s 23 was to be treated as having the same consequences as regards third party (underlessee or surety) as an actual surrender would have had. The House of Lords approved and followed the decision of the Court of Appeal in *Ex p Walton, re Levy*. Earl Cairns cited and approved the passage in the speech of James LJ which I have cited. *Hill v East and West India Dock* was decided after the Bankruptcy Act 1883 had become law. Earl Cairns referred to that Act as substituting an 'enactment of a very different and much more explicit kind upon this part of the bankruptcy law' (see 9 App Cas 448 at 453).

c To that Act I now turn. Section 55(2) provided:

d 'The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.'

e Section 618(4) of the Companies Act 1985 is in substantially the same terms. Subsection (6) of s 55 of the 1883 Act was in the following terms:

f 'The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property g comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose. Provided always, that where the property disclaimed is of a leasehold nature, the court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in h respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and i either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt.'

The proviso was later amended by s 13 of the Bankruptcy Act 1890 to enable the court to vest the leasehold property in an applicant, subject only to the same liabilities and

obligations as if the lease had been assigned to him at the date of the petition. Subsections (5) and (6) of s 619 of the Companies Act 1985 reproduce the body of sub-s (6) of s 55 and Sch 20 of the 1985 Act reproduces the proviso (as amended in 1890). a

In *Re Cock, ex Shilson* (1887) 20 QBD 343, a decision of the Divisional Court in bankruptcy, a lessee mortgaged property by a sub-demise and his trustee disclaimed the lease. The question was whether the lessor was a 'person . . . claiming [an] interest in [the] disclaimed property' within sub-s (6) and, if he was, whether he was entitled to apply, under the proviso to sub-s (6), for an order that the mortgagee be put to his election either to accept an order vesting the lease in him or to be excluded from all interest in or security on the property. In holding that he was entitled to an order in these terms, Cave J explained the operation of the proviso to sub-s (6) in the following terms (at 348-349): b

'Let us see how the case will work out in practice. A. grants a lease for ninety-nine years at 100l. a year to B., who assigns to C., who in consideration of an advance of 2000l. demises to D. for the residue of the term, except three days, at a peppercorn. C. becomes bankrupt, and his trustee wishing to disclaim brings A., B., and D. before the Court. A. cannot apply for a vesting order because he is not entitled to the property, nor can B. so long as D. is willing to take a vesting order. B. therefore applies that D. may be put to his election, and if he declines to take a vesting order that he may be excluded, and a vesting order made in favour of him, B. The same thing occurs where C. is the lessee and B. is only a surety for him. Where there is no person liable, either jointly with the bankrupt or alone, to perform the lessee's covenants we are of opinion that, notwithstanding the doubt expressed in *Re Parker and Parker, ex parte Turquand* ((1884) 14 QBD 405), the landlord may apply that the sub-lessee may be put to his election. If he elects to take a vesting order he gets one. If he declines the landlord may ask for an order excluding the sub-lessee from all interest in and security upon the property, and vesting the property in him, the landlord, discharged from the sub-lease, because, by virtue of the disclaimer and of the exclusion of the sub-lessee he has become the party entitled. This course appears to us to be warranted by the language of the Act, and to carry out its provisions. Until the sub-lessee has declined to take a vesting order the Court has no power to make a vesting order either in favour of the original lessee or of the surety for the bankrupt, if there is one, and consequently, if the power could only be exercised upon an application by a sub-lessee it would remain a dead letter, for the sub-lessee never would have any interest in making such an application, and the person liable jointly with the bankrupt, or alone, could not get a vesting order until the sub-lessee had declined. Where all the parties are before the Court upon an application for leave to disclaim, the vesting order may at once be offered to the sub-lessee, and on his refusal may be granted to the surety or original lessee, or if there is no person liable alone or jointly with the bankrupt, an order for a vesting order and for delivery of possession, or for a vesting order only, as the circumstances may require, may be made in favour of the lessor. Where no leave to disclaim is required, and consequently the parties interested in the property disclaimed or liable to perform the covenants of the lease are not brought before the Court by the trustee, we are of opinion that the person liable to perform the covenants, or, in the absence of such person, the lessor, may bring the sub-lessee before the Court, and ask for an order for his exclusion and for a vesting order, or for delivery of the property, if the sub-lessee refuses himself to take a vesting order.' c
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That decision was approved and followed by the Court of Appeal in *Re Finley, ex p Clothworkers' Co* (1888) 21 QBD 475. That was an appeal against a decision of a registrar who had made an order that the mortgagee by sub-demise be excluded from all interest in a lease which had been disclaimed by the trustee in bankruptcy of the lessee unless he j

a should within 14 days apply for and take a vesting order. Lindley LJ, having pointed out that property in s 55 was sometimes used to denote the bankrupt's interest in the thing and sometimes to denote the thing itself, went on to explain the effect of sub-ss (2) and (6) where a lessee who had created a sub-lease became bankrupt in a passage which I think I should cite in full. He said (at 485–487):

b 'Next we must consider the more complicated case of the original lessee becoming bankrupt, and we must consider it, first, as between him and his lessor. As between them the consequences will be the same if there were no sub-lease. As between the lessee and the sub-lessee the consequences will apparently be these. The lessee's rights and interests and liabilities are determined under sub-s. 2, and the extinction of his rights involves the extinction of the liability of the sub-lessee under his covenants. We must next consider the case as between the original lessor and the sub-lessee. Now their rights and liabilities are preserved by sub-s. 2, and, subject to the effect of a vesting order, whatever that may be, the case will stand in this way—
c the sub-lessee, although freed from his covenants to his own immediate lessor, must perform the covenants of the original lease or he will be liable to be distrained upon and to be ejected by the original lessor. That is obviously his position, and that was the position in which a lessee found himself, on the disclaimer of the lease by the trustee in the bankruptcy of his assignee, in *Hill v. East and West India Dock Co.* ((1884) 9 App Cas 448), under the Bankruptcy Act, 1869. That is by no means an enviable position, and it is a strange position in which to leave him. But the present Bankruptcy Act goes further. It does not stop with sub-s. 2, but sub-s. 6 has also to be considered. The sub-lessee can evidently apply under sub-s. 6 for an order vesting the lease in him; there is no controversy about that. But the question is, whether the lessor can apply for an order vesting the lease in the sub-lessee? It appears to us, for the reasons which I have already stated, having regard, that is, to the meaning of the word "property" and of the words "person claiming any interest in the disclaimed property," that the lessor can apply for such an order. But, whether the application is made by the sub-lessee or by the original lessor, in either case the vesting order can only be made in favour of the sub-lessee, subject to the covenants and conditions of the original lease, and, if the sub-lessee will not take the property on those terms, which, of course, he need not do, then these consequences appear to follow: First, the sub-lessee will be excluded from all interest in the disclaimed property. Whether the latter part of the proviso in clause 6 will apply will depend upon whether there is any such person as is there referred to. There may or may not be. If no vesting order is made, the lease will be determined under sub-s. 2, the sub-lease will be determined under sub-s. 6, and the lessor will take the property freed from both lease and sub-lease. This appears to us to be the logical consequence of the Act, and it is impossible not to see that it is a very startling result. It will very seriously affect the old practice of taking securities on leasehold property by way of sub-demise, the whole object of which was to prevent the mortgagee from becoming liable to the rent and to the covenants and obligations of the original lease. If the decision of the Divisional Court in *Re Cock, ex parte Shilson* ((1887) 20 QBD 343) is right, as we think it is, this anomaly will be introduced into the practice of conveyancing in the event of the bankruptcy of a mortgagee of leasehold property by sub-demise.'

j That analysis of sub-ss (2) and (6) is, in my judgment, conclusive against the contentions advanced on behalf of Gold Case in the instant case. Subsection (2) of s 55 of the 1883 Act avoided the use of the word 'surrendered', which had given rise to difficulty under the 1869 Act, and made it clear that the determination of the interest of the bankrupt was not to affect the rights of third parties. However, pending an application for a vesting order, the position of an underlessee was the same as under the 1869 Act. The determination of the bankrupt's rights, interests and liabilities necessarily involved the

extinction of his liability under the underlease (in the instant case the covenants given on the part of the underlessee included a covenant to pay the rent reserved by and to perform and observe the covenants on the part of the lessee contained in the lease) and the extinction of those liabilities necessarily involved the extinction of the liabilities of the underlessee. The underlessee did not become bound by any privity of contract or of estate to the lessor but was entitled to remain in possession of the property during the term of the underlease and so long as the lease would, apart from the forfeiture, have remained in existence. That position Lindley LJ thought to be unenviable and unsatisfactory, no doubt because neither the lessor nor the underlessee could enforce directly the covenants of the lease. The purpose of sub-s (6) was to remedy this state of affairs by enabling the underlessee to apply for a vesting order and the lessor to compel the underlessee to take a vesting order or be excluded from all interest in the property. Looked at in that context it is, I think, clear that what is contemplated by sub-s (6) is that an application for a vesting order may be made, firstly, by a person claiming under the bankrupt as underlessee or mortgagee (and, if more than one, in the order of priority of their respective interests inter se), secondly, if none is willing to take a vesting order by any person 'liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants' and, thirdly, by 'any person claiming [an] interest in [the lease] or under any liability not discharged by' it. If an underlessee or mortgagee is before the court and an application for a vesting order is made by a person in the second or third categories, the underlessee or mortgagee is put to his election, either himself to apply for a vesting order or to be excluded from all interest in the property. No order formally putting him to his election is needed where, as in the instant case, the underlessee has made it plain that he does not want to take a vesting order and is anxious to vacate the property.

In my judgment, therefore, the disclaimer destroyed the underlease and the only effect of a vesting order, if made, would be to destroy the interest of the underlessee, that is his right to remain in occupation, paying the rent reserved by and performing the covenants contained in the lease during the term created by the underlease. A vesting order would therefore achieve nothing that would not be achieved by the grant of a new lease by the present lessor to Gold Case.

Counsel for Gold Case submitted that this analysis is inconsistent with the decision of Uthwatt J in *Re Thompson and Cottrell's Contract* [1943] Ch 97 and reported more fully in [1943] 1 All ER 169. That case did not arise in the course of bankruptcy proceedings. It arose in the following circumstances. By a contract dated 15 October 1941 a purchaser agreed to buy an underlease of a house, held for a term of 99 years from 29 September 1928 less the last three days at a rent of £5. Under the contract the purchaser was not entitled to make any requisitions as to the title of the reversion. An assignment was duly prepared and executed in escrow and the purchaser was allowed to take possession. The vendor's solicitors then sent to the purchaser's solicitors a completion statement. With the completion statement was included a notice of disclaimer dated 5 June 1937 by the intermediate lessor. He had become bankrupt a year before. The report in the All England Law Reports states that the headlease comprised some 14 properties and reserved the rent of £70 pa; and in respect of it subleases had been granted off, each at a rent of £5 pa (see [1943] 1 All ER 169 at 170-171). The date of the lease is not given but it is, I think, a reasonable inference that the term granted by the lease was 99 years from 29 September 1928. In *Warnford Investments Ltd v Duckworth* [1978] 2 All ER 517 at 523, [1979] Ch 127 at 135 Megarry V-C referred to the underlease as 'vested in an assignee'. As Keane J pointed out in a recent case in the High Court of Ireland, *Maurice Tempamy v Royal Liver Trustees Ltd* [1984] BCLC 568 at 581, there is nothing in *Re Thompson and Cottrell's Contract* to indicate that the vendor was not the original lessee. However, nothing turns on this point. The plaintiff's solicitors initially contended that the vendor had not shown a good title and should perfect her title by applying for a vesting order.

a The vendor took out a vendor and purchaser's summons for a declaration that she had sufficiently answered the purchaser's requisitions and had shown a good title. The argument advanced on behalf of the purchaser was that—

b 'The vendor is trying to force the purchaser to accept something which she cannot be forced to accept. She is entitled to a property in which she can live without danger of eviction and which she can sell with a good title. Therefore, the vendor ought to put the matter right by applying for an order vesting the head lease in herself.'

(See [1943] Ch 97 at 99.)

Uthwatt J observed ([1943] Ch 97 at 99; cf [1943] 1 All ER 169 at 171):

c 'It is quite clear that a disclaimer does not determine the lease and all interests carved out of it by way of sub-lease or otherwise and that it is limited to determining the rights, interests and liabilities of the bankrupt in respect of the property. The rights of third parties remain on foot, except so far as it is necessary to release the bankrupt and his estate.'

d Uthwatt J then summarised the judgment of Lindley LJ in *Re Finley, ex p Clothworkers' Co* (1888) 21 QBD 475 and concluded ([1943] Ch 97 at 100; cf [1943] 1 All ER 169 at 172):

e 'For my part, all I wish to emphasize is that it certainly is not the case that a lease disappears for ever simply because it has been disclaimed. Apart from any vesting order, a disclaimed lease is operative in the sense that failure to pay the rent reserved by it will justify distress, failure to perform the covenants contained in it will justify re-entry, and, as the Bankruptcy Act, 1914, itself recognizes, it can be vested in some person by an order under that Act. In my judgment, where there is an interest in land in circumstances in which these qualities subsist, the case cannot be treated as if the lease did not exist. The lease is there, to a certain extent, as something like a dormant volcano. It may break out into active operation at any time. In those circumstances, is it accurate to describe as an underlease the interest which has been carved out of the head lease while it was active although no vesting order has been made in respect of the head lease? For myself, I do not see what other name could be given to it. To call it a lease would clearly be to misdescribe it, and, in my judgment, if an underlease be an interest in land taking effect out of a validly created leasehold interest, the interest agreed to be sold, and described, in the present case, as an underlease, was in fact an underlease.'

g I do not think that there is anything in that judgment which lends any support to the view that the underlease remained in existence (as Megarry V-C expressed it in *Warnford Investments Ltd v Duckworth* [1978] 2 All ER 517 at 523, [1979] Ch 127 at 135 in relation to a disclaimed lease) in a cataleptic state capable of being brought to life if a vesting order was made. It was the lease and not the underlease which Uthwatt J described as a dormant volcano. The question was whether the bundle of rights which the vendor had (the right to remain in possession of the house during the term created by the underlease, so long as the lease did not become liable to forfeiture and subject to the lessor's right of distraint and to apply to have the lease so far as it effected the house comprised in the underlease vested in her at an apportioned rent) was properly described as an underlease. It would have been inaccurate to describe this bundle of rights as a lease unless and until a vesting order was made since there was no privity of contract or of estate between the headlessor and the vendor; and, given that the rent under the underlease was one-fourteenth of the rent payable under the lease (for the 14 properties comprised in it), that the lease and the underlease were for terms of 99 years and 99 years less three days respectively, and that it was unlikely that the lease would have contained any onerous covenants not repeated in

the underlease, the position of the vendor was not materially different than it would have been if the lease had not been forfeited. a

In my judgment, therefore, if a vesting order were made, Gold Case would not take subject to the benefit of the underlease.

Application for vesting order dismissed.

Solicitors: Denton Hall Burgin & Warrens (for Gold Case); Holman Fenwick & Willan (for Mr Ward). b

Jacqueline Metcalfe Barrister.

Davies (Joseph Owen) v Eli Lilly & Co and others c

COURT OF APPEAL, CIVIL DIVISION

SIR JOHN DONALDSON MR, LLOYD AND BALCOMBE LJJ

2, 3 JUNE 1987 d

Costs – Order for costs – Jurisdiction – Order for costs to follow the event – Follow the event – Jurisdiction to make order as to costs before end of trial – Large number of plaintiffs bringing actions for personal injuries against defendants – Judge giving interlocutory directions for trial of certain preliminary issues in selected lead actions – Judge ordering that costs of lead actions to be borne rateably by all plaintiffs on per capita basis – Whether jurisdiction to make order before end of trial of actions – Whether ‘costs to follow the event’ referring to manner in which or time when court’s discretion to be exercised – Supreme Court Act 1981, s 51(1) – RSC Ord 62, r 3(3). e

Practice – Related claims – Procedure – Related claims made by many plaintiffs against same defendants – Court procedures to be applied and adapted flexibly so as to reach quick and economical decisions. f

The plaintiffs, of whom there were some 1,500, began actions against the defendants claiming damages for personal injuries arising out of their use of a drug manufactured by the defendants. It was arranged between the parties that certain actions should be selected as ‘lead actions’ for the purpose of deciding certain preliminary issues, and the question arose as to how the costs of such actions should be borne. The judge, in giving directions, ordered that as from a specified date all the plaintiffs should contribute rateably on a per capita basis to pay the costs incurred by those plaintiffs, either personally or through the legal aid fund, who were selected to pursue the lead actions and to meet any liability to pay the defendants’ costs. He further gave all parties liberty to apply to vary the order to take account of changed circumstances. Under s 51(1)^a of the Supreme Court Act 1981 the costs of and incidental to all proceedings in the High Court were in the discretion of the court, which had full power to determine by whom and to what extent the costs were to be paid, but RSC Ord 62, r 3(3)^b provided that where the court in the exercise of its discretion saw fit to make a costs order it should order ‘the costs to follow the event’ except when it appeared to the court that in the particular circumstances some other order should be made. One of the plaintiffs appealed against the judge’s order, contending, inter alia, that there was no jurisdiction to make the order as to costs since the words ‘to follow the event’ meant that no order as to costs could be made before the end of the trial. g

^a Section 51(1) is set out at p 101 *h j*, post

^b Rule 3(3) is set out at p 99 *f*, post h

- Held** – Section 51(1) of the 1981 Act gave the court a wide discretion as to costs which was unrestricted except and in so far as rules of court had that effect, and accordingly the court could make an order as to costs against persons even if they were not themselves parties to the proceedings. Moreover, on its true construction RSC Ord 62, r 3(3) dealt with the manner in which the court's discretion was to be exercised and not with the time when an order could be made. The words 'costs to follow the event' did not have temporal significance but were directed to the result of the trial. Accordingly, although costs would normally be awarded at the end of a trial, r 3(3) did not prohibit an order being made earlier, if the interests of justice so demanded. In any event (per Balcombe LJ), in the circumstances the judge's direction was not an order of the sort contemplated by r 3(3) since it was an order for the apportionment, not the payment, of such costs as might be ordered against, or might fall to be borne by, any plaintiff. It followed that the judge had had jurisdiction to make the order. The appeal would accordingly be dismissed (see p 99 *d e g* to *j*, p 100 *d*, p 101 *b c* and p 102 *e* to *h*, post).

Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira [1986] 2 All ER 409 considered.

- Per Sir John Donaldson MR. In cases where large numbers of plaintiffs are making related claims against the same defendants the courts should apply and adapt existing procedures as flexibly as possible so as to reach decisions quickly and economically. The appropriate authorities should consider whether the concept of the 'class action' has anything to offer and, if it does, to introduce the necessary procedural rules (see p 96 *h*, post).

Notes

- For the general jurisdiction of the High Court to award costs, see 37 Halsbury's Laws (4th edn) para 713.
- For the Supreme Court Act 1981, s 51, see 11 Halsbury's Statutes (4th edn) 809.

Cases referred to in judgments

- Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] 2 All ER 409, [1986] AC 965, [1986] 2 WLR 1051, HL.
- Barnato (decd), Re, Joel v Sanges* [1949] 1 All ER 515, [1949] Ch 258, CA.

Case also cited

Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corp [1981] 1 All ER 289, [1981] AC 909, HL.

Interlocutory appeal

- The plaintiff, Joseph Owen Davies, appealed against the order of Hirst J dated 8 May 1987 giving directions in an action for damages in respect of personal injuries brought by the plaintiff and some 1,500 others against the defendants, (1) Eli Lilly & Co, (2) Dista Products Ltd, (3) Lilly Industries Ltd, (4) Lilly Research Centre Ltd, (5) William Hamilton Shedden, (6) the Attorney General on behalf of the Committee of Safety of Medicines and (7) the Attorney General on behalf of the Department of Health and Social Security as licensing authority under the Medicines Act 1968, whereby it was ordered, inter alia, that with effect from 8 June 1987, unless otherwise ordered in the case of any costs incurred in respect of any action within the co-ordinated arrangements, and at the final trial or disposal of actions selected under such arrangements, any costs to be paid or borne by any plaintiff should be paid or borne proportionately by each plaintiff, including those who were legally-aided, so that each such plaintiff should bear an equal part of such costs. The facts are set out in the judgment of Sir John Donaldson MR.

Louis Blom-Cooper QC, Christopher Carling and Oliver Thorold for the plaintiff.
Jonathan R Playford QC, Michael Spencer and Andrew Prynne for the first to fifth defendants.

Justin Fenwick for the Attorney General.

George Pulman as amicus curiae.

Duncan Matheson for the Law Society.

SIR JOHN DONALDSON MR. The *Opren* cases need no introduction, but some features need to be emphasised since it is said, probably rightly, that taken together they give this dispute a character which is unique in English legal history.

(1) *The number of plaintiffs.* There are already some 1,500 plaintiffs, although due to the time limits governing claims this number is unlikely to rise appreciably.

(2) *The average age of the plaintiffs.* *Opren* was prescribed in cases of arthritis, which is more usually encountered in the elderly rather than the young, and accordingly the average age of the plaintiffs is higher than would otherwise be the case. By contrast, as we were told, the main *Thalidomide* claimants were all children. This has the three following consequences.

(a) *The need for speed.* If elderly plaintiffs are to be compensated by an award of damages, they need to receive that money at a time when they can still make use of it.

(b) *The size of individual claims.* The same continuing disability suffered by two people, one older and one younger, will necessarily cause a greater loss, and give rise to a larger award of damages, in the case of the younger claimant, who will have to endure it for longer. Other things being equal, the *Opren* claimants cannot expect to receive awards which are very large as compared with awards in other cases primarily involving children.

(c) *The availability of legal aid.* Older claimants are more likely to have disposal capital or income which will take them outside the scope of the legal aid scheme or, if this does not happen, will lead to their having to make a significant contribution to their own costs and, if they fail, to those incurred by the defendants. By contrast we are told that in the *Thalidomide* cases every major claimant, being a child, was legally aided, mostly with a nil contribution.

(3) *The cost of the litigation.* This will be extremely high both for the plaintiffs and for the defendants. No individual plaintiff going it alone, even if successful, could expect to derive any benefit because the irrecoverable costs would exceed the amount of the damages which he would be awarded. There is of course another side to this coin in that the defendants, even if successful, could never expect even to begin to recover the costs which they had incurred in defending an isolated claim.

(4) *The diversity of the side effects.* Although the plaintiffs do not allege 1,500 different side effects, there is a considerable diversity in the complaints and each will require some degree of separate investigation. Furthermore, even where two or more plaintiffs allege the same symptoms, each might, and being elderly probably will, have had significantly different medical histories. Accordingly, in theory at least, despite similar symptoms one might and one might not have a valid claim.

(5) *The concept of the 'class action' is as yet unknown to the English courts.* In some jurisdictions, notably in the United States, where large numbers of plaintiffs are making related claims against the same defendants, there are special procedures laid down enabling all the claims to be disposed of in a single action. Clearly this is something which should be looked at by the appropriate authorities with a view to seeing whether it has anything to offer and, if so, introducing the necessary procedural rules. Meanwhile, the courts must be as flexible and adaptable as possible in the application of existing procedures with a view to reaching decisions quickly and economically.

At an early stage it was realised that one essential requirement for achieving this result was that a nominated judge should take charge of all the interlocutory applications which are necessary before the actions can be tried, and *Hirst J* was nominated for this purpose. With his assistance and under his guidance considerable progress has been made. Thus, for example, a system of 'master pleadings' has been evolved, as a result of which individual plaintiffs do not have to incur the expense of pleading those aspects of their

a claim which are common to others. Again arrangements have been made for 'lead actions' to be selected which raise common issues and for these actions to be heard first, thus settling those issues for the benefit of all.

b It was in the course of dealing with such matters that the problem arose with which this appeal is concerned. Very naturally no individual plaintiff wanted to undertake the burden, including the costs, of a lead action. So unfair would this burden be that consideration was given to how, within the powers and procedures of the court, the costs of the lead actions could be taken off the shoulders of the plaintiffs in whose names they were being brought.

c One thought, which seems to have occurred to many people, including commentators who are not directly involved, was that the lead action should be chosen with an eye to the plaintiffs concerned being those who not only had the advantage of legal aid, but whose means were such that they had not been required to make any contribution. In this way it was thought that the whole cost of the lead actions, which might well be a very significant part of the cost of the whole proceedings, could be transferred to the broad shoulders of the state in the form of the legal aid fund. Such an approach has very considerable merit, at least from the point of view of the plaintiffs, and I do not criticise those who have espoused it. Unfortunately it betrays a woeful misunderstanding of how the legal aid scheme works. This is a point of general importance and the basis of the scheme deserves to be better known.

d Put simply, but for present purposes wholly accurately, legal aid helps those who lose cases, not those who win them. Legal aid makes 'out and out' grants to those who lose cases. It only makes loans to those who win them. This is the way it works. Mr X has a claim which, looked at from his point of view, looks reasonable. He applies for legal aid. His means are assessed, and if they are sufficiently small he will be given legal aid. e According to how small his means are, he may have to make some contribution to the legal aid fund, although there are many whose contributions are assessed as nil. Subject to his paying those contributions, which are never very large, the legal aid fund pays the whole of his costs of the litigation.

f If at the end of the case he loses, he may be ordered to pay a small sum to the successful defendant, but, unless there has been a dramatic change in his circumstances (he has had a major win on the pools or something of that sort), this is the extent of his liability. His own costs of fighting the action will be borne by the legal aid fund and the defendant will be left to pay all the costs incurred by him in successfully defending the claim. In other words, the unsuccessful plaintiff has received an out and out grant from the state.

g But suppose the plaintiff wins, as the legal aid fund claims that he does more often than not. Then a very different picture emerges. As the successful party, he does not have to pay the defendant's costs and usually the defendant will be ordered to pay his. Let him not celebrate too soon. He may find that the defendant has no money or the legal aid fund may have to incur further expense in making the defendant pay. Furthermore, and this is very important, the defendant will, at best, only be ordered to pay the plaintiff's 'taxed costs', and this is almost always less than the costs which have been incurred by the h plaintiff in prosecuting his case to a successful conclusion. So there will always be a shortfall, which may be very large if the defendant cannot meet the order for costs or if the plaintiff failed on some subsidiary issue and has been ordered to pay the defendant's costs in fighting that issue.

j 'Why worry?' says the successful plaintiff to himself. 'I have my damages, I have paid my contribution to the legal aid fund and that fund has met all the costs which I have incurred.' Unfortunately for the temporarily happy plaintiff, Parliament has required the defendant to pay the damages not to him but to the legal aid fund. That fund is required to use his damages to pay itself back every penny of the costs which it has incurred in assisting him to fight his case. It is only if after this has been done that anything which is left will be paid to him. It may be that nothing will be left or it may only be relatively small change.

In other words, for the successful plaintiff the legal aid fund provides a loan, not a grant, at least to the extent that his damages are sufficient to repay the loan. Put slightly differently, every legally-aided plaintiff should realise that if he succeeds in recovering more by way of damages, costs and interest than it has cost to recover them, if the money actually paid by the defendant in respect of damages, costs and interest exceeds his own costs, which after all is what he expected, he will be in no better position than an unassisted litigant. a

So let us look again at the scheme whereby the plaintiffs involved in the lead actions should be chosen from those who are legally assisted with nil contributions. None of them would ever get a penny piece by way of compensation. Anything which the defendants were ordered to pay in respect of damages, costs and interest would be totally absorbed in paying their own costs. This would be a grossly unfair situation and the judge rightly refused to agree to it. b

There was in fact a further technical obstacle. Section 7(6) of the Legal Aid Act 1974 provides that the fact that a person is receiving legal aid 'shall not affect . . . the principles on which the discretion of any court or tribunal is normally exercised'. No doubt the intention was that legally-assisted parties should not be treated as second-class citizens, but the subsection also prevents them from being treated differently from other citizens in any respect not expressly authorised by the 1974 Act. Using them to fight lead cases just because they were legally assisted would breach this statutory rule. All this is now common ground and not the subject of an appeal. c

In these circumstances the judge decided to make a wholly novel order. In its detail it is of some complexity, but for present purposes it is only necessary to summarise its general effect. This was that, as from 8 June 1987, where particular plaintiffs incurred costs either personally or through the legal aid fund in pursuing lead actions, or thereby became liable to pay costs to the defendants, every other plaintiff should contribute rateably on a per capita basis. Those who have practised in the Commercial Court, of which Hirst J is one of the judges, will recognise the age old respectability of such an order, based as it clearly is on the Rhodian Law, the Rolls of Oleron and the maritime law of general average. But antiquity, respectability and indeed fundamental fairness is one thing: the power to make such an order is quite another. And here we come to the nub of this appeal. d

Before coming to that issue I should add that the judge recognised that in the months that lie ahead before a settlement or a final hearing circumstances might change. Thus some of the plaintiffs might decide to abandon their claims, so that instead of each plaintiff having to contribute 66p for every £1,000 of the costs of the lead plaintiffs (on the basis of 1,500 plaintiffs), the contribution might rise significantly. And other unforeseeable eventualities might arise making this order unfair or unduly burdensome. He therefore gave all the parties liberty to apply to vary the order if circumstances changed. Finally he rightly stressed that his order in no way fettered the discretion of the trial judge to make special orders as to costs between the plaintiffs or individual plaintiffs and the defendants or individual defendants. In essence what he was doing was providing for contribution as between plaintiffs in respect of costs incurred by them or liability for costs imposed on them, subject always to retaining a right to vary that order if justice so required. He also recognised that some plaintiffs might not wish to accept even this very small percentage of what in total could be a very considerable liability and he therefore ordered that any plaintiff who wished to abandon his action could do so, each party bearing its own costs of that discontinuance if he did so before 8 June 1987. e

Such an order would have been impossible before 1986, when the law was changed by a decision of the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd*, *The Vimeira* [1986] 2 All ER 409, [1986] AC 965 to the effect that s 51 of the Supreme Court Act 1981 gave the court the widest possible discretion to order anyone to pay costs incurred in proceedings, even if they were not themselves parties to those proceedings. f

This was subject to two provisos. The first proviso was that the order was fair and g

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could be justified as an exercise of judicial discretion. That is not challenged in this case.

a The second was that there was nothing in the Rules of the Supreme Court which prevented such an order being made. It is on this second proviso that counsel for the plaintiff relies. It is no obstacle in his way, since the House of Lords was not concerned with the precise point on which he relies, that Lord Goff, giving the leading opinion, said ([1986] 2 All ER 409 at 416, [1986] AC 965 at 980):

b 'If two separate sets of proceedings are heard together, because they have common features, it may be a matter of pure chance whether the expense of presenting an argument or evidence relevant to the common feature falls within one or other of the two sets of proceedings. Sometimes, indeed, it may be very difficult to attribute costs to one set of proceedings rather than the other. It is surely consistent with the interests of justice that, in such a case, the court's jurisdiction to make a global order
c for costs relating to both sets of proceedings should not be fettered by the imposition of an implied limitation on that jurisdiction.'

Substituting 1,500 sets of proceedings for two sets, that is virtually this case, and it was no doubt for that reason that before Hirst J the judge's jurisdiction to make the order was not challenged.

d In this court counsel for the plaintiff, who did not of course appear before Hirst J, directs our attention to RSC Ord 62, r 3(3), which, in his submission, prohibits a court from making an order in relation to costs not yet incurred. A judge has, he says, a complete discretion once the costs have been incurred and at a much earlier stage he may give audible warning of approach; he may then say what, subject to further argument,
e he would be minded to do if and when the costs have been incurred. But he must never make an actual order, even if he reserves the right to vary it in the light of a change of circumstances and further argument. To reach a provisional decision now and affirm it later is all right. To reach a firm decision now, whilst saying that you reserve the right to alter it later, will not do. If this is right, the law is indeed an ass.

In fact, in my judgment it is not right. RSC Ord 62, r 3(3) provides:

f 'If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.'

Counsel for the plaintiff almost accepts that the rule viewed in isolation means no more than that the normal order for costs is that he who wins has his costs paid by the other side. This is what 'follow the event' means. But he says that if you trace the origin
g of the rule back over a century you find that in 1875 (the Supreme Court of Judicature Act 1875, Sch 1, Ord LV) it read:

h '... where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown the Judge before whom such action or issue is tried or the Court shall otherwise order.'

Under that rule clearly an application for an order for costs, and thus the order itself, could not be made before the beginning of the trial, and counsel for the plaintiff says that this reveals the true meaning of 'costs shall follow the event'. This argument is, if I may say so, as ingenious as it is wholly unsound. In both rules the words 'follow the event' have the same meaning, namely 'according to who wins'. The difference between the
j wording and the effect of the two rules lies in the fact that the 1875 rule, unlike the current rule, which came into force in 1986, refers to an application made at the trial, although not, incidentally, 'at the conclusion of the trial'.

In my judgment not only can the order of the judge not be faulted, but he is to be congratulated on producing a very fair and workable order in a novel and highly complex situation. If he had given no indication of his thinking on costs and had refused to make

any order at this stage, no plaintiff could have made any assessment of his potential liability in respect of costs. If he had merely given an indication of his thinking, the plaintiffs would have been in much the same position as they are under the order, save that they would have had no order which they could appeal. As it is, they have been able to appeal his order and know where they stand. Furthermore, if circumstances change, they can go back to the judge.

The real problem here is that in relation to any claim it can happen that it will cost too much to enforce it: the costs will be out of proportion to any benefit which is likely to be obtained. Maybe the perfect legal system would get over this problem, but our system has not yet done so. Trying 1,500 cases together is much cheaper than trying 1,500 cases separately, so the plaintiffs as a group can spend more before they reach the economic limit. But however you arrange things and whether there are 1,500 plaintiffs or only one, there is always some economic limit. That is the long and the short of the problem. Whether the limit will be reached in the present cases is not for me to say, but I see no grounds for thinking that these cases are an exception to the general rule that settling genuine disputes by agreement between the parties is almost always in the interests of all parties.

Accordingly I would dismiss the appeal.

LLOYD LJ. I agree. It is common ground between all the parties in this litigation that certain actions should be selected as the lead actions. The judge, who has overall control of all the actions, has already given certain directions as to the selection of the lead actions in his master directions given on 11 July 1986 as amended on 14 January 1987. In his order under appeal, dated 8 May 1987, he directed that the issues raised in the lead actions, when selected, should be decided as preliminary issues in all the actions. That suggestion, which was originally put forward by counsel appearing as *amicus curiae*, found favour with the judge. It seems to me, if I may say so, eminently sensible for all sorts of reasons, which I need not mention, since there is no appeal from that part of the judge's order.

Nor is there any criticism of the exercise of the judge's discretion in this case. Although it was put forward as one of the grounds of appeal that the judge's discretion was wrongly exercised for the four reasons set out in the notice of appeal, that ground of appeal was not developed by counsel for the plaintiff. So with regard to the exercise of the judge's discretion it is sufficient to say that the solution which the judge proposed for the unique problems presented by the present case, namely that, subject to any further order of the court, the costs which may be ordered to be paid or to be borne by the plaintiffs in the lead actions should be borne by all the plaintiffs equally, is the fairest that could be devised: fair not only to the defendants, who support the order, but fair also to the plaintiffs, both assisted and unassisted. Indeed, it seems to me that some such order was inevitable, granted the need for a method of selection which does not infringe the provisions of s 7(6)(b) of the Legal Aid Act 1974.

But counsel for the plaintiff submits that the judge had no jurisdiction to make the order. Support for that submission is, he says, to be found in the language of RSC Ord 62, r 3(3). He accepts that s 51(1) of the Supreme Court Act 1981 confers a wide discretion on the court in the matter of costs. The decision of the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* ([1986] 2 All ER 409, [1986] AC 965 shows that costs may be ordered to be paid by a person who is not party to the proceedings. Counsel for the plaintiff therefore concedes that if, at the end of the trial, the court were to order that any costs payable by the plaintiffs in the lead actions should be shared equally between all the plaintiffs the court would have jurisdiction to make that order.

But he says that s 51 must be read along with Ord 62, to which it is expressly made subject. Although there would be jurisdiction to make the order I have mentioned at the end of the trial, he submits that there is no jurisdiction to make that order in advance. He relies on the words of Ord 62, r 3(3) that 'the Court shall order the costs to follow the

event'. Any order for costs before the event is, he says, premature, and one which the court has no power to make. There can be no such thing as a valid anticipatory order for costs.

I cannot accept the submission of counsel for the plaintiff. When one reads Ord 62, r 3(3) as a whole, it is clear to my mind that it is dealing with the manner in which the discretion to order costs is to be exercised, if the court sees fit to make any order at all, not the time at which that discretion is to be exercised. In the normal way, of course, the discretion is exercised at the conclusion of the proceedings, whether final or interlocutory. But there is nothing in the language of Ord 62, r 3(3) to prohibit the exercise of the discretion at an earlier stage where the interests of justice so require. The reference to 'costs following the event' means no more, as Sir John Donaldson MR has said, than 'according to who wins'. They have no temporal significance. I would therefore reject the main argument of counsel for the plaintiff that the judge had no jurisdiction to make the order.

Counsel for the plaintiff also relied on *Re Barnato (decd)*, *Joel v Sanges* [1949] 1 All ER 515, [1949] Ch 258 in support of the proposition that the court never decides hypothetical or academic questions. No doubt that is true. But there is nothing hypothetical or academic about the question in the present case. It is essential, as the judge well said, to resolve the problem of costs now, subject to any further order the court may make, in order that the parties and the court can sensibly embark on the selection of lead cases as anticipated in July.

I too would dismiss the appeal.

BALCOMBE LJ. About 1,500 persons claim to have suffered damage through taking the drug Opren and have started actions claiming damages for personal injuries against the same defendants. Of these 1,500 plaintiffs some 1,000 are legally aided. Very sensibly the parties have sought to save expense by canalising the actions into a number of 'lead' actions. From time to time applications for directions have come before Hirst J, and on one such application he made an order for directions on 8 May 1987, with a view to the selection of the lead actions. Among the directions he then gave was the following:

'With effect from 8th June 1987 the following provision as to costs shall apply:— Unless otherwise ordered, in the case of any costs incurred and/or Summons brought in and/or any hearing in respect of any action within the co-ordinated arrangements, and at the final trial or other disposal of actions selected under the co-ordinated arrangements, any costs which are ordered to be paid by, or which fall to be borne by, any Plaintiff shall be paid or borne proportionately by each of the Plaintiffs whose action is either a "Schedule Action" or "Group B Action" (including those Plaintiffs who are legally-aided) so that each such Plaintiff shall bear an equal part thereof.'

It is against this direction that the plaintiff now appeals, and the sole ground of his appeal as argued before us is that the judge had no jurisdiction to deal in advance with the apportionment of costs, a point which was not taken below.

The court's jurisdiction to deal with costs in civil proceedings is conferred by s 51(1) of the Supreme Court Act 1981, which is in the following terms:

'Subject to the provisions of this or any other Act and to rules of court, the costs of and incidental to all proceedings in the civil division of the Court of Appeal and in the High Court, including the administration of estates and trusts, shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid.'

The wide discretion conferred by this section is not to be restricted except and in so far as rules of court have that effect (see the decision of the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd*, *The Vimeira* [1986] 2 All ER 409, [1986] AC 965).

The rule on which the plaintiff relies in support of his submission is RSC Ord 62, r 3(3) which in its present form came into force on 28 April 1986. That paragraph provides: a

‘If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.’

Counsel for the plaintiff submits that the words ‘to follow the event’ mean that no order as to costs can be made until after the event has taken place. In support of that submission he prays in aid the historical derivation of the rule, which can be traced back to Ord LV of the rules set out in Sch 1 to the Supreme Court of Judicature Act 1875. That rule is in the following terms: b

‘Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity: Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown the Judge before whom such action or issue is tried or the Court shall otherwise order.’ c

In that rule the reference to costs following the event is contained in a proviso, and relates to an action or issue tried by a jury. So, submits counsel for the plaintiffs, in such a case the power to order costs could only arise after the verdict of the jury, and since 1934, when trial by judge alone was substituted for trial by jury in most civil actions, after judgment. d

I cannot accept this submission. In my judgment there is substance in the contention of counsel appearing as *amicus curiae* that the direction given by Hirst J is not such an order as is contemplated by Ord 62, r 3(3), being an order, not for the *payment* of costs, but for the *apportionment* of such costs as may be ordered to be paid by, or which fall to be borne by, any plaintiff. But in any event the ‘event’ to which Ord 62, r 3(3) is directed is the result of the proceedings, and does not limit the operation of the rule to any particular point of time. Whatever may have been the position under the 1875 Act, I am satisfied that the modern Ord 62, r 3(3) is not concerned with the *time* when an order as to costs may be made, but only with the *way* in which the discretion should be exercised, and that meaning is supported by the provisions of Ord 62, r 6, dealing with those cases where costs do not follow the event. e

Since this alleged lack of jurisdiction was the only basis on which the appeal was argued, and since I am satisfied that the judge had jurisdiction to make the order which he did, that is sufficient to dispose of this appeal. No attack was made on the manner in which the judge exercised his discretion and I need say no more than to agree with Sir John Donaldson MR that his order cannot be faulted. f

I agree that this appeal should be dismissed. g

Appeal dismissed. Plaintiff to pay costs of all defendants; order for costs not to be enforced without further order of Hirst J or the judge having conduct of the proceedings. h

Solicitors: *Goldberg Blackburn & Howards*, Manchester (for the plaintiff); *Davies Arnold & Cooper* (for the first to fifth defendants); *Treasury Solicitor*; *Christopher Snowling*, Director for Legal Aid (for the Law Society). j

Diana Procter Barrister.

R v Sharp

COURT OF APPEAL, CRIMINAL DIVISION

LORD LAKE CJ, FARQUHARSON AND GATEHOUSE JJ

7 APRIL 1987

- a**
- b** *Criminal law – Duress as a defence – Offence committed as member of criminal organisation or gang – Accused voluntarily and with knowledge of its nature joining gang of armed robbers – Accused threatened by gang leader with death if he did not participate in robbery – Whether defence of duress available to accused in respect of offences committed while a member of gang.*

- c** The appellant was a member of a gang who, to his knowledge, used loaded firearms to carry out robberies on sub-post offices. During one such robbery in which the appellant took part, the leader of the gang shot and killed the sub-postmaster. The appellant was charged with murder. At his trial he put forward the defence of duress, claiming that although he did not wish to take part in the robbery when he realised that loaded firearms were going to be used the leader of the gang had pointed a gun at him and threatened to blow his head off if he did not participate. The trial judge held that the defence of duress
- d** was not open to him because he had voluntarily joined the gang knowing they used firearms. The defendant was convicted of manslaughter. He appealed, contending that the judge's ruling was wrong.

- Held** – Where a person had voluntarily, and with knowledge of its nature, joined a criminal organisation or gang which he knew might bring pressure on him to commit an offence and was an active member when he was put under such pressure, he was not entitled to rely on duress as a defence to an offence committed as a member of the gang. The trial judge had therefore been right to rule that the defence of duress was not open to the appellant and the appeal would accordingly be dismissed (see p 108 *c d* and p 109 *d*, post).
- e**

- f** *R v Hurley and Murray* [1967] VR 526, dicta of Lord Morris and Lord Simon in *Lynch v DPP for Northern Ireland* [1975] 1 All ER at 918, 932 and *R v Fitzpatrick* [1977] NI 20 applied.

Notes

- For duress as a defence to a criminal charge, see 11 Halsbury's Laws (4th edn) para 24, and for cases on the subject, see 14(1) Digest (Reissue) 57–59, 266–280.
- g**

Cases referred to in judgment

- Lynch v DPP for Northern Ireland* [1975] 1 All ER 913, [1975] AC 653, [1975] 2 WLR 641, HL.
- R v Fitzpatrick* [1977] NI 20, NI CCA.
- h** *R v Hurley and Murray* [1967] VR 526, Vict Full Ct.
- R v Tyler and Price* (1838) 8 C & P 616, 173 ER 643, NP.

Cases also cited

- R v Gill* [1963] 2 All ER 688, [1963] 1 WLR 841, CCA.
- R v Howe* [1987] 1 All ER 771, [1987] AC 417, HL.
- j** *Subramaniam v R* [1956] 1 WLR 456, PC.

Appeal against conviction

David Bruce Sharp appealed against his conviction on 21 May 1985 in the Crown Court at Reading before Kenneth Jones J and a jury of manslaughter (count 4). He pleaded guilty to attempted robbery (count 2) and robbery (count 3). He was sentenced to

concurrent terms of 15 years' imprisonment on count 2 and to 16 years' imprisonment on counts 3 and 4. The facts are set out in the judgment of the court. a

Nigel Mylne QC and Stephen Smyth (assigned by the Registrar of Criminal Appeals) for the appellant.

Daniel Hollis QC and Anthony Longden for the Crown.

LORD LANE CJ delivered the following judgment of the court. On 21 May 1985 in the Crown Court at Reading before Kenneth Jones J and a jury the appellant was charged with murder. He was eventually convicted of manslaughter. Then he pleaded guilty to the remaining counts in the indictment against him. He was sentenced as follows. In respect of count 2, which was an attempted robbery at Hounslow, he was sentenced to 15 years' imprisonment. On count 3, robbery, to which he pleaded guilty (that was a robbery at Wraysbury) he was sentenced to 16 years' imprisonment. On the manslaughter to which I have referred, which arose from the same incident at Wraysbury, he was sentenced to 16 years' imprisonment, all those sentences to run concurrently. He was jointly charged with two other men: Alderson and Hussey. Hussey was convicted of murder in respect of the Wraysbury offence. b

The appellant now appeals against conviction by leave of the single judge.

The circumstances which gave rise to the charge of murder were the culmination of what was in effect a series of armed robberies committed on sub-post offices. They culminated in the Wraysbury offence which resulted in the death of the sub-postmaster at that place. c

Count 2, the Hounslow robbery, to which this appellant pleaded guilty, concerned the following facts, and they are of relevance to the main issue. At about midday on 23 August 1984 Alderson and Hussey, both of whom were armed with sawn-off shotguns, in the company of the appellant, held up a sub-post office in Hounslow. They wore wigs. Hussey threatened the wife of the postmaster, whereupon the postmaster pressed the alarm. All three then ran off to the getaway car empty-handed, because they had not had time, after the sounding of the alarm, to take any of the money which they had covered. Hussey tried to fire his gun in the air in order to discourage anyone who was minded to pursue them. His first attempt to fire the gun failed, but his second attempt succeeded, and a pellet from that gun in fact hit Alderson, one of the other miscreants, in the ear. d

The importance of that incident is this, that both Alderson and the appellant as a result of that knew the sort of man with whom they were associating in the commission of these offences and the predeliction which Hussey had for loaded weapons. They must have known also that any attempt in the future by an unlucky postmaster to press the alarm button would be viewed by Hussey with disfavour to say the least. e

On 14 September 1984 the sub-post office at Wraysbury, near Staines, was the subject of a reconnaissance by the appellant and the two other men. Then they determined to attack the office. Alderson and Hussey once again carried loaded sawn-off shotguns. A further weapon (a pump-action shotgun) was left in the getaway car. Hussey's gun was loaded with a particular venomous sort of shot, namely buckshot. The appellant was responsible for locking the post office door after the three of them had entered. f

Alderson moved towards the wife of the sub-postmaster and Hussey went to the post office area of this little shop. Hussey then shot the sub-postmaster in the head at close range: the ballistic expert thought about two or three feet. The unfortunate postmaster died instantly. As he fell, so money was scattered. Alderson took the opportunity to hit the sub-postmaster's wife on the head with his gun three times. That was in order to try to stop her screaming, which, not surprisingly, she had started to do. Once outside, Alderson shot at the tyre of a parked vehicle which belonged to the sub-postmaster in order plainly to impede anyone who might be minded to pursue them. g

Hussey, as already stated, was convicted of murder. The jury, not unnaturally, rejected his contention that the gun may have been discharged by accident. Alderson at first h

denied that he had taken part in the matter at all, but eventually went on to admit his part in the affair and he was in due course convicted of manslaughter.

The appellant put forward the contention that he had been invited indeed to take part in these robberies and had willingly acceded to the invitation. He was the 'bagman', as he put it, the man carrying the bag in which the loot, if any, would be contained. He regarded Hussey, in the vernacular, as a 'nutcase'. The appellant did not wish any weapons to be used, so he said. He said that he panicked when he saw the guns being loaded into the car. He thought they were blanks, so he said. He wanted to pull out, but he lost his nerve and he carried on despite his wish to withdraw from the conspiracy, because Hussey pointed a gun at him and threatened to blow his head off if he did not carry on with the plan to rob the post office. The appellant did not carry a gun. He said he had thought of sabotaging either the gun or the ammunition by using some salt, but he did not get the opportunity.

So stood the case. Counsel for the appellant, who appeared for him in the court below as he appears for him today, submitted to the judge that his client was entitled to rely on duress as a defence to the charges of murder and manslaughter. There then took place a series of submissions by counsel to the judge and a ruling by the judge.

There was plainly a misunderstanding between the judge and counsel for the appellant as to what it was that the judge had in fact ruled. As some of the grounds of appeal are based on that misconception, it is necessary perhaps very briefly to refer to them, although as matters have turned out today they are not vital to the determination of this appeal.

Counsel thought that the judge was ruling that the defence of duress was not open to the appellant on three grounds: (a) such a defence is only available where the defendant discharges the evidential burden of proof sufficient to show that there is something fit for the jury to consider in the way of duress; (b) the defence of duress is not available to a man who has voluntarily joined an organisation or a gang which he knows might compel him to commit serious crimes similar to those with which he is charged; and (c) the evidence was such that the jury could come to no conclusion other than that the defendant had voluntarily joined such a gang. That was plainly counsel's understanding of the matter, which was based on a passage in the judge's ruling which initially gave that impression. In fact the judge, as is clear if one reads the passage as a whole, was taking the view that all he had ruled on was point (b), namely that duress is not available to a man who, to put it briefly, has the necessary knowledge, and with the necessary knowledge joins the gang of miscreants.

There is no need to go further into that misconception, because counsel now agrees that everything in this appeal depends on whether the judge was correct or not in ruling that a defendant who has voluntarily joined a gang such as this cannot subsequently rely on the defence of duress.

So we turn to examine the situation which lies behind counsel for the appellant's submission to the judge, and again the submission to this court, namely that the common law knows no such exception to the defence of duress. Counsel realistically is the first to concede that pragmatically, to use his own word, and realistically the judge's interpretation of the law was desirable, if not essential, if justice is to be done in circumstances such as existed in the present case. But he submits that it is not for this court, or indeed any other court, to usurp the function of Parliament and to introduce into the common law a rule which, in his submission, has never previously been held to form part of it.

No one could question that if a person can avoid the effects of duress by escaping from the threats, without damage to himself, he must do so. In other words if there is a moment at which he is able to escape, so to speak, from the gun being held at his head by Hussey, or the equivalent of Hussey, he must do so.

It seems to us to be part of the same argument, or at least to be so close to the same argument as to be practically indistinguishable from it, to say that a man must not voluntarily put himself in a position where he is likely to be subjected to such compulsion.

Counsel for the appellant, I hope, will forgive us if we do not refer to all the citations which he made of authority. He read to us lengthy extracts from the decision in *R v Tyler* (1838) 8 C & P 616, 173 ER 643 and a further passage from Glanville Williams *Criminal Law: The General Part* (2nd edn, 1961) p 751 ff at 'Duress and Coercion, which do not, if we may say so respectfully, seem to advance the argument one way or the other. But we are fortified in the view which I indicate (which, to jump ahead, is that this is part of the common law and always has been) by certain matters which appear in the speeches of their Lordships in *Lynch v DPP for Northern Ireland* [1975] 1 All ER 913, [1975] AC 653. Although *Lynch's* case has been the subject of certain adverse comment since the date of those speeches, nevertheless the passages to which we wish to refer have not, as far as we know, been the subject of criticism.

First of all in the speech of Lord Morris appears this passage ([1975] 1 All ER 913 at 915, [1975] AC 653 at 668):

'Where duress is in issue many questions may arise such as whether threats are serious and compelling or whether (as on the facts of the present case may specially call for consideration) a person the subject of duress could reasonably have extricated himself or could have sought protection or had what has been called a "safe avenue of escape". Other questions may arise such as whether a person is only under duress as a result of being in voluntary association with those whom he knew would require some course of action. In the present case, as duress was not left to the jury, we naturally do not know what they thought of it all.'

A little later Lord Morris said ([1975] 1 All ER 913 at 918, [1975] AC 653 at 670):

'In posing the case where someone is "really" threatened I use the word "really" in order to emphasise that duress must never be allowed to be the easy answer of those who can devise no other explanation of their conduct nor of those who readily could have avoided the dominance of threats nor of those who allow themselves to be at the disposal and under the sway of some gangster-tyrant. Where duress becomes an issue courts and juries will surely consider the facts with care and discernment.'

Here of course, I interpolate, Hussey was the archetypal gangster-tyrant.

I turn from Lord Morris to the speech of Lord Wilberforce, in which appears this passage ([1975] 1 All ER 913 at 925, [1975] AC 653 at 679):

'It is clear that a possible case of duress, on the facts, could have been made. I say "a possible case" because there were a number of matters which the jury would have had to consider if this defence had been left to them. Among these would have been whether Meehan, though uttering no express threats of death or serious injury, impliedly did so in such a way as to put the appellant in fear of death or serious injury; whether, if so, the threats continued to operate throughout the enterprise; whether the appellant had voluntarily exposed himself to a situation in which threats might be used against him if he did not participate in a criminal enterprise (the appellant denied that he had done so); whether the appellant had taken every opportunity open to him to escape from the situation of duress. In order to test the validity of the judge's decision to exclude this defence, we must assume on this appeal that these matters would have been decided in favour of the appellant.'

Finally, so far as the passages in favour of the contention which we are supporting are concerned, in the speech of Lord Simon appears this passage ([1975] 1 All ER 913 at 932, [1975] AC 653 at 687):

'I spoke of the social evils which might be attendant on the recognition of a general defence of duress. Would it not enable a gang leader of notorious violence to confer on his organisation by terrorism immunity from the criminal law? Every member of his gang might well be able to say with truth, "It was as much as my life

a was worth to disobey". Was this not in essence the plea of the appellant? We do not, in general, allow a superior officer to confer such immunity on his subordinates by any defence of obedience to orders; why should we allow it to terrorists? Nor would it seem to be sufficient to stipulate that no one can plead duress as a defence who had put himself into a position in which duress could be exercised on himself.'

b In deference to counsel for the appellant, we turn finally to a passage in the speech of Lord Kilbrandon, who, in his opening words, said ([1975] 1 All ER 913 at 942, [1975] AC 653 at 699-700):

c 'My Lords, the learned trial judge directed the jury to the effect that the defence of duress is not available as exculpation in a charge of murder, whether the accused has been charged as a principal in the first or in the second degree. In my opinion, that direction correctly stated the law as it then stood and now stands. It is my misfortune that while I agree with those of your Lordships who consider that that law is in a very unsatisfactory state, and is in urgent need of restatement, I remain convinced that the grounds on which the majority propose that the conviction of the appellant be set aside involve changes in the law which are outside the proper functions of your Lordships in your judicial capacity.'

d Counsel for the appellant submits, as already indicated, that that view is a correct one, that it is not for this court to extend by judicial interpretation what he submits is the present state of the common law.

e We draw assistance from the fact that common law jurisdictions as well as Commonwealth jurisdictions throughout the world have adopted this rule almost unanimously (although the wording in their various statutes differs the one from the other), which is an indication to us that this may well have been, and indeed was, throughout a principle of the common law.

The matter was stated clearly by Winneke CJ in *R v Hurley and Murray* [1967] VR 526, the Supreme Court of Victoria. Before turning to the passage in Winneke CJ's judgment, let me just read part of the headnote in order to summarise the effect of the decision:

f 'Held . . . (2) Whether or not the matters raised by M could amount to a defence of duress, that defence was not available to him in the present case because he had voluntarily, and without any threat to himself, joined in the criminal enterprise and could not excuse his conduct by showing that he had subsequently been subjected to threats of violence to ensure that he did not withdraw from the enterprise.'

g Turning to the judgment of Winneke CJ, which was the majority judgment of the court, the passage runs as follows (at 533):

h 'Tyler's case ((1838) 8 C & P 616, 173 ER 643) was cited to us by [counsel for the Crown] as authority for the proposition contained in the last sentence of the passage quoted above from Dr. Glanville Williams' book [*Criminal Law: The General Part* (2nd edn, 1961) p 759, para 247], but it is plain on consulting the report that Lord Denman did not in his charge to the jury advert to the matter at all. [If I may interpolate there, that is a statement with which this court entirely agrees.] There is thus nothing in his charge to the jury which is authority for Dr. Glanville Williams' statement. Nevertheless, we are persuaded that it is both good law and good sense, and that a person who without threat of death or serious violence voluntarily makes himself a party to a criminal enterprise cannot excuse his criminal conduct in participating in that enterprise by showing that after he had embraced the cause he was subjected to threats of violence at the hands of the other parties to ensure that he did not resile from the bargain he had voluntarily entered into.'

j That was the precise description of what happened in this case between this appellant and Hussey.

Winneke CJ went on to cite from the Criminal Codes of Queensland, Western Australia and Tasmania, each of which contained a provision to that very effect. He cited the first Criminal Code from Canada (1892). He cited the New Zealand codification of the criminal law (first codified in 1893, then in the Crimes Act 1961), and he cited also the well-known American textbook, *Perkins on Criminal Law* (1957) p 843, where the following passage appears:

'If D for example is compelled under threat of death to provide a getaway car for robbers, or to assist them in some other way, he is not guilty of robbery . . . He cannot be a perpetrator of a robbery of which he is innocent. This is not comparable in any way to the claim that one who willingly joins in the robbery was compelled during the perpetration to do something against his will. Such a claim will be rejected because the situation was the result of extreme culpability of his part.'

Two American decisions are cited there by name.

We are therefore, in the light of that persuasive authority and the indications in their Lordships' speeches in *Lynch v DPP for Northern Ireland*, of the opinion that the judge, Kenneth Jones J, was correct in the decision which he reached.

We are further fortified in that view by the judgment of Lord Lowry LCJ in *R v Fitzpatrick* [1977] NI 20. Let me read the brief headnote once again in order to indicate the nature of the decision. It runs as follows:

'If a person by joining an illegal organisation or a similar group of men with criminal objectives and coercive methods, voluntarily exposes and submits himself to illegal compulsion, he cannot rely on the duress to which he has voluntarily exposed himself as an excuse either in respect of the crimes he commits against his will or in respect of his continued but unwilling association with those capable of exercising upon him the duress which he calls in aid.'

Turning to the body of the judgment, there are just three passages which we would like to cite to indicate the way in which Lord Lowry LCJ's judgment went. The first reads as follows (at 22):

' . . . the judge held that, having joined the I.R.A. and voluntarily exposed himself to the risk of compulsion by the I.R.A. to commit crimes on its behalf, the appellant was not entitled to rely on the defence of duress exercised by that organisation. In so holding the learned trial judge cited the well known passage from Stephen's *History of the Criminal Law of England* ((1883) vol 2, p 108), which was referred to by Lord Edmund-Davies in *Lynch* ([1975] 1 All ER 913 at 947, [1975] AC 653 at 705): "If a man chooses to expose and still more if he chooses to submit himself to illegal compulsion, it may not operate even in mitigation of punishment. It would surely be monstrous to mitigate the punishment of a murderer on the ground that he was a member of a secret society by which he would have been assassinated if he had not committed murder."'

The second passage reads as follows (at 23):

'Counsel on both sides have informed us that the point is devoid of judicial authority and we have not found anything to suggest the contrary. Therefore we have to decide, in the absence of judicial decisions, what is the common law. Assistance may be sought from the opinions of textwriters, judicial dicta and the reports of Commissions and legal committees, and from analogies with legal systems which share our common law heritage, with a view to considering matters of general principle and arriving at the answer. [Counsel for the appellant] drew to our attention the penal codes of Canada, New Zealand and the State of Queensland and we have also considered among others the penal codes of Western Australia and the State of New York as well as the draft code of 1879 prepared by the Royal

a Commission of which Mr. Justice Stephen was a member and the American Model Penal Code. All these codes and draft codes contain various provisions withholding from members of unlawful organisations the right to rely on a defence of duress.'

Then Lord Lowry LCJ cites two extracts from the various codes and authorities which he indicates in précis in the passage which I have read.

b There is no need for us to go into that and there is no need for us to cite further from Lord Lowry LCJ, except for one passage, where he said (at 26):

c 'We consider that the widespread adoption of such limiting provisions with regard to duress shows that the framers of the codes and drafts which we have mentioned considered that this exclusory doctrine was already part of the common law and the Law Commission's recommendation indicates the view of a distinguished body of jurists, (whose recommendations are in general favourable to duress as a defence), that participation in unlawful associations or conspiracies should disqualify the accused from relying on it.'

d In other words, in our judgment, where a person has voluntarily, and with knowledge of its nature, joined a criminal organisation or gang which he knew might bring pressure on him to commit an offence and was an active member when he was put under such pressure, he cannot avail himself of the defence of duress. Counsel for the appellant concedes that such a ruling is the end of his appeal. The appeal is therefore dismissed.

Appeal dismissed.

Solicitors: *Crown Prosecution Service.*

N P Metcalfe Esq Barrister.

President of India v Lips Maritime Corp

The Lips

HOUSE OF LORDS

LORD KEITH OF KINKEL, LORD FRASER OF TULLYBELTON, LORD BRANDON OF OAKBROOK, LORD GRIFFITHS AND LORD MACKAY OF CLASHFERN

8, 9, 10 JUNE, 28 JULY 1987

Shipping – Demurrage – Late payment – Payment in sterling – Currency exchange loss – Damages arising from late payment of demurrage – Charterparty providing for demurrage to be calculated in US dollars but paid in sterling – Dispute over demurrage resolved by arbitration – Sterling exchange rate falling between date demurrage due and date of arbitration award – Whether currency exchange loss arising from late payment of demurrage recoverable.

In July 1980 the owners chartered their vessel to the charterer for the carriage of a cargo of phosphate from Louisiana to India. Under cl 30 of the charterparty freight and demurrage were to be calculated in US dollars but were to be paid in London in sterling at the mean exchange rate ruling on the date of the bill of lading. At that date the exchange rate was \$2.37 to the pound. A dispute arose between the parties over demurrage which was referred to arbitration in England. In February 1983 the umpire published an award in favour of the owners. By the date of the award the sterling exchange rate had dropped to \$1.54 to the pound. The umpire held that the charterer was liable for demurrage amounting to \$24,250 and that because the charterer was liable for damages for late payment the owners were entitled to recover the exchange loss suffered by them because of the fall in the sterling exchange rate, with the result that the total award in effect comprised demurrage converted at the \$2.37 exchange rate (ie £10,232) and damages for the exchange loss, being the difference in converting at the \$1.54 and \$2.37 exchange rates (ie £5,514), making a total of £15,746. In a further award the umpire held that the exchange loss was recoverable as special damages. On appeal by the charterer the question arose whether the exchange loss was recoverable as general or special damages. The judge allowed the charterer's appeal, holding that the exchange loss caused by the late payment of demurrage could not be recovered as special damages and he varied the award by converting the demurrage into sterling at the \$2.37 exchange rate (thus reducing the award to £10,232). On appeal by the owners the Court of Appeal held that the exchange loss suffered by the owners was recoverable as special damages and allowed the appeal. The charterer appealed to the House of Lords.

Held – Since demurrage was not a liability in debt but a liability in damages arising out of the detention of a chartered ship by the charterer beyond the stipulated lay days, and since there was no such thing as a cause of action in damages for late payment of damages, a currency exchange loss arising out of the late payment of demurrage was not recoverable as special damages and could only be compensated by the award of interest. Having regard to the terms of cl 30 of the charterparty, the appropriate award was demurrage payable in sterling at the \$2.37 exchange rate prevailing on the date of the bill of lading together with interest running from two months after the completion of discharge (that being the period within which demurrage was usually settled and paid for). The appeal would therefore be allowed (see p 111 *h j*, p 115 *c to e*, p 117 *a to d*, p 118 *d to f* and p 121 *a*, post).

Aruna Mills Ltd v Dhanrajmal Gobindram [1968] 1 All ER 113 and *President of India v La Pintada Cia Navegacion SA* [1984] 2 All ER 773 distinguished.

Decision of the Court of Appeal [1987] 1 All ER 957 reversed.

Notes

- a** For damages for late payment, see 12 Halsbury's Laws (4th edn) para 1179.

Cases referred to in judgments

- Aktieselskabet Reidar v Arcos Ltd* [1927] 1 KB 352, [1926] All ER Rep 140, CA.
Aruna Mills v Dhanrajmal Gobindram [1968] 1 All ER 113, [1968] 1 QB 655, [1968] 2 WLR 101.
b *Dias Cia Naviera SA v Louis Dreyfus Corp* [1978] 1 All ER 724, [1978] 1 WLR 261, HL.
Eleftherotria (owners) v Despina R (owners), The Despina R [1979] 1 All ER 421, [1979] AC 685, HL.
Hadley v Baxendale (1854) 9 Exch 341, [1843-60] All ER Rep 461, 156 ER 145.
Loh Wai Lian v Sea Housing Corp Sdn Bhd (3 March 1987, unreported), PC.
London Chatham and Dover Rly Co v South Eastern Rly Co [1893] AC 429, HL.
c *Monrovia Tramp Shipping Co v President of India, The Pearl Merchant* [1978] 2 Lloyd's Rep 193; *affd* sub nom *George Veflings Rederi A/S v President of India, The Bellami, The Pearl Merchant, The Doric Chariot* [1979] 1 All ER 380, [1979] 1 WLR 59, CA.
Naylor (Isaac) & Sons Ltd v New Zealand Co-op Wool Marketing Association Ltd [1981] 1 NZLR 361, NZ CA.
d *President of India v La Pintada Cia Navegacion SA* [1984] 2 All ER 773, [1985] AC 104, [1984] 3 WLR 10, HL.

Appeal

- The President of India, the charterer of the vessel Lips from the owners, Lips Maritime Corp, under a charterparty in the Ferticon form dated 1 July 1980, appealed with leave of the Appeal Committee granted on 5 February 1987 against the decision of the Court of Appeal (Neill, Nicholls LJ and Sir Roualeyn Cumming-Bruce) ([1987] 1 All ER 957, [1987] 2 WLR 906) on 31 October 1986 allowing the owners' appeal against the decision of Staughton J ([1985] 2 Lloyd's Rep 180) on 3 April 1985 varying the award made by the umpire, Mr Frank Rehder, on 22 February 1983 in an arbitration between the parties whereby he awarded the owners the sum of \$24,250, converted at the rate of \$1.54 to the pound to £15,746.75, for demurrage and the exchange loss arising out of the late payment thereof. The facts are set out in the opinion of Lord Brandon.

A E Diamond QC and *Peregrine Simon* for the charterer.
Anthony Grabiner QC and *Steven Gee* for the owners.

- g** Their Lordships took time for consideration.

28 July. The following opinions were delivered.

- LORD KEITH OF KINKEL.** My Lords, I have had the opportunity of reading the speech to be delivered by my noble and learned friend Lord Brandon. I agree with it and
- h** for the reasons he gives would allow the appeal.

- LORD FRASER OF TULLYBELTON.** My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Mackay, and I share his difficulty in departing from the umpire's holding to the effect that the charterer was contractually bound to pay the demurrage by 11 December 1980. But I agree with my
- j** noble and learned friend that it would be inappropriate either to remit the case to the umpire or to decide the appeal on a legal basis which is unsound. In these circumstances I agree that the appeal should be allowed and should be disposed of in the way proposed by my noble and learned friend Lord Brandon.

LORD BRANDON OF OAKBROOK. My Lords, this is an appeal by leave of your Lordships' House from an order of the Court of Appeal (Neill, Nicholls LJ and Sir Roualeyn Cumming-Bruce) ([1987] 1 All ER 957, [1987] 2 WLR 906) made on 31 October 1986. By that order the court allowed an appeal from an order of Staughton J ([1985] 2 Lloyd's Rep 180) made in the Commercial Court on 4 April 1985, by which he had varied an award, dated 22 February 1983 made in arbitration proceedings in London by an umpire, Mr Frank Rehder.

The appellant (the charterer) was the charterer of the *m v Lips* (the ship) owned by the respondents (the owners) under a voyage charterparty dated 1 July 1980 (the charter). Pursuant to the charter the ship loaded a cargo of di-ammonium phosphate at Donaldsville, Louisiana, and carried it to India. There she discharged part of the cargo, for lightening purposes, at Visakhapatnam, and the remainder of it at Calcutta. After the completion of the voyage disputes arose concerning, among other things, the amount of the charterer's liability to the owners in respect of demurrage. It is with the way in which the umpire dealt with the owner's claim in respect of demurrage that the proceedings in the courts below and the present appeal is concerned.

The charter provided, so far as material, as follows: by cl 9, that if the ship should be detained beyond the lay days demurrage should be paid at the rate of \$US6,000 per day and pro rata, and dispatch money for all working time saved at half the demurrage rate per working day and pro rata; by cl 13, that the owners should have a lien on the cargo for demurrage; by cl 15, that general average should be settled in London; by cl 17, that any dispute arising under the charter should be settled by arbitration in London; by cl 18, that the freight should be paid in London in British sterling: 90% within seven days of submission of the necessary freight bill and the balance after completion of settlement of demurrage/dispatch; by cl 19, that freight should be calculated at various rates in US dollars per ton of cargo depending on the charterer's choice of ports for loading and discharge; by cl 28, how laytime should be calculated and that laytime for loading and discharging should be reversible.

Clause 30 of the charter further provided:

'(A) Freight . . . is payable in British External Sterling in London . . . at the mean exchange rate ruling on Bill(s) of Lading date . . .

(B) The mean exchange rate ruling on Bill of Lading date will also apply, to other related payments/settlements including demurrage/dispatch settlements under this Charter Party and will apply in all cases where payments/settlements are affected in currency other than the currency in which the rates of freight and demurrage/dispatch are indicated in the Charter Party.

(C) In cases where there is more than one Bill of Lading in respect of a shipment the mean exchange rate as above will be applicable to the calculation of freight under each Bill of Lading. For the purpose of demurrage/dispatch and other related payments, the exchange rate applicable will be the simple average of the mean exchange rates adopted for freight calculations.

(D) Demurrage/dispatch and any other payments, under this Charter Party shall also be made in British External Sterling.'

By his award the umpire decided as follows: (1) that the ship had been on demurrage for 28 days 1 hour 47 minutes of which only 24 days and 47 minutes had been admitted and paid for by the charterer, leaving 4 days and 1 hour still to be paid for by him; (2) that the amount of demurrage payable in respect of this period of 4 days and 1 hour, calculated at the prescribed rate of \$6,000 per day and pro rata, was \$24,250; (3) that the rate of exchange on the date of the bills of lading was \$1.54 = £1.00; (4) that the charterer was under an obligation to settle and pay for demurrage within two months of the completion of discharge; (5) that the owners were entitled to recover, as damages for late payment of the outstanding demurrage, the loss suffered by them by reason of sterling having depreciated from a rate of \$2.37 = £1.00 at the bills of lading date to

a \$1.54 = £1.00 at the date of the award; (6) that, in order to give effect to this right of recovery, the sum of \$24,250 referred to earlier should be converted into sterling, not at the rate of \$2.37 = £1.00 prevailing at the bills of lading date, but at the rate of \$1.54 = £1.00 prevailing at the date of the award, producing a sum payable by the charter of £15,746.75 to which interest should be added.

While the above represents a summary of what the umpire decided, I think that I should set out in full two passages from the reasons for his award given by him.

b Paragraph 4.2 of the reasons states:

‘On the date of the Bills of Lading the rate of exchange was about \$2.37 = £1. At the present time it is about \$1.54 = £1. Thus, if, as Charterers contended, conversion of the amount awarded is made at the rate as at the Bill of Lading date, Owners will suffer a considerable loss. Charterers were in breach in not making payment at the proper time, and the damages for that breach is the difference between the respective rates of exchange, and I have awarded accordingly.’

c

Paragraph 8.2 of the reasons states:

‘The demurrage should have been settled and paid within two months of the completion of discharge, i.e. by 11 December 1980 . . .’

d

It was common ground between the parties before your Lordships that the sum of £15,746.75 awarded by the umpire in respect of demurrage, though not so expressly described in the award, must be regarded as comprising two separate elements: firstly, \$24,250 converted at \$2.37 = £1.00, which comes to £10,232.07 (the demurrage element), and, secondly, the difference between \$24,250 converted at \$1.54 = £1.00 and at \$2.37 = £1.00, which comes to £5,514.68 (the damages element).

e

The charterer's case before your Lordships was that the umpire was wrong in law in deciding that demurrage should have been settled and paid for two months after completion of discharge and, on that ground, in adding the damages element to the demurrage element. It was, however, also common ground that, assuming that the umpire was right in law about these two matters, he should have calculated the damages element by reference to the rate of exchange prevailing two months after completion of discharge, i.e. 11 December 1980, rather than the rate of exchange prevailing on the bills of lading date. The rate of exchange prevailing on 11 December 1980 was \$2.32 = £1.00. If that rate is taken, the damages element is reduced from £5,514.68 to £5,294.16, and the total of both elements from £15,746.75 to £15,526.23.

f

My Lords, by order dated 15 July 1983 Hobhouse J gave the charterer leave to appeal on a question of law which was, in effect, whether the umpire was right in law, in dealing with the owners' claim in respect of demurrage, to add the damages element to the demurrage element.

g

On 26 July 1984 the appeal came before Lloyd J, whose judgment is reported (see [1985] 2 Lloyd's Rep 180). He took the view that the principle laid down by your Lordships' House in *President of India v La Pintada Cia Navegacion SA* [1984] 2 All ER 773, [1985] AC 104 in relation to claims to recover interest as damages for late payment applied equally in relation to claims to recover currency exchange losses as damages for late payment. That principle was that interest could be recovered as damages for late payment if it was special damage which could be brought within the second part of the rule in *Hadley v Baxendale* (1854) 9 Exch 341, [1843–60] All ER Rep 461, but not if it was general damage which could only be brought within the first part of that rule. Lloyd J, being of that opinion and considering also that the umpire's reasons for his award left it in doubt whether he regarded the owners' currency exchange loss as coming within the first or second part of the rule in *Hadley v Baxendale*, by order dated 30 July 1984 allowed the appeal to the extent of remitting the award to the umpire in order that he should reconsider the matter and resolve that doubt.

j

As a result of the remission the umpire made a further award dated 23 November 1984. In it he set out a series of further findings of fact on the basis of which he said that, in his view, the currency exchange loss suffered by the owners was special damage coming within the second part of the rule in *Hadley v Baxendale*. Paragraph 15 of his further award states:

'The provisions of clause 30 apply, for better or for worse, where the contract is correctly performed; but they do not apply to a breach. I have already found that Charterers were in breach in not making payment timeously.'

It appears to me that this passage involves some confusion of thought. In arriving at the amount of the demurrage element, the umpire did apply the provisions of cl 30; but he counteracted that application by adding the damages element. The result is, mathematically, the same; but the rationale is different. What I think that the umpire was really trying to say was that, although cl 30 was applicable to the calculation of the demurrage element, it did not preclude the addition to the latter of the damages element.

Following the making of the umpire's further award, the charterer's appeal came back for further hearing before Staughton J (see [1985] 2 Lloyd's Rep 180). He held that, having regard to the further findings of fact made in the further award, the umpire had been wrong in law to conclude that the owners' currency exchange loss came within the second part of the rule in *Hadley v Baxendale*; he should instead have concluded that it came within the first part of that rule. He accordingly made an order dated 4 April 1985, the effect of which was to vary the umpire's award in respect of demurrage by excluding from it the damages element.

The owners appealed to the Court of Appeal (see [1987] 1 All ER 957, [1987] 2 WLR 906), constituted as stated earlier. That court allowed the appeal on two grounds. The first ground was that the currency exchange loss suffered by the owners came within the second part of the rule in *Hadley v Baxendale* and was therefore recoverable as special damages for breach of contract. The second ground was that cl 30 of the charter determined the rate of exchange applicable when the contract was performed, ie when demurrage was settled and paid for within two months of the completion of discharge, but did not do so when the paying party was in breach of the contract by failing to pay within that time. The clause did not, therefore, preclude the owners' claim for damages.

Here again there seems to have been some confusion of thought. If cl 30 did not apply to determine the rate of exchange applicable in the case of a late payment, then there was no provision for conversion in that case at all. It would follow for reasons given later than, in such a case, demurrage would be payable in dollars. The Court of Appeal, however, held that, since the owners had not contended for payment in dollars before the umpire, it was too late for them to do so at that stage.

My Lords, it will be apparent from the account which I have given of the proceedings in the courts below that this case has been dealt with throughout on two basic assumptions. The first assumption has been that the umpire was right in law in deciding that the charterer was under a contractual obligation to settle and pay for demurrage within two months of the completion of discharge. The second assumption has been that the principle laid down by your Lordships' House in *President of India v La Pintada Cia Navegacion SA* [1984] 2 All ER 773, [1985] AC 104 in relation to claims to recover interest as damages for late payment applied equally in relation to claims to recover currency exchange losses as damages for late payment. For reasons which I shall give later, I am of the opinion that both these assumptions were fallacious. I also think that, because the assumptions were fallacious, the courts below were led into two errors. The first error was to apply themselves to deciding a question which, on what I consider to be a true view of the law, did not need to be decided. The second error, which was linked with the first, was to approach the construction of cl 30 of the charter on a wrong basis. Your Lordships are faced with the difficulty that the charterer does not appear to have disputed the correctness of either of the assumptions to which I have referred in the courts below.

It seems to me, however, that this circumstance, while it may in certain events be relevant to questions of costs, should not inhibit your Lordships from deciding this appeal on a correct legal basis. The real issue in the appeal is the true construction of the provisions relating to demurrage contained in the charter, which your Lordships were given to understand were in a form commonly used by the charterer in his chartering transactions. That being so, it would, in my view, be wrong to allow fallacious assumptions of law, which were allowed to go unchallenged in the courts below, to affect the way in which your Lordships decide the matters of construction which are really in issue.

I consider first the assumption that the umpire was right in law in deciding that the charterer was under a contractual obligation to settle and pay for demurrage within two months of the completion of discharge. This part of the umpire's decision appears to have been treated below as if it were a finding of fact, whereas it was plainly a holding in law. The question whether it was right or wrong must be dealt with on that basis.

It is essential to the decision of that question to have in mind the legal nature of demurrage: both what it is and what it is not. I deal first with what demurrage is not. It is not money payable by a charterer as the consideration for the exercise by him of a right to detain a chartered ship beyond the stipulated lay days. If demurrage were that, it would be a liability sounding in debt. I deal next with what demurrage is. It is a liability in damages to which a charterer becomes subject because, by detaining the chartered ship beyond the stipulated lay days, he is in breach of his contract. Most, if not all, voyage charters contain a demurrage clause, which prescribes a daily rate at which the damages for such detention are to be quantified. The effect of such a claim is to liquidate the damages payable: it does not alter the nature of the charterer's liability, which is and remains a liability for damages, albeit liquidated damages. In the absence of any provision to the contrary in the charter the charterer's liability for demurrage accrues *de die in diem* from the moment when, after the lay days have expired, the detention of the ship by him begins. These propositions of law are so well established that the citation of authority for them is perhaps unnecessary. However, if authority is required, it is to be found in such cases as *Aktieselskabet Reidar v Arcos Ltd* [1927] 1 KB 352, [1926] All ER Rep 140, a decision of the Court of Appeal, and *Dias Cia Naviera SA v Louis Dreyfus Corp* [1978] 1 All ER 724, [1978] 1 WLR 261, a decision of your Lordships' House. In the latter case Lord Diplock said ([1978] 1 All ER 724 at 726–727, [1978] 1 WLR 261 at 263–264):

'If laytime ends before the charterer has completed the discharging operation he breaks his contract. The breach is a continuing one; it goes on until discharge is completed and the ship is once more available to the shipowner to use for other voyages. But unless the delay in what is often, though incorrectly, called redelivery of the ship to the shipowner is so prolonged as to amount to a frustration of the adventure, the breach by the charterer sounds in damages only. The charterer remains entitled to continue to complete the discharge of the cargo, while remaining liable in damages for the loss sustained by the shipowner during the period for which he is being wrongfully deprived of the opportunity of making profitable use of his ship. It is the almost invariable practice nowadays for these damages to be fixed by the charterparty at a liquidated sum per day and *pro rata* for part of a day (demurrage) which accrues throughout the period of time for which the breach continues.'

The charter with which this appeal is concerned contained no express provision that demurrage, instead of being payable *de die in diem* from the moment detention of the ship beyond the lay days began, should only be payable within two months after the completion of discharge. Nor can I see any basis for implying any such provision. It is no doubt true that, because there has to be a general settlement of accounts between the charterer and the shipowner after the completion of the charter voyage, and because time is needed to agree the calculation of the amount of demurrage where a liability for it has

been incurred, demurrage will not in practice be settled and paid for until a reasonable time, which may well be of the order of two months, has elapsed after the completion of discharge. This circumstance, however, does not afford a basis for implying a term that the charterer's liability to pay demurrage does not accrue until such a reasonable time has elapsed. I would, therefore, hold that the umpire's decision that the charter here concerned was subject to such a term, adopted without dispute by the courts below, though not without some expression of surprise by Staughton J (see [1985] 2 Lloyd's Rep 180 at 183), was wrong in law. a

I turn to the second assumption, that the principle laid down by your Lordships' House in the *La Pintada* case in relation to claims to recover interest as damages for late payment of a debt applied equally in relation to claims to recover currency exchange losses as damages for such late payment. In the *La Pintada* case the House was invited to depart from its earlier decision in *London Chatham and Dover Rly Co v South Eastern Rly Co* [1893] AC 429. In that case it was held that, under English common law, interest could not be given as damages for late payment of a debt. Two matters were decided by the House in the *La Pintada* case. The first matter was that the application of the principle established in the *London Chatham and Dover Rly* case was limited to claims to recover interest as general damages under the first part of the rule in *Hadley v Baxendale* (1854) 9 Exch 341, [1843-60] All ER Rep 461 and did not extend to claims to recover interest as special damages under the second part of that rule. The second matter was that it would be inappropriate for the House, pursuant to the 1966 Practice Statement (Note [1966] 3 All ER 79, [1966] 1 WLR 1234), to depart from the principle established in the *London Chatham and Dover Rly* case as so limited. The reason for not so departing, and the only reason, was that the legislature had, since the *London Chatham and Dover Rly* case had been decided, intervened on more than one occasion to confer on courts a discretionary power to award interest on unpaid debts and that a departure would produce an undesirable conflict between the right to recover interest at common law and statutory entitlement to recover interest on a discretionary basis so conferred. b

The *London Chatham and Dover Rly* case was concerned, and concerned only, with the recovery of interest as damages for late payment of a debt. It was in no way concerned with the recovery of currency exchange losses as damages for such late payment. It follows necessarily that the scope of the *La Pintada* case, in so far as it differentiated between claims for the recovery of interest as other general damages on the one hand and as special damages on the other, was similarly limited. The House had no reason in the *La Pintada* case to consider claims to recover currency exchange losses and did not do so. Such claims differ significantly from claims to recover interest in two ways. Firstly, there is no previously established law, comparable to that laid down in the *London Chatham and Dover Rly* case, precluding the recovery of currency exchange losses as damages for late payment of a debt. Secondly, there are no statutory provisions relating to the recovery of such losses which could conflict with any right of recovery at common law. In these circumstances it appears to me that claims to recover currency exchange losses as damages for breach of contract, whether the breach relied on is late payment of a debt or any other breach, are subject to the same rules as apply for damages for breach of contract generally. This view is supported by *Isaac Naylor & Sons Ltd v New Zealand Co-op Wool Marketing Association Ltd* [1981] 1 NZLR 361. For these reasons I would hold that the assumption that the principle laid down by your Lordships' House in the *La Pintada* case in relation to claims to recover interest as damages for late payment of a debt applied equally to claims to recover currency exchange losses as damages for late payment, an assumption which was again made without dispute in the courts below, was also wrong in law. c

My Lords, I shall now consider the charterer's case that the umpire was wrong, in dealing with the owners' claim in respect of demurrage, to add the damages element to the demurrage element. I shall, moreover, do this untrammelled by the two assumptions made in the courts below which I have held to have been wrong in law. d

Once it is recognised that a claim for demurrage sounds in damages rather than in debt, it becomes apparent that the two concepts, firstly, of a contractual date for the payment of such damages and, secondly, of a claim for damages for breach of contract in not paying them by such date have no basis in law. As I said earlier an owner's cause of action for demurrage, being one for damages, albeit liquidated damages, accrues *de die in diem* from the moment when the ship is detained beyond the stipulated lay days. There is no such thing as a cause of action in damages for late payment of damages. The only remedy which the law affords for delay in paying damages is the discretionary award of interest pursuant to statute. It follows that the umpire's decision in the present case, in dealing with the owners' claim in respect of demurrage, to add the damages element to the demurrage element, was wrong in law, and was so irrespectively of the provisions of cl 30 of the charter. The umpire was, however, right in principle to award interest (although not compound interest: see the *La Pintada* case) on the amount of the demurrage payable by the charterer. Further, on the basis that demurrage is usually settled and paid for within two months of the completion of discharge, as I infer that the umpire found, he was also right to make interest payable only from the day following the expiry of that period, i.e. from 12 December 1980, as he did.

The owners, in support of their case that the umpire was right to add the damages element to the demurrage element, relied strongly on *Aruna Mills Ltd v Dhanrajmal Gobindram* [1968] 1 All ER 113, [1968] 1 QB 655. In that case sellers contracted with buyers to ship goods under a *cif* contract on or before a stipulated date. The price of the goods was to be a sum in Indian rupees, and there was an express provision in the contract that any difference in the rates of exchange between the Indian rupee and the pound sterling prevailing on the date of the contract and on the date when the price was paid should be borne and paid for by the buyers. The sellers shipped the goods later than the contractual date and during the period of delay in shipment the Indian rupee was devalued in relation to the pound sterling. As a result the buyers had to pay an increased price for the goods. A dispute between the parties was referred to arbitration and subsequently a special case was stated for the opinion of the court on the question whether the buyer was entitled to recover the increase in the price of the goods resulting from the devaluation as damages for the sellers' breach of contract in shipping the goods late. It was held by Donaldson J, applying the principles laid down in *Hadley v Baxendale* and later authorities on the recovery of damages for breach of contract, that the loss claimed was not too remote and was therefore recoverable by the buyers, so as to entitle them to set it off against the increased price.

The *Aruna Mills* case is, in my opinion, clearly distinguishable from the present case. In the *Aruna Mills* case the sellers committed a breach of contract in shipping goods later than the contractual date of shipment, and the only question was whether the loss suffered by the buyer in having to pay an increased price for the goods was within the contemplation of the parties at the time of contracting so as to make such loss recoverable as damages for the breach. Donaldson J decided that it was and I see no reason to doubt the correctness of his decision. In the present case, however, for reasons which I gave earlier, there was no breach of the charter by the charterer in respect of the payment of demurrage. All that happened was that the charterer did not pay liquidated damages for the detention of the ship at the time when the cause of action in respect of such damages accrued, or indeed at any time up to and including the date of the umpire's award. For that non-payment the only remedy which the law affords to the owners is interest on the sum remaining unpaid. In my view, therefore, the *Aruna Mills* case does not assist the owners.

My Lords, there remains for consideration the effect of cl 30 of the charter. According to the findings contained in the umpire's further award, the currency in which the owners carried on their business was US dollars. Clause 9 of the charter further provided that demurrage should be calculated at the rate of \$6,000 per day and *pro rata*. In these

circumstances, were it not for the inclusion of cl 30 in the charter, the owners would have been entitled to an award in respect of their claim for demurrage expressed in dollars: see *Eleftherotria (owners) v Despina R (owners)*, *The Despina R* [1979] 1 All ER 421, [1979] AC 685. In that situation the owner would not have suffered the currency exchange loss which led the umpire to add the damages element to the demurrage element. Clause 30, however, expressly changed what would otherwise have been the situation. It did so in two ways. Firstly, it provided that demurrage calculated in dollars under cl 9 should, for the purposes of payment, be converted into pounds sterling. Secondly, it provided that such conversion should take place at the rate of exchange prevailing on the bills of lading date. These provisions, by the express terms of the clause, apply whenever demurrage is settled or paid for. Further it is clear that the expression 'settlement', as used in cl 30, includes settlement by an award in arbitration proceedings as well as settlement by agreement between the parties. I reach that conclusion after considering the use of the expression 'settle' in relation to general average in cl 15 of the charter and in relation to disputes referred to arbitration in cl 17. In any case, I did not understand the owners to be disputing that this was the meaning of the expression 'settlement' in cl 30. Their acceptance of the division of the umpire's award in respect of demurrage into two elements, the demurrage element and the damage elements, is inconsistent with their doing so.

My Lords, for the reasons which I have given I would allow the appeal, set aside the order of the Court of Appeal and restore the order of Staughton J except in so far as it relates to costs. As will be apparent, however, the grounds on which I think that the substantive part of the order of Staughton J was right differ fundamentally from those on which he relied in making it.

LORD GRIFFITHS. My Lords, I have had the advantage of reading the speeches of my noble and learned friends Lord Brandon and Lord Mackay. I should for myself have preferred to reach a result which did not enable the charterer by delaying payment to take advantage of the decline of the pound against the dollar. For the reasons given by Lord Mackay this result would be achieved only if the charterparty is subject to the implied term as to payment found by the umpire. Despite the fact that this term as to payment was not challenged until the hearing in your Lordships' House I have been reluctantly persuaded by the reasoning of Lord Brandon that no sufficient grounds exist to support such a term and that for the reasons he gives the appeal must be allowed.

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Brandon. I gratefully adopt his account of the facts and the history of these proceedings.

As my noble and learned friend has pointed out the umpire decided that the charterer was under an obligation to pay the demurrage within two months of the completion of discharge. The breach of contract alleged by the owners was failure on the part of the charterer to comply with this obligation and the damages element is the quantum of damages said to arise from that breach. If there was no such contractual obligation payment more than two months after the completion of discharge was not a breach of contract and accordingly no damages for breach of contract could be successfully claimed. Staughton J said of the umpire's holding on this point ([1985] 2 Lloyd's Rep 180 at 183):

'Quite why the charterer is allowed two months grace is not clear to me, and was not explained by counsel. But there has been no challenge to that conclusion.'

This remained the position in the Court of Appeal ([1987] 1 All ER 957, [1987] 2 WLR 906). The petition by the charterer for leave to appeal to your Lordships' House included a submission 'that it is not a breach of contract to fail to pay damages/demurrage promptly such as to entitle the payee to damages rather than interest'. In argument before your Lordships counsel for the charterer made it plain that he was not submitting

a that there had been no breach of contract by late payment in the present case although his submission was that the contractual term breached was that the demurrage should have been paid from day to day as it arose.

If there was a contractual provision requiring the charterer to pay the demurrage by 11 December 1980, in my opinion, this appeal should be dismissed.

b Briefly, my reasons are that failure to perform this contractual term would involve a breach of contract entitling the owners to damages for that breach, measured by the amount of loss caused to them by the breach. Clause 30, in my opinion, applies whenever payment is made and accordingly applies to a late payment just as much as to a timeous payment. The business of the owners was carried on in US dollars and on receipt of timeous payment in accordance with cl 30 in British external sterling the owners would be expected to convert it as at that date into US dollars at the prevailing exchange rate. If instead of paying on the due date the charterer deferred payment to a later date and if on c that later date the same amount in British sterling converted into US dollars would yield a smaller amount than if converted at the due date the difference in US dollars would be a loss to the owners for which they were entitled, in my opinion, to compensation. I see nothing in the words of cl 30 to preclude such a claim. In my opinion, the reasoning of Donaldson J in *Aruna Mills Ltd v Dhanrajmal Gobindram* [1968] 1 All ER 113, [1968] 1 QB 655 would apply in this situation. Counsel for the charterer sought to distinguish the d *Aruna Mills* case on the basis that the reason the payment in that case was later than it would have been if the contract was performed was not because there was a breach of contract by late payment but because a breach of contract in failing to ship at the proper time resulted in payment being due later than otherwise it would have been. I cannot see why this makes any difference in principle. In both the *Aruna Mills* case and the present case on the basis which I am now discussing the payment was later than it should e have been with resulting loss to the payee in consequence of breach of contract on the part of the payer.

It was submitted for the charterer that the word 'settlement' in cl 30 somehow showed that cl 30 precluded the owners' claim. Clause 30 is dealing with an account between the charterer and the owners which may include items such as demurrage payable by the f charterer to the owners and items such as dispatch payable by the owners to the charterer. Where one is thinking of an account in which it is desired to bring out the balance payable by the charterer to the owners it is natural to regard amounts payable by the charterer to the owners as payments whereas amounts due in the opposite direction will not require to be paid but to be accounted for by deduction. Clause 30 provides not only that payments are to be subject to the exchange rate regime of the clause but that g amounts to be allowed by way of deduction are also to be calculated under the same regime and, in my opinion, the word 'settlement' is a convenient expression to use for this process of allowing an item as a deduction in an account. The express distinction taken between demurrage on the one hand and dispatch on the other is, in my view, in the structure of the clause mirrored by the distinction between payment on the one hand and settlement on the other. In *Monrovia Tramp Shipping Co v President of India, The Pearl Merchant* [1978] 2 Lloyd's Rep 193 at 196 Donaldson J records a submission by Mr h Hobhouse, who appeared for the charterers in that case, in a somewhat similar context to the present 'that settlement in this context means calculation and not payment, and he says that despatch would be settled by deduction from the freight', which Donaldson J adds, 'may well be right.'

j It is true that elsewhere in the charterparty the word 'settlement' occurs in the context of settlement of disputes but I cannot regard it as related to dispute in the context of cl 30. Clause 30 is a clause which has to be applied in reaching a determination of the amount to be paid by the charterer to the owners. If the directions in cl 30 are followed and the amount brought out by the charterer following those directions is the same as the amount brought out by the owners no dispute would arise. The clause as a whole would be put into effect. If, however, a dispute arose about the payment those responsible

for determining the dispute would require to apply the rules for determination of the amount to be paid set out in cl 30. It would be strange indeed if the rules to be followed differed according to whether parties were agreed on how they should be applied or differed on how they should be applied. In both cases the true construction of the rules set out in cl 30 would be applicable. In this context I think it is worth noting that clause 30(D) provides: 'Demurrage/despatch and any other payments, under this Charter Party shall also be made in British External Sterling.' The word 'settlement' is not present in that part of the clause and even after a dispute is determined what is ultimately made is an order for payment of the amount found due. It would not, I think, be correct to describe it as an order for 'settlement' of an amount found due. What is settled by the arbitration procedure is the amount of the payment to be made. a

If I am right so far, the owners had a claim for damages for breach of contract by reason of late payment of an amount equal to the exchange losses sustained by them in consequence of that breach. I agree with my noble and learned friend Lord Brandon that the decision of this House in *London Chatham and Dover Rly Co v South Eastern Rly Co* [1893] AC 429 was limited to claims to recover interest as general damages under the first part of the rule in *Hadley v Baxendale* (1854) 9 Exch 341, [1843-60] All ER Rep 461 and therefore has no application to the present claim. The reasoning of this House in *President of India v La Pintada Cia Navegacion SA* [1984] 2 All ER 773, [1985] AC 104 makes it clear that damages other than interest may be recovered for breach of contract by late payment. Accordingly, on this basis the owners' claim in the present case was a valid claim. b

However, there is no express term in this charterparty obliging the charterer to pay the demurrage within two months of the completion of discharge and the umpire's finding must depend on implication. As a practical matter I can see some attraction in having a term providing for a date on which payment is due which allows sufficient time for making up the necessary account but there is nothing in this charterparty or in the circumstances so far as disclosed in this appeal which would render necessary an implication of such a clause in the present case but would not produce a similar necessity in many other cases which have been reported. c

In general, contracts do not contain provisions regulating the amount or the manner or due date of payment of damages for their breach. A contract may contain a clause quantifying damages and this charterparty is an example in that it provides for demurrage as liquidated damages for breach of the obligation to complete loading and discharge within the lay days provided. But that does not deal with the time of payment. No doubt it is possible to make a provision which has the effect that, in respect of failure to perform a particular contractual term, a party becomes liable to pay a specified amount on a particular day to the other party. An example in which that was held to be the result is afforded by the decision of the Privy Council in *Loh Wai Lian v Sea Housing Corp Sdn Bhd* (3 March 1987, unreported), although in that case the date on which payment of the sum was due was not expressly provided although the Board held that it was implied. d

I have felt considerable difficulty in departing completely from this aspect of the umpire's holding, which was unchallenged in the two courts below and in respect of which it was expressly accepted by counsel for the charterer before your Lordships that a breach of contract had occurred by reason of late payment, although the breach counsel accepted was of a term different from that on which the umpire's decision rested, without giving an opportunity to the umpire to state the justification for his holding. Having regard to the amount at stake and to the issues of general importance which the parties sought to litigate I consider it would be most unfortunate to remit the case to the umpire now. I also agree that it would not be proper for this House to act on the assumption that the necessary contractual term was to be implied in this charterparty where no basis has been suggested on which that could happen. I am further persuaded that difficult questions are posed by this assumption. For example, the lien provided to the owners in respect of demurrage is a formidable though perhaps not completely insurmountable e

a obstacle to the implication of any term in this contract on the lines suggested in the umpire's holding. Such questions have not been examined. In that situation I have reached the conclusion that the course proposed by my noble and learned friend Lord Brandon is the proper one to follow, and I agree with his conclusion that this appeal should be allowed.

Appeal allowed.

b Solicitors: Zaiwalla & Co (for the charterer); Richards Butler (for the owners).

Mary Rose Plummer Barrister.

c Bobolas and another v Economist Newspaper Ltd

COURT OF APPEAL, CIVIL DIVISION

LLOYD AND BALCOMBE LJ

d 9, 10 JUNE 1987

Estoppel – Res judicata – Retrial – Directions given during inconclusive trial – Jury disagreeing in trial of libel action – Trial judge ordering retrial – Whether rulings made and issues decided in first trial binding at retrial.

e Rulings made and issues decided by a judge in the course of a trial where no decision has been reached and a retrial has been ordered are not res judicata and are not binding at the retrial, whether by way of issue estoppel or otherwise (see p 124 f to j p 128 c to e, post).

Dictum of Swinfen Eady MR in *Roe v R A Naylor Ltd* (1918) 87 LJKB at 963 applied.

f Dictum of Diplock LJ in *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 2 All ER at 10 doubted.

Notes

For the doctrine of res judicata and issue estoppel generally, see 16 Halsbury's Laws (4th edn) paras 1527–1535, and for cases on the subject, see 21 Digest (Reissue) 37–50, 23 2–3 16.

g Cases referred to in judgments

Associated Leisure Ltd v Associated Newspapers Ltd [1970] 2 All ER 754, [1970] 2 QB 450, [1970] 3 WLR 101, CA.

Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2) [1966] 2 All ER 536, [1967] 1 AC 853, [1966] 3 WLR 125, HL.

h *Cropper v Smith* (1884) 26 Ch D 700, CA; on appeal 10 App Cas 249, HL.

Egger v Viscount Chelmsford [1964] 3 All ER 406, [1965] 1 QB 248, [1964] 3 WLR 714, CA.

Fidelitas Shipping Co Ltd v V/O Exportchleb [1965] 2 All ER 4, [1966] 1 QB 630, [1965] 2 WLR 1059, CA.

Howard v Pickford Tool Co Ltd [1951] 1 KB 417, CA.

j *Roe v R A Naylor, Ltd* (1918) 87 LJKB 958, CA.

Venn v Tedesco [1926] 2 KB 227.

Cases also cited

Mills v Cooper [1967] 2 All ER 100, [1967] 2 QB 459, DC.

Morgan v Odhams Press Ltd [1971] 2 All ER 1156, [1971] 1 WLR 1239, HL.

Interlocutory appeal

The defendants, Economist Newspaper Ltd, appealed with leave against the order of Tucker J dated 22 May 1987 (i) granting the plaintiffs, George Bobolas and Ethnos Publications: Nicolopoulos-Kyriazis SA, leave to serve a reamended statement of claim and reply to the reamended defence and defence to the reamended counterclaim in their action brought against the defendants for defamation and (ii) holding that the rulings of law made by Kenneth Jones J at the trial of the action would not be binding at the retrial which was ordered by reason of the jury's failure to agree on issues of fact. The facts are set out in the judgment of Lloyd LJ. a b

David Eady QC for the defendants.

Geoffrey Shaw for the plaintiffs.

LLOYD LJ. We are very grateful to both counsel in this appeal. It is an appeal from a decision of Tucker J given on 22 May 1987 whereby he allowed the plaintiffs to make certain very late amendments to their pleadings in this protracted libel action. The trial started in February 1987 before Kenneth Jones J and a jury. It lasted for 42 days. At the end of the hearing the jury were unable to agree, so the judge ordered a retrial. The retrial is, as I understand it, due to start next week. c

The appeal raises an interesting question of law as to the status of issues decided at the first trial, that is to say issues decided by the judge before the jury disagreed. The defendants say that the plaintiffs cannot reargue those same issues. They rely on the doctrine of issue estoppel. The plaintiffs say that that is wrong, the trial starts again de novo. The issues decided at the first trial and any rulings given by the judge are, in the celebrated phrase of Asquith LJ, 'writ in water' (see *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417 at 421). d e

Before Tucker J the argument turned largely on the question of law which I have mentioned. Before us that question of law has receded somewhat, but it is necessary to decide it all the same. The main argument before us has been that the judge erred in the exercise of his discretion. Counsel for the defendants accepts that the burden in that respect will not be easy for him to discharge.

It is necessary now to give the briefest possible description of how the points for decision arise. The first plaintiff, Mr George Bobolas, is a Greek industrialist. He is also the majority shareholder in the second named plaintiff. The second plaintiffs are the publishers of a Greek daily newspaper called τὸ Ἔθνος which, being translated, means 'The Nation'. The defendants are publishers of the Economist Foreign Report. In their issue of 29 April 1982 the defendants published a report about τὸ Ἔθνος which the plaintiffs say is defamatory of them. In para 4 of the statement of claim as originally served they say that the natural and ordinary meaning of the words published is: f g

'... that the Plaintiffs and each of them were publishing "Ethnos" with a subsidy from Soviet Russia, and that they were not part of a free press but rather the mouthpiece of a communist and totalitarian state's propaganda machine.'

I will return to para 4 in a moment since it is one of the paragraphs which the plaintiffs seek to amend, reluctant though they are to amend the natural and ordinary meaning of the words at this late stage of the proceedings. h

In para 7 the plaintiffs say that the natural and probable consequence of the publication was that other Greek newspapers would republish the libel as front page news, which indeed they did. The plaintiffs seek to amend that paragraph also, to which again I will return. j

The defence and counterclaim was served in August 1982. It was originally a fairly simple affair. But it was amended in February 1985 to plead justification and has been reamended on numerous occasions since then. In para 5(A) of the defence the defendants

a gave notice that they will rely on s 5 of the Defamation Act 1952, which I need not pause to read.

b By their counterclaim the defendants retaliated in kind. They said that on 8 June 1982, some six weeks after the publication of which the plaintiffs complain, the plaintiffs published an article about the defendants, the natural and ordinary meaning of which is that the Economist Foreign Report is 'used as a tool by the CIA for the purposes of propaganda and false information.' They say the same about a much shorter article published on the following day, 9 June.

c The plaintiffs, in their defence to the counterclaim served in November 1982, admitted that the plaintiffs and each of them were responsible for the publication of which the defendants complain. But they denied that the words bear the meaning alleged and they go on to say that in any event they were published as a reply to the attack made on them. They can therefore rely on qualified privilege in English law. Finally, in their reply the defendants say that the plaintiffs were activated by express malice.

d The plaintiffs wish to amend their defence to the counterclaim so as to make it clear that, whilst they admit that Mr Bobolas published the words in question, nevertheless they deny that he is vicariously liable for the acts or omissions of the second plaintiffs' servants or agents. Counsel for the defendants surmises, and I do not doubt that he is right, that that proposed amendment is not unconnected with the plea of express malice.

e The plaintiffs also wish to amend the defence to counterclaim to plead certain specific provisions of Greek law which they say would provide them with a defence similar, although not in all respects identical, to the English defence of qualified privilege. In order to establish the defence in Greek law it would be necessary for them to show that they were, at the time of publication, in a state of 'justified indignation'.

f That is an outline of the amendments sought. There are thus two amendments to the statement of claim and two to the reply and defence to counterclaim. They were all allowed by Tucker J. I leave aside the other amendments which were unopposed before Tucker J and which are not therefore the subject of any appeal to this court. I will take the amendments in order, but before doing so it may be as well to deal first with the question of law raised in the appeal.

g Counsel for the defendants submits that the issues decided at the trial should be treated as binding between the parties, even though the trial was in the end inconclusive. He was unable to cite any direct authority in support of that proposition other than the decision of the Court of Appeal in *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 2 All ER 4, [1966] 1 QB 630, which does not, for the reasons which I shall mention later, throw much light on the present problem. Counsel for the defendants says that he must in any event be right in principle. Interest reipublicae ut sit finis litium applies, he says,

h as much to issues decided in the course of litigation as it does to the final outcome. Thus if there had been a preliminary issue in this case which had been decided one way or the other nobody would suggest that it should be relitigated just because the judge has ordered a retrial. He says that the same must apply to issues decided by the judge himself in the course of the trial. Those decisions are unaffected by the fact that the jury subsequently failed to agree.

i Counsel for the plaintiffs on the other hand submits that the trial starts again de novo. That means what it says. Existing issues can be abandoned and fresh issues can be raised. Where the same issue arises in both trials, the judge at the second trial should not be hampered by any decision at the first trial. He should be free to decide the issue for himself.

j In *Roe v R A Naylor Ltd* (1918) 87 LJKB 958 the facts were that the plaintiff, a builder, bought some timber from a traveller employed by the defendants, a firm of timber merchants. The 'sold' note bore a printed clause in very small print saying: 'Goods are sold subject to their being on hand and at liberty when the order reaches the head office.' The plaintiff, who was very short-sighted, was unable to read the condition (so small was

the print) even with his glasses on. Some of the goods were not in stock and were not therefore delivered. The plaintiff brought an action for non-delivery. The county court judge decided in favour of the plaintiff. The Court of Appeal then ordered a retrial. At the retrial the county court judge (it is not clear whether or not it was the same judge) again decided in favour of the plaintiff. There was an unsuccessful appeal to the Divisional Court, and thence to the Court of Appeal. The Court of Appeal dismissed the appeal. In the course of giving his judgment Swinfen Eady MR said (at 963):

'Counsel for the appellants sought to rely upon some finding of the Judge in the first trial of the action. In my opinion, he is not entitled to do that. This action was sent for a new trial, and the second trial superseded the first, and any finding in the first action was got rid of when the action was sent for a new trial.'

I need not I think refer to *Venn v Tedesco* [1926] 2 KB 227, another case relied on by counsel for the plaintiffs. It was a decision of McCardie J. All I need say is that there had in that case been a trial before Lord Hewart CJ and a special jury. Although it does not appear from the report I would suspect that there, as here, the jury disagreed. There was then an order for a retrial. McCardie J held that the fact that the defendants had at the first trial abandoned a certain defence which was available to them under the Public Authorities Protection Act 1893 did not preclude them from raising the same point at the subsequent trial. He described it as a hearing de novo.

Finally counsel for the plaintiffs referred to a relatively recent decision of this court in *Egger v Viscount Chelmsford* [1964] 3 All ER 406, [1965] 1 QB 248, another libel case. The defence was one of qualified privilege. There, as here, the jury disagreed, and there was a retrial. At the first trial the judge had ruled that the occasion was privileged. It does not seem to have occurred to Lord Denning MR or any of the counsel in the case, who were very experienced in matters of this kind, that the ruling at the first trial might be binding at the second trial (see [1964] 3 All ER 406 at 408, [1965] 1 QB 248 at 258). In the present case the judge said:

'My view is this. It makes no difference whether the retrial takes place as a result of a ruling of the Court of Appeal or because the jury has failed to agree. An order or ruling made, whether in interlocutory proceedings or in the course of proceedings at trial, which is a final decision may be described as *res judicata*. But if it is raised in proceedings which have come to no final conclusion it is not *res judicata*. It is as if it were "writ in water". In any event, I see no reason why a party should not reamend their pleadings to circumvent the effect of such a ruling, whether *res judicata* or not. The retrial is a new trial. It is wholly independent of the first. The parties are not fettered by anything that took place in the previous proceedings. I do not agree that Kenneth Jones J's rulings are *res judicata*. In my judgment they are not.'

I agree with the view there expressed by the judge, and I find it difficult to improve on his language. I say nothing as to any interlocutory proceedings concluded before a trial has begun, which may raise other problems. But once the trial has begun any rulings given by the judge in the course of the trial and any issues decided by him lapse when the trial itself lapses. I accept of course the importance of the twin principles on which counsel for the defendants relies: that there should be an end to litigation and that no man should be vexed more than once in relation to the same cause of action. But I find it difficult to apply those principles to a ruling given or an issue decided in the course of a trial when *ex hypothesi* a second trial is called for.

In *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 2 All ER 4 at 10, [1966] 1 QB 630 at 642, on which counsel for the defendants particularly relied, Diplock LJ said that an issue decided between the parties in any proceedings (in that case the proceedings were arbitration proceedings) will bind in subsequent proceedings, and, a fortiori, in the same proceedings. That passage must now be read in the light of the comments in *Carl-Zeiss-*

Stiftung v Rayner & Keeler Ltd (No 2) [1966] 2 All ER 536 at 565–566, 573, [1967] 1 AC 853 at 935, 947 per Lord Guest and Lord Upjohn.

In any event, the difficulty of counsel for the defendants in the present case is more fundamental. There are no relevant 'proceedings'. The effect of the jury's disagreement, followed by the order for a retrial, means that the proceedings have to start all over again. It is as if they had never been. I would therefore reject the argument of counsel for the defendants on the point of law and decide it in the same way as the judge.

I now turn to the argument that the judge erred in the exercise of his discretion. I have already read the unamended version of para 4 of the statement of claim. The plaintiffs now wish to amend that paragraph so as to read as follows:

'The said words meant and were understood to mean, in their natural and ordinary meaning, that the Plaintiffs and each of them had set up their newspaper Ethnos with a Soviet subsidy, that their newspaper was losing circulation and incurring losses which were being met by Russia, and that the Plaintiffs' newspaper was not an independent Greek newspaper because the Plaintiffs were in the pay of the Russians.'

The difference, broadly speaking, between the original plea and the proposed amended plea is that the plaintiffs wish to drop the reference to the newspaper being the 'mouthpiece' of the Russian propaganda machine. They wish to make clear that the sting of the libel consists solely in the allegation of a Russian subsidy.

Counsel for the defendants opposes the amendment. He says that there is no point in it, and if there is a point he does not like it. He fears the Greeks et dona ferentis. He refers to a sentence in the skeleton argument of counsel for the plaintiffs where it is said that one of the purposes of the amendment is to limit the extent to which the defendants are able to take an unfair advantage of the meaning originally pleaded.

That sentence reflects what is said in an affidavit sworn by Mr Martin Kramer, a partner in the firm of solicitors acting for the plaintiffs. He says:

'... The Plaintiffs contend that the existing paragraph means that the Plaintiffs and each of them were publishing Ethnos with a subsidy from the Soviet Union and that *therefore* they were not part of a free press but rather the *paid* mouthpiece of a Communist and totalitarian state's propaganda machine. It is the Defendants' contention that the Plaintiffs' complaint was simply that Ethnos was a Soviet mouthpiece, and it is this which the Defendants say they can justify. It is the Plaintiffs' case that the Defendants' contention involves taking the word "mouthpiece" out of context, and that the allegation of Soviet subsidy is all important. The Plaintiffs now wish to amend their pleading in order to make even clearer the nature of their own complaint and to limit the extent to which the Defendants are able to take what the Plaintiffs regard as an unfair advantage of the original appearance of the word "mouthpiece" in the pleaded meaning in the Statement of Claim. (Mr Kramer's emphasis.)'

Finally counsel for the defendants stresses, as he stresses in relation to all the proposed amendments, that it comes at a very late stage indeed in these proceedings: five years after the original pleading. He relies on what was said by Lord Denning MR in another libel case, *Associated Leisure Ltd v Associated Newspapers Ltd* [1970] 2 All ER 754 at 758, [1970] 2 QB 450 at 456. That passage is as follows:

'... when the defendant seeks to plead justification at a late stage, his conduct will be closely enquired into. The court will expect him to have shown due diligence in making his enquiries and investigations. The court may well refuse him application if he has been guilty of delay or not made proper enquiries earlier.'

Counsel for the plaintiffs says in answer that, since there is to be a retrial, there could be no objection to each side taking the opportunity to put its tackle in order before the

retrial starts. The judge, as I have said, concentrated mainly on the point of law, but he also explained his approach to the exercise of his discretion. What he said about that was as follows:

'The defendants are unable to point to any specific prejudice which could not be overcome by an order for costs. Of course the plaintiffs have in mind some advantage to themselves in making these reamendments and there must be a corresponding disadvantage to the defendants. In that sense the defendants' case is prejudiced but it is not unfairly prejudiced. I look to see if there is any unfair or real prejudice. The defendants have not suggested that there would be. Of course they say the application is late but it has not been suggested that they will be unable to call specific evidence as a result of this, or that they will be handicapped in the calling of witnesses or that witnesses have died or are unavailable. If they had done so I would have been influenced by it.'

On that approach the judge granted the leave to reamend para 4.

Once again I find myself in complete agreement with the judge. He asked himself the right questions in relation to this late application to amend. His approach is in line with the decision of this court in *Associated Leisure Ltd v Associated Newspapers Ltd*, and in particular with a passage from the judgment of Edmund Davies LJ which I should read ([1970] 2 All ER 754 at 758-759, [1970] 2 QB 450 at 457):

'The defendants rightly accept that by the words complained of here they make grave charges. They also accept that their application for leave drastically to amend their defence is very belatedly made. So it is. Even so, should it be granted? The all-embracing principle applicable to such a case as the present was enunciated by Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 at 710-711 in classic words: "... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right." To that approach all other considerations must be subordinate.'

For my part I would regard the proposed amendment as falling within the all-embracing principles enunciated by Bowen LJ in *Cropper v Smith*. Like the judge I would therefore allow the amendment to para 4.

I come now to the proposed amendment to para 7. The original pleading was that the natural and probable consequence of the original publication was that there would be republication by various newspapers in Greece. The pleading was put in that way in reliance on a passage which appears in *Gatley on Libel and Slander* (8th edn, 1981) p 118, para 267(ii). The plaintiffs now wish to strengthen their pleading by adding that the consequence was not only natural and probable but inevitable, and, indeed, intended. As to the inevitability of the consequence, it seems to me that that was already covered by further and better particulars of the pleading, which were given as long ago as November 1982. As to intention, counsel for the defendants submits that this is the first time that any issue has been raised as to the defendants' state of mind. He says that the evidence at the trial was uncontroversial on that point, and in the light of that uncontroversial evidence the proposed amended plea must fail. It would be impossible for the jury at the retrial to find that the defendants had intended republication. He relies in particular on the fact that the *Economist Foreign Report* is supplied to subscribers only and expressly states that the information contained in the report is confidential and not for dissemination.

a Counsel for the defendants also relies, in relation to the amendment to para 7, on a finding which the judge made in the course of the trial which is now, he says, res judicata. The judge said:

b 'In all the circumstances it seems to me to be impossible to hold other than that the republication in any other newspaper was the voluntary act of a free agent, namely the editor of that paper, over whom the defendants had no control and for whose acts they were not answerable, and therefore not something for which the defendants should be held liable.'

He says that that gives rise to a classic instance of issue estoppel. That is the point of law with which I have already dealt in the course of this judgment. I say no more about it now. In my judgment it does not bind the plaintiffs at the retrial.

c Counsel for the plaintiffs, on the other hand, argues that the fact that the information is stated in the Economist Foreign Report to be confidential is not in itself conclusive. It may of course be, as he would accept, that the amended plea will not succeed. It may be that it is unlikely to succeed. But that is not for us to say. Unless it is certain to fail the likelihood of the amended pleading succeeding is not a ground for refusing the amendment. The judge has found that the defendants will suffer no relevant prejudice as a result of the amendment to para 7. I can see no basis on which this court could d interfere with the judge's discretion in that respect.

Turning then to the third proposed amendment in the reply and defence to counterclaim, the plaintiffs now wish to plead that Mr Bobolas is not vicariously liable for the acts or omissions of the second plaintiffs' servants or agents. In the original pleading the plaintiffs had admitted that Mr Bobolas was responsible for the publication e of the newspaper. Counsel for the defendants submits that that could only be on the basis of respondeat superior. Now it is to be said that he is not liable on the basis of respondeat superior, which contradicts the original pleading. Furthermore, the proposed amendment is, says counsel for the defendants, inconsistent with paras 4 and 6 of the reply and defence to counterclaim, in which it is expressly admitted that Mr Bobolas published the words complained of.

f I can see no necessary inconsistency. As counsel for the plaintiffs pointed out, two or more persons may take part in the publication of a defamatory statement. It does not follow that each is vicariously liable for the other so as to infect him with that other's malice, if proved. Of course the plea that Mr Bobolas is not vicariously responsible for the malice, if any, of the second plaintiffs' employees, and, in particular, Mr Leonardos, may, like the other amended pleas now put forward, fail on the facts. But that is another matter. I see no reason why the point should not be pleaded. So, like the judge, I would g allow that amendment too.

h Finally, there is the question of Greek law. The judge at the trial held that the plaintiffs could not rely on a special defence of what I will call qualified privilege in Greek law because it had not been properly pleaded. Counsel for the defendants did not rely on any issue estoppel in that connection, but he says that if the Greek defence is to be raised, then the plaintiffs must show that it is in some way different from the English defence of qualified privilege. If it is the same, the plaintiffs do not need the amendment: it is otiose. If, on the other hand, the Greek defence goes beyond the English defence, in other words if it is more favourable to the plaintiffs, then it is far too late to allow the amendment now. No explanation has been given why the Greek law was not fully pleaded in the first place. If the amendment is allowed it will inevitably increase the length of the trial and add to the costs, since the two experts in Greek law unfortunately j speak no English. Anyone who has any experience of examining or cross-examining experts through an interpreter will appreciate the difficulty.

I have some sympathy with the argument of counsel for the defendants' on this amendment, and perhaps even more sympathy, as had Tucker J, with the judge who will preside at the retrial. I am happy to think that it is more likely to be him than me. Be

that as it may, I can see no ground for refusing the amendment. One of the consequences of the jury failing to agree, and the only beneficial consequence, is that it has enabled the parties to get their tackle in order. One would hope that that would in general, as it should, result in a saving of time and expense at the retrial. Issues which are no longer critical can and should be dropped. I would earnestly hope that the parties would see it in that light and take advantage of the opportunity afforded by the order for a retrial. But, if the plaintiffs wish to raise a new issue which may lengthen the retrial, I cannot see how in justice we can prevent it. Counsel for the defendants submits that the Greek defence remains chimerical. I am not persuaded that it is. I do not of course decide that it will necessarily add anything to the English defence of qualified privilege, but I think it may, and that is enough to allow the amendment. a

So I would allow the amendment in relation to Greek law, although I do so with much more reluctance than in the case of the other amendments sought.

In the result I would allow all the amendments. I would add that even if I had been minded to disagree with the judge I can see no possible ground in this case on which we could have interfered with the exercise of his discretion. On those grounds, both on the point of law and on the point of discretion, I would dismiss this appeal. b

BALCOMBE LJ. I agree that this appeal should be dismissed. On the question of law I am satisfied that, as a matter of principle, the rulings made by a judge in the course of a trial where no decision is reached cannot be binding at the retrial, whether by way of issue estoppel or otherwise. I am not surprised that such authority as exists (Lloyd LJ has referred to *Roe v R A Naylor Ltd* (1918) 87 LJKB 958, *Venn v Tedesco* [1926] 2 KB 227 and *Egger v Viscount Chelmsford* [1964] 3 All ER 406, [1965] 1 QB 248, supports this view. It accords with what I understand to be the principle in the case of a criminal trial where the jury disagrees and there is a retrial. c

On the question about the specific amendments, it is sufficient for me to say that the judge was fully entitled, in the exercise of his discretion, to allow these amendments. On the well-known principles by which an appellate court acts in the case of the exercise of judicial discretion at first instance, there are no grounds on which we could interfere with this decision. d

Appeal dismissed. e

Solicitors: *Allen & Overy* (for the defendants); *Theodore Goddard* (for the plaintiffs). f

Diana Procter Barrister.

O'Sullivan v Herdmans Ltd

a

HOUSE OF LORDS

LORD BRIDGE OF HARWICH, LORD ELWYN-JONES, LORD BRANDON OF OAKBROOK, LORD MACKAY OF CLASHFERN AND LORD ACKNER

14 MAY, 9 JULY 1987

b

Discovery – Discovery against persons not parties to proceedings – Claim in respect of personal injuries or death – Production of documents such as medical records – Whether production must be necessary for fair disposal of action or to save costs – Whether strong case must be made out that impossible or impracticable to conduct action without seeing documents – Administration of Justice Act 1970, s 32(1) – Supreme Court Act 1981, s 34(2) – RSC Ord 24, r 13(1) – RSC (Northern Ireland) (Revision) 1980, Ord 24, r 12(1).

c

The power which the court in Northern Ireland has under s 32(1)^a of the Administration of Justice Act 1970 (which is equivalent to s 34(2)^b of the Supreme Court Act 1981 in England and Wales) to order a person who is not a party to produce documents, such as medical records, relevant to an issue in personal injuries or fatal accident cases is to be exercised so as to achieve the proper administration of justice and is not restricted by the provision in RSC (Northern Ireland) (Revision) 1980, Ord 24, r 12(1)^c (which is in the same terms as RSC Ord 24, r 13(1)) that an order for production is not to be made unless the court is of opinion that the order is necessary either for disposing fairly of the case or for saving costs nor is it subject to a requirement that the party seeking the order must first establish that it is impossible or impracticable for him to conduct his case without seeing the documents (see p 130 *d e*, p 134 *g* to *j* and p 135 *j* to p 136 *b h*, post).

e

Notes

For discovery against persons not parties to the proceedings in personal injuries claims, see 13 Halsbury's Laws (4th edn) para 13.

f

For the Administration of Justice Act 1970, s 32, see 31 Halsbury's Statutes (4th edn) 289.

For the Supreme Court Act 1981, s 34, see 11 *ibid* 787.

Cases referred to in opinions

Farrell v Rotary Services Ltd [1985] 1 NIJB 55, NI HC.

McClelland v Clyde Fuel Systems Ltd [1973] NI 66, NIJB February 1973, NI HC.

McIvor v Southern Health and Social Services Board [1978] 2 All ER 625, [1978] 1 WLR 757, HL.

Appeal

The plaintiff, Sarah Christina O'Sullivan, appealed with the leave of the Court of Appeal in Northern Ireland against the decision of that court (Gibson LJ and Carswell J) on 27

h

a Section 32(1) is set out at p 132 *j* to p 133 *b*, post

b Section 34(2) provides: 'On the application, in accordance with rules of court, of a party to any proceedings to which this section applies, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim—(a) to disclose whether those documents are in his possession, custody or power; and (b) to produce such of those documents, as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—(i) to the applicant's legal advisers; or (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.'

j

c Rule 12(1) is set out at p 134 *c*, post

c

June 1986 allowing an appeal by the defendants, Herdmans Ltd, against the decision of O'Donnell LJ on 31 January 1986 dismissing their appeal against the refusal by Master Wilson on 13 January 1986 of their application for an order that the Department of Health and Social Services produce certain medical records in its possession relating to an application by the plaintiff for industrial disablement benefit. The defendants sought to use the documents in an action brought against them by the plaintiff by writ dated 28 January 1983 for damages for personal injury, loss and damage arising out of byssinosis contracted by the plaintiff as the result of the defendants' negligence and breach of statutory duty. The facts are set out in the opinion of Lord Mackay.

James McNulty QC and Dermot Fee (both of the Northern Ireland Bar) for the plaintiff.
Brian Kerr QC and Norman Lockie (both of the Northern Ireland Bar) for the defendants.

Their Lordships took time for consideration.

9 July. The following opinions were delivered.

LORD BRIDGE OF HARWICH. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Mackay. I agree with it and for the reasons he gives I would dismiss the appeal.

LORD ELWYN-JONES. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Mackay. I agree with it, and for the reasons which he gives I would dismiss the appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Mackay. I agree with it, and for the reasons which he gives I would dismiss the appeal.

LORD MACKAY OF CLASHFERN. My Lords, this is an appeal from Her Majesty's Court of Appeal in Northern Ireland with leave of that court against an order that the Department of Health and Social Services produce the records of the decision given on 6 July 1982 of the pneumoconiosis medical board on the application of the appellant plaintiff to be held entitled to payment of industrial disablement benefit and of the decision given on 4 March 1983 by the medical appeal tribunal which heard an appeal from the decision of the board. The decision appealed against is an important one since it marks a change in the practice in Northern Ireland in relation to the granting of such orders.

The plaintiff claims to have contracted byssinosis by reason of exposure to excessive flax dust in the course of her employment between 1950 and 1961 in the factory of the respondent defendants. She claims that as a result she has severe respiratory impairment with considerable consequences for her working ability and her social and domestic activities. She claims that the defendants were negligent and in breach of their statutory duty under the Factories Act (Northern Ireland) 1938. The defendants deny liability. One of the major issues in the action is whether the plaintiff's chest condition is properly to be regarded as flax byssinosis. The Court of Appeal describe the background to the case as follows:

'In the diagnosis of flax byssinosis the history given by the patient is of peculiar importance. The disease is brought on by inhalation of excessive amounts of flax dust. The aetiology is obscure, but it is accepted that a pulmonary condition can be attributed to a reaction to the components of such dust when inhaled in sufficient quantities. That condition can be very difficult to distinguish clinically from other chest conditions which have no connection with exposure to dust. We were

a informed by counsel, and this corresponds with our own experience of such cases, that the distinguishing features for which a medical examiner looks to support a diagnosis of byssinosis are a combination of factors, in which major importance may be attributed to the date of onset of symptoms after first exposure, the day of the working week on which symptoms are first present to a significant degree (the so-called "Monday syndrome"), the progression of symptoms to other days of the week and the extent of remission in the evenings, at weekends and in holiday periods. In his grounding affidavit sworn in support of the second application, Mr F J Irvine, partner in the defendant's solicitors, states: "My experience in such litigation has revealed that an analysis of the history of symptoms and complaints made by the Plaintiff is crucial to the diagnosis of flax byssinosis." This averment was not challenged by the plaintiff's counsel, and it accords with our own experience that in cases where the diagnosis is contested the history given by a plaintiff at different times is the subject of minute examination. The use which is made of the previous history at the trial of such cases accordingly goes beyond the mere testing of the plaintiff's credit. It was common case that the plaintiff made an application to the Department of Health and Social Services for industrial disablement benefit. In order to do so she would have had to complete Form BL 100 (Pn), setting out certain personal details and her working history. The normal procedure then was that the department would send Form BL 77 (FB) to the defendant for completion and return, to give the department verification of the [plaintiff's] periods of employment with the defendant and the work which she did in that employment. The plaintiff was examined by the pneumoconiosis medical board, consisting of two respiratory physicians, who carried out a clinical examination and took a history from her. Their practice after concluding their examination and forming their opinion is to complete Form BL 180 (B), of which a sample from another case was put in evidence. The section containing the history contains the following instruction to the examiner: "The statement should record, as nearly as possible in the claimant's own words, what he has to say about his present illness and how it developed, and should be read to him for agreement and signature below." There appears a space for the claimant's signature at the bottom of the section of the form. The members of the board set out their decision on the diagnosis of byssinosis, and add in the next section a statement of findings "ON ALL QUESTIONS OF FACT MATERIAL TO THE DECISION ON DIAGNOSIS". A claimant whose claim has been refused by the board has the right of appeal to the medical appeal tribunal composed of two respiratory physicians and a lawyer as chairman. These physicians examine the claimant again and consider the material contained in Form B. 1. 180(B) completed by the board, together with any material submitted on behalf of the claimant, which may include a medical report or medical reports obtained to support the claim. Their practice is to take a fresh history from the claimant and record it. The tribunal then comes to a conclusion, and records it on Form BL 255 (C). This form, a sample of which was produced in evidence, contains the tribunal's findings and conclusion in some detail. The sample before us contains an extract from a medical report obtained from a respiratory physician and submitted on the claimant's behalf. In some cases that report may be one which the claimant's solicitor has obtained for the purpose of the claim brought against the employer. [Counsel] for the defendant conceded that if the tribunal's decision on Form BL 255 (C) is to be discovered some editing would need to be done in order to remove any extracts from such a report, and possibly also discussion of its contents in the decision. He submitted, however, that this would not in practice be difficult to do.'

The plaintiff's solicitors had obtained copies of these forms from the Department of Health and Social Services and the defendants made an application under RSC (Northern Ireland) (Revision) 1980, SI 1980/346, Ord 24, r 5 seeking their discovery. This was

resisted on the ground of legal professional privilege and the Court of Appeal, affirming the judge (Kelly J), upheld the claim and refused to order discovery. No appeal is taken to this House against that decision. a

This appeal is concerned with a summons brought under s 32(1) of the Administration of Justice Act 1970 for production of the originals of these documents by the Department of Health and Social Services. The defendants' application for such an order, which was opposed by the plaintiff although not by the department, had been refused both by the master and by the judge (O'Donnell LJ). In refusing the order, the judge had given his reasons orally but no full record of them exists. There were some slight differences of recollection between counsel for the parties before your Lordships as to precisely what the judge had said. It seems clear, however, that he refused the order by an exercise of his discretion in accordance with the views expressed by himself (O'Donnell J) in *McClelland v Clyde Fuel Systems Ltd* [1973] NI 66. Counsel for the party applying for the order in that case had argued that s 32 of the 1970 Act had made no difference to the law in Northern Ireland and that the principles on which the discretion of the court should be exercised should be the same as those previously applied. The judge, dealing with this matter, said (see NIJB, February 1973, p 6): b

'Although I consider that the Act of 1970 did intend to make a change in the existing law, I consider that in exercising its discretion a court should have regard to the earlier decisions dealing with the production of medical records and notes.' c

It appears from these earlier decisions that the power to make an order which had the effect of securing production of such documents was regarded as closely circumscribed and a very strong case had to be made out that it was impossible or impracticable for the party seeking the order to conduct his case without seeing the documents. Accordingly, it was a test on these lines that the judge applied in considering whether he should exercise his discretion to make an order in the present case. d

Before the passing of the 1970 Act a party who wished to have access to medical records was obliged to make an application to the court to stay further proceedings in the action under s 27 of the Supreme Court of Judicature Act (Ireland) 1877 until the other party made the records available. The medical records would normally not be in the custody of that other party to the action but this was the only method available to force that party to give consent for the production of these records to the party applying for the stay. Section 27(5) enabled the High Court and the Court of Appeal to stay proceedings in any cause or matter 'so far as may be necessary for the purposes of justice'. There was, at that time, no power to make an order at any stage before trial for disclosure or production against anyone who was not a party to the proceedings and it was obviously a strong step for the court to stay an action brought by a plaintiff so that the defendant could obtain production of medical records not in the plaintiff's possession. No doubt these circumstances along with the wording of the statutory provision on which the procedure was founded led the court to regard the power to stay as closely circumscribed in the manner that I have mentioned. e

A party to an action could then and still can obtain production to the court at the trial by a third party of a document relevant to the action by a subpoena duces tecum. The issue of such a subpoena is an administrative act at the instance of the party seeking the document and if the third party had any reason to dispute the validity of the subpoena he had an opportunity to do so by applying to the court to set it aside. f

The 1970 Act introduced in Northern Ireland, as it did in England and Wales, new provisions in this respect¹. Section 32, which is the relevant provision in this appeal is, so far as relevant, in these terms: g

¹ Section 32 of the 1970 Act has been repealed as regards England and Wales and now applies to Northern Ireland only. Section 34 of the Supreme Court Act 1981 makes equivalent provision for England and Wales. h

a '(1) On the application, in accordance with rules of court, of a party to any proceedings in which a claim in respect of personal injuries to a person or in respect of a person's death is made, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising out of that claim—(a) to disclose whether those documents are in his possession, custody or power; and (b) to produce to the applicant such of those documents as are in his possession, custody or power . . .'

b Section 33 provided that the power to make rules of court should include power to make rules of court as to the circumstances in which an order could be made under s 32. At the time with which this appeal is concerned the relevant rules of court were in Ord 24 of RSC (Northern Ireland) (Revision) 1980. That order contains a number of rules relating to discovery and inspection of documents. Rule 1 provides for discovery between parties to a cause or matter and rr 2 to 5 are related to that subject. Rule 6 by para (2) and its later paragraphs regulates applications for an order under s 32 of the Act and provides that they shall be made by summons which must be served personally on the person against whom the order is sought and on every party to the proceedings other than the applicant. Rule 6(6) provides so far as relevant as follows:

c 'No person shall be compelled by virtue of such an order to produce any documents which he could not be compelled to produce . . . (b) in the case of a summons under paragraph (2), if he had been served with a writ of subpoena duces tecum to produce the documents at the trial.'

d Rule 6(8) provides:

'For the purposes of rules 9 and 10 an application for an order under the said section 31 or 32(1) shall be treated as a cause or matter between the applicant and the person against whom the order is sought.'

Rule 7 provides:

e 'On the hearing of an application for an order under rule 1, the court . . . shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.'

Rule 8 provides:

f 'A party who has served a list of documents on any other party, in compliance with an order under rule 1, must allow the other party to inspect the documents referred to in the list . . . and, accordingly, he must when he serves the list on the other party also serve on him a notice stating a time within seven days after the service thereof at which the said documents may be inspected at a place specified in the notice.'

g Rule 9 provides:

'(1) Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice . . .'

h and then makes a provision in para (2) on the same lines as the concluding part of r 8. Rule 10 provides:

'(1) If a party who is required by rule 8 to serve such notice as is therein mentioned or who is served with a notice under rule 9(1)—(a) fails to serve a notice under rule 8 or, as the case may be, rule 9(2), or (b) objects to produce any document

for inspection, or (c) offers inspection at a time or place such that, in the opinion of the court, it is unreasonable to offer inspection then or, as the case may be, there, then subject to rule 12(1), the court may, on the application of the party entitled to inspection, make an order for production of the documents in question for inspection . . .'

Rule 11 provides:

'At any stage of the proceedings in any cause or matter the court may, subject to rule 12(1), order any party to produce to the court any document in his possession, custody or power relating to any matter in question in the cause or matter and the court may deal with the document when produced in such manner as it thinks fit.'

Rule 12(1) provides:

'No order for the production of any documents for inspection or to the court shall be made under any of the foregoing rules unless the court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.'

The provisions of rr 7 and 12 appear to be the first provisions in statute or rules of court preventing the court in Northern Ireland from making orders for discovery or related matters unless the court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs. A similar provision had been introduced in England and Wales by r 13 of the Rules of the Supreme Court, 1 November 1893 (see now RSC Ord 24, r 13(1)).

From these provisions applying in Northern Ireland it is clear that the documents which may be ordered to be produced under s 32 are restricted to those relevant to an issue arising out of a claim in respect of personal injuries or death and which the holder could be compelled to produce if he had been served with a writ of subpoena duces tecum to produce them at the trial. The provision of r 6(6) on this point was obviously not brought to the attention of the Court of Appeal in the present case since they were a little less certain than Lord Diplock had been in *McIvor v Southern Health and Social Services Board* [1978] 2 All ER 625 at 628, [1978] 1 WLR 757 at 761 that discovery is confined under s 32 to 'those documents of which production could ultimately be obtained at the trial on subpoena duces tecum'.

It was submitted to your Lordships, although this had not been submitted to the Court of Appeal, that r 12, which I have quoted above, applied to orders under s 32 and that in this respect r 12 was part of the specification in the rules of the circumstances in which the court should have power to make an order under that section. It was argued for the plaintiff that an order under s 32 is made under r 6 and that when r 12 refers to 'the foregoing rules' that includes r 6.

In my opinion, while r 6 provides the procedure to be followed in making an order under s 32(1) it is not correct to describe an order under s 32(1) as an order under r 6 since that rule is not the authority for the order but merely prescribes the method by which it is to be applied for and prescribes circumstances in which such an order may be made. Rule 6(8) itself describes such an order not as an order under that rule but as an order under s 32(1). If it had been intended to apply a proviso such as is found in r 12 to the subject matter dealt with in r 6 one would have expected it in r 7 which deals with an analogous proviso applied in respect of orders under r 11 but, in my opinion, the plaintiff's argument on this point is most effectively met by noting that the immediately foregoing rules to r 12, namely rr 10 and 11, empower the court to make orders for production of documents for inspection and for production of documents to the court and that these two rules conferring power to make orders do so expressly subject to r 12(1). In contradistinction to that, r 12(1) is nowhere mentioned in r 6 and the provisions of r 6(8) underline the fact that r 10 is dealing with something quite distinct from the subject matter of r 6. I conclude, for these reasons, that r 12 does not apply to restrict the power to make orders under s 32(1).

I turn now to the principal issue with which the Court of Appeal was concerned in the present case. The plaintiff argued that the principles on which the judge at first instance exercised his discretion based on the tests for the exercise propounded by him in *McClelland v Clyde Fuel Systems Ltd* [1973] NI 66, were correct and that it was right to use the practice developed before 1970 in exercising the discretion conferred by s 32. The defendants, on the contrary, submitted that the pre-1970 case law was not an appropriate basis on which to exercise the new discretion which had been conferred by s 32. On this the Court of Appeal expressed its conclusion thus:

'We have come to the conclusion, after careful consideration of the authorities and the implications of a change in practice, that the argument put forward for the defendant is correct. We are in agreement with the views expressed by the judge in *McClelland v Clyde Fuel Systems Ltd* that discovery should not be ordered under s 32 as a matter of course, and we also share his opinion about the undesirability of fishing expeditions for documents. We further consider that a party seeking discovery should have to make out a positive case, based on sufficient evidence and not on unsupported averments, that the respondent to the summons is likely to have or to have had in his possession, custody or power documents which are relevant to an issue arising out of the plaintiff's claim. That does not in our opinion mean that he must establish that he and his advisers would be unable to prepare or present his case without resort to the documents. The present application itself poses the issue. It would be possible for the defendant's medical advisers to reach their diagnosis and advice the defendant without recourse to the records. The deponent Mr Irvine has not attempted to aver and counsel has not attempted to argue to the contrary. But the records are directly relevant to the issues in the action in the way in which I earlier set out, and the ability to make proper use of their contents may well make a material difference to the outcome of the action. In these circumstances it would in our view be wrong to deny the defendant access to them, and a limitation on the discretion of the court which would have that effect would in our opinion be unjustified and contrary to the intention of Parliament, as we understand it to be, in enacting s 32(1) of the 1970 Act. We do not think that we can usefully attempt to lay down a comprehensive definition of the situations in which discovery should be ordered under s 32(1). As Lord Lowry LCJ observed in *Farrell v Rotary Services Ltd* [1985] 1 NIJB 55 at 61, each case must be judged on its own facts. It is sufficient for present purposes to say that in our opinion the extent of the discretion of the court was too closely circumscribed in *McClelland v Clyde Fuel Systems Ltd*, and that in relying on the propositions which he there laid down the judge applied a wrong principle. We consider that on a proper approach to the ambit of s 32(1) of the 1970 Act and the extent to which the discretion of the court to order discovery should be exercised, the records should in the present case be disclosed.'

In the argument before your Lordships counsel for the plaintiff clearly and fairly accepted that the documents in question were documents which the department could have been compelled to produce if they had been served with a writ of subpoena duces tecum to produce them at the trial. Although he suggested that they were confidential he agreed that such confidentiality as they had would not found a valid objection to their being produced at the trial. No doubt it was because the Department of Health and Social Services took the view that it would not be right to hand these documents over to the defendants without the consent of the plaintiff or an order of the court that this application was necessary. Accordingly, there is no dispute between the parties that the documents should be produced; the only live question is *when* they should be produced.

In terms of s 32(1), when an application has been made in accordance with the rules in proceedings of the kind described and in the circumstances specified in the rules, all of which prerequisites have admittedly been met in the present case, the court has a power in no way expressly fettered to order production of any documents which are relevant to an issue arising out of the claim as these documents admittedly are. Where such an

unfettered power is given, in my opinion, it is to be construed as a power to be exercised when its exercise would help to achieve the purpose of the Act which is the proper administration of justice or, to put the matter negatively, in the words of Lord Diplock in *McIvor v Southern Health and Social Services Board* [1978] 2 All ER 625 at 627, [1978] 1 WLR 757 at 760, the court can decline to make an order—

‘if it is of opinion that the order is unnecessary or oppressive or would not be in the interests of justice or would be injurious to the public interest in some other way.’

In my opinion, there is no factor present in the circumstances of this case which would indicate that it would be just to refuse to exercise the power and there are strong factors in favour of the exercise of the power. If the case goes to trial it is obviously in the interests of justice that these documents of central importance should be available to both parties before the trial starts so that the jury may be given a fair impression of the central issues from the beginning. To force the defendants to refuse to deploy its full position in cross-examination until the stage is reached at which these documents would be available to it under a subpoena duces tecum would not be in any way in the interests of justice. Further the early production of these documents may well affect the course of the litigation before the trial. It may lead the defendants to consider a settlement of the action and it certainly will enable the medical advisers and the legal advisers of the defendants to appreciate the real issues in the case when they are preparing for trial. The interests of justice are, in my opinion, served by the promotion of settlements rather than the prolongation of litigation and by the possibility of early, complete preparation for both parties to a trial rather than by obliging one party to delay its full preparation until after the trial has actually started.

Where a third party has no objection to the disclosure or production of documents at an early stage in a litigation and no party to the action has an objection to the production of the documents that would be a valid obstacle to their production to the court under a subpoena duces tecum I cannot see any valid reason for the court refusing to make an order under s 32(1) when the prerequisites set out in the section are met. For a party to the action to oppose such an order in these circumstances appears to me to be an attempt to delay the attainment of justice rather than to promote it.

In my opinion the decision of the Court of Appeal in the present case was plainly right, as were its reasons for reaching that decision. The 1970 Act is to be construed according to its own provisions and the discretion which it confers is to be exercised on considerations derived from that construction. It is not, in my opinion, sound to fetter the discretion conferred by the 1970 Act by reference to decisions taken under an entirely different statute in relation to a completely different procedure for seeking to obtain documents from persons not parties to an action by means of forcing a stay of the action until those documents were produced.

For these reasons, in my opinion, this appeal should be dismissed.

LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Mackay. I agree with it, and for the reasons which he gives I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Sharpe Pritchard & Co*, agents for *Donnelly & Wall*, Belfast (for the plaintiff); *Hewitt Woollacott & Chown*, agents for *Francis J Irvine & Co*, Belfast (for the defendants).

Mary Rose Plummer Barrister.

a

International Westminster Bank plc v Okeanos Maritime Corp

CHANCERY DIVISION

PETER GIBSON J

17, 18, 19, 20 FEBRUARY 1987

b

Company – Compulsory winding up – Unregistered company – Foreign company – Jurisdiction – Essentials to establish jurisdiction – Connection with England – Assets not within jurisdiction – Whether court having jurisdiction to wind up company – Whether company having sufficient connection with jurisdiction – Whether benefit reasonably likely to accrue to creditors from winding up.

c

A company which was incorporated in Liberia and was part of a group of companies controlled by a Greek family (the S family), borrowed some \$13m from a bank to provide part payment for the construction of a bulk carrier. The loan was secured by a charge executed by the company over the vessel. The loan agreement was negotiated and executed in England, the agreement required performance in England, the company's only bank accounts were in London, the company gave London as the address of its directors and management decisions were taken in London either directly or through another company, S Ltd, which was an English company with which the S family were associated. The vessel flew the Greek flag and notice under the loan and mortgage agreements had to be given to a company in Greece which was also controlled by the S family. The company breached the loan agreement with the bank, which, after obtaining judgment against the company for some \$14m, then presented a petition to wind up the company and applied for the appointment of a provisional liquidator. Affidavit evidence was filed that no member of the S family had ever had a beneficial interest in any shares of the company, that all the members of the S family had resigned as directors of the company, that any responsibility that S Ltd had in connection with the vessel had been brought to an end and that the vessel was being managed by a company in which the S family had no interest. On that basis the company contended that the court had no jurisdiction to wind it up because it had no assets within the jurisdiction.

f

Held – The presence of assets in England was not essential to confer jurisdiction on the court to wind up a foreign company. The court could wind up a foreign company if there was a sufficient connection with England and a reasonable possibility that benefit would accrue to the company's creditors from the winding up. On the facts, there was evidence indicating that the company had sufficient connection with England to confer jurisdiction, since, in particular, the loan agreement with the bank was negotiated and executed in England and required performance in England and there was evidence to suggest that the company was effectively managed in England either directly or through S Ltd and that it carried on business in England. Moreover, no other jurisdiction was more appropriate for the winding up of the company, since the connection with England was closer than with the country of incorporation, namely Liberia, or with the country where the vessel was registered, namely Greece. Furthermore, there was a reasonable possibility that the liquidator might be successful in bringing an action under ss 213^a

h

^a Section 213, so far as material, provides:

j

(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company . . . or for any fraudulent purpose, the following has effect.

(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.'

and 214^b of the Insolvency Act 1986 against some members of the S family resident in England which would benefit the creditors. Accordingly, the court would grant a winding-up order and, in view of the exceptional nature of the case, in particular the fact that the vessel, the only known asset of the company, could not be located, it was appropriate to appoint a provisional liquidator, and the bank's request for the appointment of someone other than the Official Receiver would be granted (see p 145 *h j*, p 148 *b c h* to p 149 *c e* to *j* and p 150 *a* to *f h j*, post).

Dictum of Megarry J in *Re Cia Merabello San Nicholas SA* [1972] 3 All ER at 460 applied.

Banque des Marchands de Moscou (Koupetschesky) (in liq) v Kindersley [1950] 2 All ER 549 and *Re Eloc Electro-Optieck and Communicatie BV* [1981] 2 All ER 1111 considered.

Notes

For the winding up of a foreign company, see 7 Halsbury's Laws (4th edn) para 1865, and for cases on winding up unregistered companies, see 10 Digest (Reissue) 1275–1278, 8048–8066.

Cases referred to in judgment

Allobrogia Steamship Corp, Re [1978] 3 All ER 423.

Banque des Marchands de Moscou (Koupetschesky) (in liq) v Kindersley [1950] 2 All ER 549, [1951] Ch 112, CA; *affg* [1950] 2 All ER 105.

Cia Merabello San Nicholas SA, Re [1972] 3 All ER 448, [1973] Ch 75, [1972] 3 WLR 471.

Eloc Electro-Optieck and Communicatie BV, Re [1981] 2 All ER 1111, [1982] Ch 43, [1981] 3 WLR 176.

Siskina (cargo owners) v Distos Čia Naviera SA, The Siskina [1977] 3 All ER 803, [1979] AC 210, [1977] 3 WLR 818, HL.

Cases also cited

Deverall v Grant Advertising Inc [1954] 3 All ER 389, [1955] Ch 111, CA.

Hercules (A/S Dampskib) v Grand Trunk Pacific Rly Co [1912] 1 KB 222, CA.

Sarflax Ltd, Re [1979] 1 All ER 529, [1979] Ch 592.

South India Shipping Corp Ltd v Export-Import Bank of Korea [1985] 2 All ER 219, [1985] 1 WLR 585, CA.

Theodohas, The [1977] 2 Lloyd's Rep 428.

Petition

By a petition dated 3 February 1987 International Westminster Bank plc sought an order that Okeanos Maritime Corp, a company established under the laws of the Republic of Liberia, be wound up under the provisions of the Insolvency Act 1986, on the grounds that it was an unregistered company which was unable to pay its debts and that it was just and equitable that it should be wound up. The facts are set out in the judgment.

W A Blackburne QC and Geoffrey Vos for the petitioner.

Hilary Heilbron for the company.

b Section 214, so far as material, provides:

'(1) ... if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.

(2) This subsection applies in relation to a person if—(a) the company has gone into insolvent liquidation, (b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and (c) that person was a director of the company at that time ...'

PETER GIBSON J. On 3 February 1987 International Westminster Bank plc (the petitioner), a subsidiary of National Westminster Bank plc (NatWest), presented a petition for the winding up of Okeanos Maritime Corp (the company). On 5 February the petitioner, appearing by Mr Vos, applied for the appointment of a provisional liquidator. That application was made *ex parte* but short notice was given to the company which the next day appeared by Miss Heilbron to oppose the application. As the major question raised by the application related to the jurisdiction of the court which the company challenged, and as the company wished to put in evidence, I acceded to her submission that the application be stood over to enable such evidence to be filed. The matter has come back before me *inter partes* after an 11-day adjournment. I am grateful to Mr Blackburne leading Mr Vos for the petitioner and to Miss Heilbron for their helpful arguments in what is a very unusual case.

The affidavits filed on both sides reveal a number of matters to be in dispute, but the following appears to be not challenged or is supported by documentary evidence. The Samonas family is a Greek family having at its head Captain John Samonas. His wife is Maritsa Samonas and they have three sons, Christos, Dimitri and Nikolas. The family has been connected with shipping for many years. An English company, John Samonas & Sons Ltd (JSS), which on its headed paper describes itself as 'Shipbrokers and Shipagents' was incorporated in 1966. Its present directors are Christos, Dimitri and Nikolas Samonas and one other and their offices are in the City of London. Christos, Dimitri and Nikolas Samonas are all resident in England. Captain John Samonas has sworn two affidavits in which he gives a Greek address, but on 12 December 1984 a letter from Dimitri Samonas on JSS paper gives the JSS office address as Captain John Samonas's and his wife's address, and Captain John Samonas's name with a London address is given in the current London telephone directory. If he has moved to Greece it is only recently that he has done so.

There are four ships which bear names which show their apparent relationship to each other and to Captain John Samonas as they all include the name 'Samjohn'. The Samjohn Captain is the vessel relevant to the present case, being the company's only known asset. The Samonas family, through Liberian or Panamanian companies, owns the other three ships. One other company I must mention is Esperos Shipping Co SA (Esperos). This is a Panamanian company and a search of the Panamanian Companies Register shows as its board of directors Captain John Samonas, Nikolas Samonas and Mrs Maritsa Samonas. However, another Greek, Mr Vennis, is its general manager.

The company was incorporated in Liberia on 16 June 1982. Until 15 August 1986 but according to Captain John, Christos, Dimitri and Nikolas Samonas not thereafter, the board of directors of the company consisted of Captain John Samonas (who was also president), Mrs Maritsa Samonas, Christos, Dimitri and Nikolas Samonas. Its share capital consists of 100 bearer shares of no par value. It has a registered office in Monrovia but its byelaws allow it to have an office or offices within or outside Liberia as the board may from time to time appoint or the business of the company may require, and they permit it to hold directors' meetings whenever and wherever the board requires.

The Samonas family has had dealings with NatWest over many years and by 1982 the Samonases were held in high regard by NatWest. On 12 May 1982 Dimitri Samonas approached Mr Haynes, the manager of the shipping section of the corporate financial Services Department of NatWest, to finance the purchase of a newly built bulk carrier. The Samonases were not willing to provide written guarantees of any sort, apparently because of fears that the Revenue might obtain access to such documents with possible fiscal consequences for them. Dimitri Samonas told Mr Haynes that the Samonases would verbally assure NatWest that they would support the vessel from other fleet income, their three ships all being unincumbered. On 4 June 1982 Mr Haynes wrote to Captain John Samonas offering a facility of \$US12.8m and pointing out that NatWest had been looking for a formal undertaking by the other shipowning companies in his group but in view of the personal assurances that Captain John Samonas and his sons had given him, NatWest was not asking for a formal undertaking. The draft facility letter

supplied by NatWest indicated that the loan facility was to be offered to a Liberian company to be formed.

The Samonases then changed their plans, proposing instead to purchase a new vessel, first from a Danish yard, and by April 1983 they had decided that the new vessel would be built in a Japanese yard. They sought finance for that contract from NatWest. On 23 August 1983 the company entered into a contract with a Japanese shipbuilder for the building of a 64,100 ton bulk carrier at a cost of about \$18m. The address of the company for the service of notices was given as care of JSS in London. The contract was signed by Captain John Samonas for the company and the contract included a term that the company should on execution of the contract cause a letter of guarantee to be issued by Captain John Samonas to the shipbuilder, whereby he personally guaranteed payment of the whole of the purchase price. Only on 30 March 1984 were the terms and the execution of that contract approved by the board of the company and in turn by the shareholders.

Negotiations for the financing through NatWest of nearly \$13.5m of the contract price continued that autumn. NatWest was content to rely simply on the Samonases' verbal assurances as Captain John Samonas was told by letter of 8 December 1983, enclosing the petitioner's draft facility letter. On 15 December in London the petitioners' offer was accepted by Dimitri Samonas signing the facility letter on behalf of the company. It was thereby agreed that the facility should be evidenced by a loan agreement and secured by a first preferred mortgage on the vessel, together with an assignment to the petitioner of all the earnings of the vessel. It was a term of the facility letter that there should be no change in the ownership and control of the company for the duration of the facility.

On 30 March 1984 there was a board meeting of the company in London. In addition to approving Captain John Samonas's action in signing the shipbuilding agreement the board resolved to borrow nearly \$13.5m on the terms of the loan agreement and to execute the first preferred mortgage and assignment. The same day there was a meeting of shareholders of the company, the minutes showing Captain John Samonas, Dimitri and Nikolas Samonas as present as proxies for the shareholders. The meeting approved the board's resolutions.

Also on 30 March the loan agreement was executed in London by Captain John Samonas for the company. It provided for a loan of \$13,443,872 on which interest was payable at 1% above London Interbank Offered Rate. The vessel was to be registered under the Greek flag. The company covenanted to keep the vessel fully insured and maintain current operating accounts with the St Mary's Axe branch of NatWest in London into which all the vessel's earnings were to be paid. The company agreed not to dispose of the vessel and not to permit any change in the ownership and control of the company. Again therefore, what was envisaged was that the Samonases would own and control the company. There was a provision that if, inter alia, the company failed to pay interest when it fell due, the petitioner could declare the whole of the indebtedness of the company to be immediately payable. It was provided that notice under the loan agreement should be given to the company care of Esperos in Greece with a copy to JSS in London and legal process could be served on the company at the offices of JSS. JSS was required to write a letter accepting its appointment as the agent of the company for service of process and notices.

On 2 October JSS for the company asked the St Mary's Axe branch to open sterling and dollar accounts in the company's name and on 10 December 1984 Dimitri Samonas wrote to that bank, on JSS paper but signing for the company directly, supplying the name and address of each of the directors of the company and the JSS office was given as that address. Similarly Dimitri and Captain John Samonas wrote to that branch on 25 January 1985 on JSS paper but directly for the company, requesting a transfer of some \$85,000 to the petitioner, debiting the company's account. At the end of December 1984 the full loan facility was drawn down and the Samjohn Captain was delivered to the company in early January 1985.

a By the first preferred mortgage made on 25 January in accordance with Greek law the company granted the petitioner a first preferred mortgage on the Samjohn Captain. JSS was appointed the agent for the managers of the company so long as the mortgage was in force. In the event of any default the petitioner had the right to take possession of the vessel without giving notice. Notices were again to be sent to the company care of Esperos with a copy to JSS and, to comply with Greek law, an agent and representative of the company in Greece was appointed, namely the managing director of Esperos. Again, b legal process could be served on the company at JSS's office in London. That deed was executed by the company in London, as was a deed of assignment of the same date, whereby the company assigned all its earnings from the vessel to the petitioner.

In 1986 the company was adversely affected by the slump in the shipping market. The first signs of financial difficulties affecting the company appear in the late summer of 1986. The company failed to pay its insurance premium of nearly \$35,000 due on 25 July c 1986. On 15 August NatWest wrote to Dimitri Samonas about the level of borrowings on the accounts of, inter alia, the company and JSS. The company's sterling account was £2,691 overdrawn while the dollar account was \$62,214 overdrawn. The company was due to pay \$593,584.29 interest on 30 September. Because of the company's difficulties it was agreed that only \$250,000 needed be paid then, but the balance of the interest instalment, together with further interest thereon, had to be paid on or before 14 d November. The \$250,000 were paid but on 1 October NatWest wrote again to Dimitri Samonas pointing out that, inter alia, the company's account was in overdraft in excess of £26,000 and requesting that no further cheques be drawn.

On 3 October 1986 Dimitri Samonas for JSS wrote to NatWest saying: 'My principals have had a very happy association with the Bank for over 20 years.' In the context, that e could not mean the company and could only mean the Samonas family. He sought by that and a letter of 14 October the consent of the bank to the company using the earnings from the Samjohn Captain to keep it trading. But no consent was forthcoming and the bank warned that failure to pay the balance of the interest instalment on 14 November would be an act of default. On 22 October Dimitri Samonas wrote pointing out that the debts of the Samjohn Captain amounted to \$350,000 and on 24 October he wrote again f saying that the vessel was not producing the funds necessary to pay all the various expenses. On 10 November he wrote again saying that he had had an opportunity of consulting with the shareholders of the company. Their own resources had been exhausted. He asked that the overdue interest be capitalised. That was refused. On 13 November Dimitri Samonas wrote that there were no funds to meet the interest payment due on 14 November. There was a default the next day. On 17 November the petitioner g declared the whole of the indebtedness to be due.

The company had on 4 November through JSS in London negotiated a charterparty whereby the vessel was to be chartered to a Japanese company, Daiichi, to take coal from Newcastle, New South Wales, to Japan and a sum of \$210,000 was to be paid initially into the NatWest account of the company. However on 18 November the company in breach of contract directed Daiichi to pay that sum to an account at the Midland Bank in h London. The petitioner decided to arrest the Samjohn Captain which was due to arrive at Newcastle on about 19 November. A warrant for her arrest was obtained from a New South Wales Court but through ill luck bad weather delayed the vessel coming into port. On 21 November Daiichi's Australian agents in Newcastle heard of the proposed arrest and informed Daiichi. Daiichi sought and obtained from JSS on 21 November an option to cancel the charter. All the decisions taken in the name of the company in respect of j the charterparty were taken after the Samonases had been consulted. That option was exercised on 23 November by Daiichi's London agents telephoning Christos Samonas. In the meantime the Samjohn Captain, no doubt as a consequence of JSS being made aware of the petitioner's intention to arrest the vessel, never put into Newcastle and so avoided arrest. Attempts by the petitioner to communicate with the vessel have failed or at any rate have met with no response. The vessel is not trading but is 'semi-laid up' (in the

words of Mr Vennis as reported by Christos Samonas) somewhere, but where has never been revealed, off Indonesia.

The company failed to pay another insurance premium due in October and the insurers on 24 November visited the offices of JSS and were told of the financial difficulties of the vessel and that the premium could not be paid. The petitioner is having to pay substantial sums to keep the vessel insured. There were without prejudice negotiations between the company and the petitioner in December. Dimitri and Christos Samonas attended two meetings as representatives of the company, but no agreement was reached.

On 23 December proceedings were issued by the petitioner in the Commercial Court for the recovery of its debt owed by the company. On 24 December Dimitri Samonas wrote to the petitioner saying that JSS was no longer the agent for the company or the Samjohn Captain; but of course the provisions of the loan agreement and the first preferred mortgage required JSS to remain agents for service of proceedings on the company. On 7 January 1987, no notice of intention to defend having been given by the company, the petitioner recovered judgment in the sum of \$14,024,095.47 plus costs. Interest continues to accrue on the debt at over \$5,000 per day.

In the mean time Esperos commenced proceedings against the company in Greece claiming that it had agreed to become the agent of and to manage in Greece the Samjohn Captain for all the vessel's supplies, wages and essential needs, and that it was owed \$840,000 by the company. It claimed that the ship was the only asset of the company and was subject to navigational dangers of every nature, and that the company had the intention of causing Esperos loss and according to information (which and its source were not specified) the company intended secretly to sell the ship. For these reasons Esperos sought a temporary order forbidding the transfer of the legal status of the vessel, which order was granted on 8 December by the Piraeus court.

The application before me had been supported by evidence put in by the petitioner of the insolvency of the company and of the incurring of huge costs and expenses including the accrual of interest since 14 November 1986. Those costs and expenses are estimated by the petitioner to exceed \$800,000 and that sum continues to increase so long as the vessel is not given up.

The affidavit evidence put in on behalf of the company in relation to the question of jurisdiction consists of affidavits from Captain John, Dimitri, Christos and Nikolas Samonas and a short affidavit from Mr Flint, a solicitor, who states that he has the care and conduct of this matter on behalf of the company. Alone of the deponents he states that he is duly authorised to make the affidavit, although he does not state who in the company so authorised him. Mr Flint in his affidavit deposes only to a conversation with Mr Vennis. The burden of that affidavit evidence can be summarised thus: no member of the Samonas family has ever had any beneficial interest in any share in the company; all the Samonases ceased to be directors at a board meeting in Greece on 15 August 1986 when they all resigned and three Greeks with the surname Lemos were elected; by a management agreement dated 1 January 1985 the company appointed Esperos as manager of the Samjohn Captain and by a further agreement of the same date Esperos appointed JSS as its agent; JSS's agency for Esperos was terminated on 21 November 1986 by mutual agreement and all documents relating to the vessel were forwarded to Esperos; no member of the Samonas family owns any shares in or exercises any control or influence over Esperos and the management and control of the vessel are and have since 21 November 1986 been fully in the hands of Esperos, and to the best of the Samonases' knowledge there are no assets of the company within the jurisdiction.

This evidence raises to my mind as many or more questions as or than those which it purports to answer. No affidavit has been supplied by anyone claiming to be a director or officer of the company. Not even Mr Vennis has put in an affidavit, although he is said to be not only the general manager but also the sole shareholder of Esperos and although on 12 February the company's solicitors said that an affidavit would be sworn

by Mr Vennis, and that despite a general strike in Greece they anticipated being in a position to serve that affidavit the following morning.

The deponents in their affidavits are noticeably coy about the identity of the shareholders, past and present, of the company, why it has never been explained and despite being asked by the petitioner's solicitors to provide answers to the question of ownership no information has been forthcoming. When Dimitri Samonas swore that he did not know by whom the shares in the company were held, in my judgment he was being less than frank, having regard to the fact that on 30 March 1984 at the shareholders' meeting he was a proxy for the shareholders and on 10 November 1986 he had told NatWest by letter that he had been consulting the shareholders of the company. If the Samonases were not the shareholders, why did they allow the negotiations with the bank for the financing of the cost of a bulk carrier to proceed on the basis that they were? The stipulation that the beneficial ownership should not change was pointless unless the Samonases, on whose verbal assurances the bank was asked to rely and did rely, were the owners. Why would Captain John Samonas have given a personal guarantee to pay the full cost of building the ship if he had no beneficial interest in the company which owned the ship? It is not a sufficient explanation to say, as he does, that the shipbuilder required it or that the company would find the money: why should he, and not the shareholders, be content to give such a huge guarantee?

Dimitri Samonas says that the Samonases resigned as directors on 15 August at a time when the company was able to pay and was paying its trade debts as they fell due. Apart from the inconsistency of this with the evidence of the failure to pay the July insurance premium, why did the directors resign then in flagrant breach of the loan agreement, providing as it did that there should be no change in the control of the company? Dimitri Samonas accepts that he continued to be involved in the affairs of the vessel, although he says only as a director of JSS as the London agent for the vessel. How were the new directors chosen? There is no evidence indeed that the new directors agreed to become directors. If they did, why is there no evidence whatsoever of any meeting by them or of any decision or act on their part?

There is no evidence as to how and why the agency of JSS was terminated in breach of the company's obligation under the first preferred mortgage apart from the statement that it was by mutual agreement with Esperos. Further, why if the agency of JSS was terminated on 21 November was Christos Samonas accepting on 23 November for the company Daiichi's exercise of the option to terminate the charterparty, and why on 24 November was JSS telling the insurance agents that the insurance premiums would not be paid? Is it really to be believed that Dimitri and Christos Samonas, in negotiating in December for the company as Christos Samonas now deposes, were acting only in their personal capacity at the request of Mr Vennis instead of acting as they had always done for the company? It was not revealed at the time that they were acting merely in their personal capacity.

In relation to Esperos, why if no Samonas owns any share in or exercises control or influence over Esperos are the only directors shown in the Panamanian Companies' Register members of the Samonas family? Captain John and Nikolas Samonas say they are non-executive directors but presumably there must be an executive director. Why, if they own no shares in the company, did they give personal guarantees as security for a guarantee of \$5,000 given for Esperos by the Piraeus branch of NatWest? It is suggested by the Samonases that Mr Vennis is in control of Esperos but against that must be set evidence that in January 1987, when he was asked by that Piraeus branch to provide cash backing for that and another guarantee of £6,000, Mr Vennis said that he had to speak to London. Why on 5 February 1987, when pressed for a definite answer, did Mr Vennis say that the matter was out of his hands and that his 'boss' had told him that nothing would be decided?

There is no evidence to explain or justify the company's flagrant breach of its contractual obligations or of the steps which it has taken to avoid the arrest of the vessel.

The inevitable inference, to my mind, is that those in control of the company are deliberately seeking to keep the vessel out of the hands of the petitioner regardless of the insolvency of the company and the harm that is being done to the legitimate interests of the company's creditors. The purpose of all this may be seen from the open offer that has recently been made by the company by its solicitors: it seeks to force the petitioner to accept only \$9m in total extinction of the petitioner's security and the petitioner releasing not only the company but also its present and past directors and officers. The conduct of those in control of the company seems to me to be nothing short of disgraceful.

The company's evidence, as counsel for the company was constrained to admit, was not as complete or as satisfactory as it might be. On the third day of this hearing, towards the close of her submissions, she applied for an adjournment for several days to enable further evidence to be put in to deal with the question to what extent the company had carried on business within the jurisdiction. I refused that application. It had been alleged in the petition as well as in the affidavit in support of the application for a provisional liquidator that the company had traded here, and the company has had ample time to complete its evidence. I have been indulgent in allowing evidence to be adduced in the course of this hearing and I must decide this application on the evidence that is now before me.

The first and major question is whether the court has jurisdiction to wind up the company notwithstanding that it is an overseas company. I start with the statutory provisions now to be found in Pt V of the Insolvency Act 1986 relating to the winding up of unregistered companies. The company is of course such a company. Section 221 (1) provides:

'Subject to the provisions of this Part, any unregistered company may be wound up under this Act; and all the provisions of this Act and the Companies Act about winding up apply to an unregistered company with the exceptions and additions mentioned in the following subsections.'

The provisions about winding up include s 125(1) which (so far as material) provides that the court should not refuse to make a winding-up order on the grounds only that the company's assets have been mortgaged to an amount equal to or in excess of the assets or that the company has no assets.

Section 221(5) provides:

'The circumstances in which an unregistered company may be wound up are as follows—(a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs; (b) if the company is unable to pay its debts; (c) if the court is of opinion that it is just and equitable that the company should be wound up.'

The reader of those provisions without the benefit of judicial authority might be forgiven for thinking that the question whether for the purpose of exercising the statutory jurisdiction the court has jurisdiction to wind up an unregistered company falls to be answered by reference to the statutory conditions. In the present case what is asserted by the petitioner and is abundantly clear from the evidence is that the company is unable to pay its debts. Not only is there an unsatisfied judgment debt in excess of \$14 million but it is common ground that the only known asset of the company, the vessel, is worth substantially less than that sum. On the company's own evidence of the vessel's value in November, it was worth a mere \$7m. The petitioner puts the value of the Samjohn Captain somewhat higher, but even on the higher value it is clear that there is a substantial shortfall.

However, it is plain from authorities binding on me that the question of jurisdiction is not determined simply by reference to the statutory provisions and that there are what Megarry J in *Re Cia Merabello San Nicholas SA* [1972] 3 All ER 448 at 455, [1973] Ch 75 at 86 called the inherent requirements of jurisdiction to make a winding-up order in respect

of a foreign company which have to be satisfied in addition to the statutory conditions. In that case Megarry J summarised the essentials of the relevant law relating to the existence of jurisdiction to make a winding-up order in what he called normal cases in respect of a foreign company ([1972] 3 All ER 448 at 460, [1973] Ch 75 at 91-92):

'(1) There is no need to establish that the company ever had a place of business here. (2) There is no need to establish that the company ever carried on business here, unless perhaps the petition is based on the company carrying on or having carried on business. (3) A proper connection with the jurisdiction must be established by sufficient evidence to show (a) that the company has some asset or assets within the jurisdiction, and (b) that there are one or more persons concerned in the proper distribution of the assets over whom the jurisdiction is exercisable. (4) It suffices if the assets of the company within the jurisdiction are of any nature; they need not be "commercial" assets, or assets which indicate that the company formerly carried on business here. (5) The assets need not be assets which will be distributable to creditors by the liquidator in the winding-up: it suffices if by the making of the winding-up order they will be of benefit to a creditor or creditors in some other way. (6) If it is shown that there is no reasonable possibility of benefit accruing to creditors from making the winding-up order, the jurisdiction is excluded.'

When leading counsel opened the petitioner's case to me, he, like junior counsel on the ex parte application, put it on the footing that jurisdiction was founded by the presence of assets within the jurisdiction because, he said, there were good claims against at least Dimitri, Christos and Nikolas Samonas that they had been guilty of fraudulent trading or wrongful trading within the meaning of ss 213 and 214 of the Insolvency Act 1986 which, at the suit of the liquidator, would be likely to produce a substantial sum of money by way of contributions to the company's assets. The question whether there are assets within the jurisdiction such as to give the court jurisdiction to wind up must, as counsel for the company submitted, and I accept, be determined as at the moment the petition is presented. But to my mind it is fallacious to reason that there are assets to found the jurisdiction because, if the court has jurisdiction and makes a winding-up order, assets will then arise (cf *Siskina (cargo owners) v Distos Cia Naviera SA, The Siskina* [1977] 3 All ER 803 at 825, [1979] AC 210 at 257).

Seeing the way the judicial wind was blowing, leading counsel for the petitioner then adroitly changed tack. He submitted that the existence of assets within the jurisdiction was not necessary to found jurisdiction. Whilst that is normally the way that both a sufficient connection with the jurisdiction and a benefit to the creditors are shown, it was not, he said, an essential requirement in every case. What was important, he submitted, was to satisfy the court of a sufficient connection with the jurisdiction. The first line of defence of counsel for the company was that the presence of assets within the jurisdiction must be shown.

Before looking at authority let me consider the rationality of that proposition. Take a case, no doubt unusual, where a foreign company is incorporated abroad but thereafter the only jurisdiction with which it has a close connection is this jurisdiction. For example, if the company has been trading here actively, incurring trade debts here, perhaps at a time when there was no prospect of paying in full the debts as they fell due, but then, fearing court proceedings a director causes all the assets of the company to be removed from the jurisdiction. In those circumstances why should not the English court have jurisdiction to wind up the company at the suit of a creditor if satisfied that there is a reasonable possibility of benefit resulting from the winding up? Why should the mere fact that the assets were removed, perhaps to a place which is not known, deprive the court of jurisdiction where there is no other jurisdiction with which the company has a closer connection? I cannot see any logical reason why the court should not have jurisdiction.

However, counsel for the company was able to rely on what was said in *Banque des*

Marchands de Moscou (Koupetschesky) (in liq) v Kindersley [1950] 2 All ER 549, [1951] Ch 112. In that case a Russian bank had been dissolved in Russia in 1918. In 1932 Eve J made an order winding up the company on the basis that the bank's agent had registered the bank here in 1920. As any agency must have terminated with the company's dissolution the basis of Eve J's decision could not withstand a challenge. However, in 1949 the bank's liquidator brought an action against English defendants to recover sums alleged to be due to the bank. The defendants took out a summons to dismiss on the basis, in effect, that the bank did not exist and that the winding-up order was invalid. Harman J dismissed the summons on a ground that is not material to the present case but also held that the fact that the company had assets in this country conferred jurisdiction to make the winding-up order (see [1950] 2 All ER 105). The defendants appealed. The Court of Appeal would have differed from Harman J in respect of the ground on which he dismissed the summons but then went on to consider whether Eve J had jurisdiction to make the winding-up order on a ground other than registration. They considered whether it was a statutory condition for the exercise of jurisdiction to wind up a foreign company that it should have conducted business here and concluded that it was not. They then considered whether there was jurisdiction to wind up the bank which had been dissolved. Evershed MR said ([1950] 2 All ER 549 at 556-557, [1951] Ch 112 at 125-126):

'As a matter of general principle, our courts would not assume, and Parliament should not be taken to have intended to confer, jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, or at least submitting, to the jurisdiction who are concerned or interested in the proper distribution of the assets ... The existence of assets here, the presence here of persons claiming as creditors of the plaintiff bank or said to be indebted to it, seem to constitute at least the *indicia* of a business in some sense formerly conducted here. Where, therefore, the circumstances exist which, on the general principle above referred to, would make the case appropriate for the exercise by our court of its winding-up jurisdiction, it would appear that the question whether the foreign corporation carried on business in this country would generally be academic unless it is also necessary to show that such business was carried on directly and from some established, or specified, place or places in this country.'

And the court went on to hold that it was not so necessary.

Counsel for the company fastens on the words 'There must be assets here to administer ...' but such words must be read in their context. Evershed MR was speaking in the context of a case where the presence of assets and creditors in this country was sufficient, as the Court of Appeal held, to confer jurisdiction on the English court. If he was attempting to lay down a universal rule then he was going beyond what was necessary for his decision.

That appears to be the way Megarry J in *Re Cia Merabello San Nicholas SA* [1972] 3 All ER 448, [1973] Ch 75 viewed what Evershed MR said. At the start of the passage which I have already cited he referred to the essentials as being those in normal cases. Earlier, he described as the usual essentials the presence of assets and creditors here (see [1972] 3 All ER 448 at 455, [1973] Ch 75 at 86). Again he said ([1973] Ch 75 at 88, cf [1972] 3 All ER 448 at 457):

'... a petitioner who can satisfy s 399 [of the Companies Act 1948 (the predecessor of s 221(5))] must normally go on and show that the company has assets of some sort here and that there are claimants for those assets over whom there is jurisdiction ...'

As he put it, it *suffices* if there are.

Megarry J was also not prepared to give the words of Evershed MR their literal

a meaning that there must be assets to administer in the winding up. In the *Merabello* case the only asset here was a claim which under the Third Parties (Rights against Insurers) Act 1930 on a winding-up order would vest automatically in the petitioner in that case. That asset would never be administered in the liquidation. I respectfully echo Megarry J's words ([1972] 3 All ER 448 at 460, [1973] Ch 75 at 91):

b 'Words in a judgment must be construed in relation to the subject-matter of the case in question, and not as if they were Acts of Parliament.'

c Counsel for the company rightly pointed out that the ratio of the decision in *Re Cia Merabello San Nicholas SA*, unlike the present case, turned on the existence of an asset of the company within the jurisdiction immediately before the winding up. However, in *Re Eloc Electro-Optieck and Communicatie BV* [1981] 2 All ER 1111, [1982] Ch 43 Nourse J held that the court had jurisdiction to wind up a Dutch company which had no assets within the jurisdiction. In that case the Dutch company had traded in England but never had a place of business here. The petitioners were two employees whom the Dutch company dismissed. They recovered judgment against that company in 1978. The Dutch company ceased operating in 1979. On the hearing of the petition the Dutch company was not represented but in a reserved judgment Nourse J held that the court had jurisdiction to wind it up. He referred to Megarry J's summary of the essentials in a normal case and to the fact that the petitioners had applied to the Department of Employment for payment out of the Redundancy Fund but that under the statutory provisions no payment could be made until the company was wound up. He stated that there was a reasonable possibility of benefit accruing to the petitioner from the making of a winding-up order. He continued ([1981] 2 All ER 1111 at 1114-1115, [1982] Ch 43 at 48):

e 'The benefit would consist of assets coming into the hands of the petitioners not from the company but from an outside source which can only be tapped if an order is made. In the light of that consideration and of the facts, first, that the company did carry on business in England and Wales, second, that it employed the petitioners in that business, and, third, that the potential source of assets is directly related to that employment, there is, in my judgment, sufficient to found the jurisdiction of the court. To put it in another way, it would, in my judgment, be a lamentable state of affairs if the court's jurisdiction was excluded by the mere technicality that the assets in respect of which the reasonable possibility of benefit accruing to the petitioners derived belonged not to the company but to an outside source. I think that support for this view is to be found in the fourth and fifth essentials in Megarry J's summary ([1972] 3 All ER 448 at 460, [1973] Ch 75 at 92) [and then Nourse J cited those essentials and continued:] That shows, first, that the assets can be of any nature and, second, that the consequential benefit accruing to a creditor or creditors need not be channelled through the hands of the liquidator. To my mind that confirms that the ownership of the assets by the company is not a matter of crucial importance. I must again observe that Megarry J's summary of the essentials was directed to normal cases.'

h And accordingly, he held that this was a case in which the court had jurisdiction to wind up a Dutch company.

j To my mind it is clear firstly that the assets to come into the hands of the petitioners in *Re Eloc Electro-Optieck and Communicatie BV* were not assets existing at the moment of presentation of the petition: they were the potential fruits of a claim that could only be made if the company was wound up. Secondly, the assets were never in any sense assets of the company. Nourse J had referred to an argument presented to him by counsel for the petitioners to the effect that there was no overriding requirement that the company should have assets within the jurisdiction and that what was important was the carrying on of business in the country (see [1981] 2 All ER 1111 at 1113, [1982] Ch 43 at 46-47).

Nourse J stated that he found it unnecessary to decide whether that proposition could be made out. But whilst he may not have decided the question whether the mere carrying on of business was enough, if I may say so with the greatest respect, the judge does seem to me to have decided that there is no universal requirement in every case that there should be assets within the jurisdiction to found the jurisdiction to wind up a foreign company. In an abnormal case like the *Eloc* case, the court has jurisdiction, even though there are no assets here. a

As I understand that decision therefore, it does support leading counsel's proposition for the petitioner that there need be no assets within the jurisdiction provided that there is a sufficient connection with the jurisdiction and provided that there is a reasonable possibility of benefit accruing to the creditors from the winding up. b

Counsel for the company submitted that *Re Eloc Electro-Optieck and Communicatie* was distinguishable on its facts. Of course, the facts were different. The source of the benefit was to come from a third party which had nothing to do with the Dutch company and the benefits would never accrue to the company but directly to the petitioners, but I cannot see why that should make the present case one less suitable for the court's jurisdiction. The benefit in the present case would consist of the contribution to the assets of the company to make up for losses caused by the wrongful or fraudulent trading of the company. Further, a substantial element in the fraudulent and wrongful trading claim would be the amount of interest that has continued to accrue and that is of course directly related to the petitioner's debt. Another factual difference from the *Eloc* case is that there the petitioners were ex-employees. But the fact that the petitioner here is a creditor relying on a debt incurred by the company under an agreement made here again does not seem to me to be a material difference. In both the *Eloc* case and the present case it is an important circumstance that there is said to have been the carrying on of business in this country by the company in question. c d e

Counsel for the company then said that the *Eloc* case was wrongly decided, firstly because it was inconsistent with *Banque des Marchands de Moscou (Koupetschesky) (in liq) v Kindersley* [1950] 2 All ER 549, [1951] Ch 112. For the reasons which I have already given I do not accept that. She also said that it was wrongly decided because, for the court to have jurisdiction to wind up a foreign company with no assets here, the company has to have been trading here at the time the petition was presented. She relied by analogy on the statutory requirements for service on a foreign corporation in respect of which the ability to serve on that company at a place of business established by that company in this country has been held to be limited by the necessity to show that the company was carrying on business at the time of service. I cannot obtain any assistance from those specific statutory provisions or the authorities thereon, dealing as they do only with service. What Parliament has thought fit to provide in relation to service is likely to be governed by the necessity to bring that which has to be served to the notice of the foreign company. The question of jurisdiction seems to me to involve a wholly different concept, that is to say a sufficient connection with this country. I would add that no authority on jurisdiction has been cited to me to support the proposition of counsel for the company on this point. f g h

In the circumstances, I am prepared, consistently with the *Eloc* case to hold that the presence of assets in this country is not an essential condition for the court to have jurisdiction in relation to the winding up of a foreign company. In my judgment, provided a sufficient connection with the jurisdiction is shown, and there is a reasonable possibility of benefit for the creditors from the winding up, the court has jurisdiction to wind up the foreign company. i

I turn then to the question whether there is a sufficient connection with the jurisdiction. The following matters seem to me to provide such a connection. Firstly, the company incurred the debt on which the petitioner, an English company, relies under an English loan agreement negotiated and executed here and requiring performance

here. Secondly, there is clear evidence that the company has carried on business in England. All the directors and officers of the company were resident in England at least until August 1986. All the negotiations for the loan from the petitioner were carried on in London, all the loan documents were executed in London and the only bank accounts of the company that are known were in London. Even as late as 18 November the company, when in breach of its contractual obligation it decided that the Daiichi freight should not be paid into the NatWest account, directed payment to an account with another London bank. Charterparties were negotiated and agreed here. In relation to the Daiichi charterparty, the petitioner's evidence, which is accepted by Dimitri Samonas, is that all the arrangements were made in London and the decisions were taken here by JSS for the company after reference to the Samonases. That shows that even in November, management decisions on the company's business were being taken in London. At least two business letters were written directly in the name of the company from JSS's offices and those offices were the address given to NatWest as the address of the directors of the company. Counsel for the company submitted that it was not sufficient for a company to trade here through agents but I do not follow this. If what was done was done in the name of and for the company I fail to see why that is not the company carrying on business here through its agents. She also referred me to the requirements that, under the loan agreement and the first preferred mortgage, notices under those documents were to be given to the company care of Esperos. She also relied on the agreements of 1 January 1985 for Esperos to be the manager and JSS to be the agent or sub-manager in respect of the Samjohn Captain. But there is no evidence that any act was done by JSS pursuant to that agreement, or that Esperos exercised any control whatever over JSS. In all their dealings with NatWest and the petitioner it was never suggested by the Samonases that JSS was merely acting as sub-managers or agents for Esperos as distinct from acting for the company. In my judgment therefore, it can be said, on the evidence that is before me, that at least until November 1986 the company has been effectively managed from London by the Samonas family and has carried on business here, either directly or through JSS. There is, I would stress, no evidence that the company has carried on business outside this country at all. The only business transacted at the one board meeting known to have taken place abroad in August 1986 was merely to accept the directors' resignations and to appoint other directors.

It is also appropriate for the court to consider whether any other jurisdiction is more appropriate for the winding up of this admittedly insolvent company. In my judgment, there is none. Counsel for the company accepts that Liberia is not a serious rival to this country for the purpose of jurisdiction. The company seems to have had nothing to do with Liberia after its incorporation. But she suggested that Greece might be a more appropriate jurisdiction. I do not accept that. Apart from the fact that the vessel flies a Greek flag and that notices under the loan agreement and first preferred mortgage are required to be sent to the company care of Esperos in Greece I cannot see on what basis Greece would be a more appropriate jurisdiction to wind up the company. In my judgment, for the reasons I have given, the company has a much closer connection with this jurisdiction.

I am therefore satisfied that, on the evidence that has been put before me, the company has a sufficiently close connection with the jurisdiction, and that there is no more appropriate jurisdiction for the winding up of the company which plainly ought to be wound up.

I turn next to the question whether there is a reasonable possibility of benefit accruing to creditors from the making of a winding-up order. That such is the appropriate test appears from *Re Cia Merabello San Nicholas SA* [1972] 3 All ER 448, [1973] Ch 75 and *Re Eloc Electro-Optiek and Communicatie BV* [1981] 2 All ER 1111, [1982] Ch 43. Similarly in *Re Allobrogia Steamship Corp* [1978] 3 All ER 423 the company in that case had a claim of the same type as in the *Merabello* case and that was the asset which founded jurisdiction

for the court. Slade J held that it was not necessary to show that the claim was one which was certain to succeed. It was sufficient to show that the claim had a reasonable possibility of success. a

In the present case leading counsel for the petitioner has submitted that there is a reasonable possibility of the liquidator recovering contributions to the assets of the company from members of the Samonas family under ss 213 and 214 of the Insolvency Act 1986. To my mind it is abundantly clear that those who have been in charge of the company since at least the end of October have been conducting the affairs of the company in a way that is likely to bring them within the scope of one or both of those sections, and whilst the 1986 Act does not state how much can be recovered under those sections, the additional costs and debts incurred at a time when the company should have ceased trading and given up the vessel provides a likely measure of those contributions. b

I did not understand counsel for the company to contend that ss 213 and 214 could not apply in the present case. She quarrelled about one item in the quantification of the costs and expenses incurred since November, but that is a comparatively minor matter. I recognise that the question whether the liquidator will wish to and will be able to succeed against the Samonases turns on disputed questions of fact in view of the apparent resignation of the Samonases of their directorships and the termination of JSS's agency. But I bear in mind the wide terms of those sections, for example, that for fraudulent trading someone who is knowingly a party to the fraudulent trading of the company may be liable and similarly for wrongful trading shadow directors may be held liable. On the evidence before me I would agree with leading counsel for the petitioner that there is a reasonable possibility of the liquidator succeeding in proceedings against at least Dimitri and Christos Samonases and they are resident in this country. I think it undesirable to say more on what may well have to be litigated at a later date. c

Accordingly I reach the conclusion that on the existing evidence before me there is a reasonable possibility of benefit accruing to the creditors from the winding up of the company. It seems to me therefore that the court has jurisdiction to make a winding-up order in relation to the company. d

Ought the court to exercise its power to appoint a provisional liquidator at this stage? Leading counsel for the petitioner submitted that I should because the single known asset of the company, the Samjohn Captain, is being kept out at sea and the debts of the company are thereby constantly increasing by over \$5,000 per day. Further, he pointed to what was said by Esperos in the Greek proceedings, in particular that the company may be trying to sell the vessel. The provisional liquidator will, he submits, be able to exercise the wide powers now conferred on such an officer under ss 234 to 236 of the Insolvency Act 1986 to obtain information to ascertain the whereabouts of the vessel and who are in control of her with a view to bringing the vessel back into responsible hands. e

This is an unusual application in that the court will normally only be looking to safeguard assets within the jurisdiction that are in jeopardy, but then this is a highly unusual case. Those in control of the company have behaved badly in flouting its contractual obligations in running up costs unnecessarily and in seeking to force the petitioner to accept far less than it is entitled to. In the meantime, the company's debts increase daily. In these special circumstances therefore it seems to me that it is appropriate to appoint a provisional liquidator. The Official Receiver would normally be appointed but because of the unusual tasks with which the provisional liquidator will be faced in seeking to recover the vessel, the petitioner has requested the appointment of Mr Houghton, a partner in Messrs Touche Ross & Co. The Official Receiver has indicated his acquiescence in such an appointment. I shall so order. f

Order accordingly. g

Solicitors: Wilde Sapte (for the petitioner); Watson Farley & Williams (for the company). h

Celia Fox Barrister. i

a CBS Songs Ltd and others v Amstrad Consumer Electronics plc and another

COURT OF APPEAL, CIVIL DIVISION

FOX, NICHOLLS LJ AND SIR DENYS BUCKLEY

15, 16, 17 OCTOBER 1986, 12 JANUARY, 25 FEBRUARY 1987

b Copyright – Infringement – Right of action – Incitement to make infringing copies – Defendants advertising and selling twin-deck tape recorders – Machines capable of being used for copying of copyright material – Defendants advertising machines in manner likely to encourage copying – Plaintiffs’ copyright material likely to be infringed – Plaintiffs bringing action alleging defendants inciting members of public to commit offence of making infringing copies – Plaintiffs seeking injunction and damages – Whether plaintiffs entitled to sue for injunction to restrain breach of criminal law – Whether plaintiffs having good cause of action – Copyright Act 1956, s 21(3).

c The first defendant manufactured twin-deck tape-recording machines which were sold by the second defendant. A tape-to-tape facility on the machines meant that they could be used to reproduce one tape directly onto another and they were advertised in a manner which was likely to encourage home taping and copying of copyright material. The plaintiffs, who were three record companies suing on behalf of themselves and other copyright owners in the music business, brought an action against the defendants seeking an injunction to restrain them from selling the machines without ensuring that the plaintiffs’ copyrights in sound recordings were not infringed by use of the machines. The plaintiffs subsequently sought to amend their statement of claim to allege that the first defendant had advertised and the second defendant had sold the machines in such a way as unlawfully to incite members of the public to commit an offence under s 21(3)^a of the Copyright Act 1956, which prohibited the making of infringing copies of a copyright work. The judge allowed the amendment, holding that the plaintiffs had an arguable case for both injunctive relief and damages arising out of the incitement. The defendants **d** appealed against the judge’s ruling.

e **Held** (Sir Denys Buckley dissenting) – A plaintiff was not entitled to sue for an injunction to restrain a breach of the criminal law unless either he was a member of a protected class for whose benefit or protection particular legislation had been passed or he had suffered damage special to him. Although a plaintiff might be entitled to an injunction if the defendant’s criminal activity infringed a property right of the plaintiff, in such a case it was the infringement of the property right that gave rise to the cause of action rather than any attempt to compel observance of the criminal law. In the absence of express statutory provision, persons other than the Attorney General acting ex officio or ex relatione had no standing to seek to enforce the criminal law by a claim in equity in the civil courts and the appropriate remedy was to bring a private prosecution. Since s 21(3) of the 1956 Act did not confer on a copyright owner a right to sue for breach of the section, the defendants’ incitement, if proved, did not confer on the plaintiffs the right to sue for an injunction and damages. It followed that the appeal would be allowed and that the amendment to the plaintiffs’ statement of claim would be disallowed (see p 159 j, p 160 a to d h j, p 161 e to p 162 b h j and p 169 h, post).

f Dictum of Lord Wilberforce in *Gouriet v Union of Post Office Workers* [1977] 3 All ER at 79 and *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456 applied.

Emperor of Austria v Day and Kossuth (1861) 3 De GF & J 217, *Springhead Spinning Co v Riley* (1868) LR 6 Eq 551, *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 and dictum of Oliver LJ in *RCA Corp v Pollard* [1982] 3 All ER at 779 considered.

^a Section 21(3) is set out at p 155 c, post

Notes

For incitement of another to commit an offence, see 11 Halsbury's Laws (4th edn) para 57, and for cases on the subject, see 14(1) Digest (Reissue) 115-117, 770-788.

For infringement of copyright, see 9 Halsbury's Laws (4th edn) paras 909-923, and for cases on the subject, see 13 Digest (Reissue) 117, 962-968.

For criminal offences in relation to copyright, see 9 Halsbury's Laws (4th edn) para 959, and for cases on the subject, see 13 Digest (Reissue) 158-159, 1338-1340.

For the right of action for breach of copyright, see 9 Halsbury's Laws (4th edn) para 940, and for cases on the subject, see 13 Digest (Reissue) 138-143, 1136-1178.

For the Copyright Act 1956, s 21, see 11 Halsbury's Statutes (4th edn) 279.

Cases referred to in judgments

Amstrad Consumer Electronics plc v British Phonographic Industry Ltd [1986] FSR 189, CA.

Austria (Emperor) v Day and Kossuth (1861) 3 De GF & J 217, 45 ER 861.

Bedford (Duke) v Ellis [1901] AC 1, [1900-3] All ER Rep 694, HL.

Benjamin v Storr (1874) LR 9 CP 400.

Boyce v Paddington BC [1903] 1 Ch 109.

Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corp Ltd [1981] 1 All ER 289, [1981] AC 909, [1981] 2 WLR 141, HL.

British Airways Board v Laker Airways Ltd [1984] 3 All ER 39, [1985] AC 58, [1984] 3 WLR 413, HL.

Dixon v Holden (1869) LR 7 Eq 488.

Doe d Bishop of Rochester v Bridges (1831) 1 B & Ad 847, [1824-34] All ER Rep 167.

EMI Records Ltd v Riley [1981] 2 All ER 838, [1981] 1 WLR 923.

Gouriet v Union of Post Office Workers [1977] 3 All ER 70, [1978] AC 435, [1977] 3 WLR 300, HL.

Island Records Ltd, Ex p [1978] 3 All ER 824, [1978] Ch 122, [1978] 3 WLR 23, CA.

Lonrho Ltd v Shell Petroleum Co Ltd [1981] 2 All ER 456, [1982] AC 173, [1981] 3 WLR 33, HL.

Macaulay v Shackell (1827) 1 Bli NS 96, 4 ER 809.

Markt & Co Ltd v Knight Steamship Co Ltd [1910] 2 KB 1021, CA.

Prudential Assurance Co v Knott (1875) LR 10 Ch App 142.

RCA Corp v Pollard [1982] 3 All ER 771, [1983] Ch 135, [1982] 3 WLR 1007, CA.

Rickless v United Artists Corp [1987] 1 All ER 679, [1987] 2 WLR 945, CA.

Springhead Spinning Co v Riley (1868) LR 6 Eq 551.

Temperton v Russell [1893] 1 QB 435, CA.

Cases also cited

A & M Records Inc v Audio Magnetics Inc (UK) Ltd [1979] FSR 1.

Bollinger (J) SA v Goldwell Ltd [1971] RPC 412.

Columbia Picture Industries Inc v Robinson [1986] 3 All ER 338, [1987] Ch 38.

Electrical Electronic Telecommunication and Plumbing Union v Times Newspapers Ltd [1980] 1 All ER 1097, [1980] QB 585.

EMI Records Ltd v Kudhail [1985] FSR 36, CA.

Paterson Zochonis & Co Ltd v Merfarken Packaging Ltd [1986] 3 All ER 522, CA.

Reade v Conquest (1861) 9 CBNS 755, 142 ER 297.

Siskina (cargo owners) v Distos Cia Naviera SA, The Siskina [1977] 3 All ER 803, [1979] AC 210, HL.

Skeen v British Rlys Board [1976] RTR 281.

White v Mellin [1895] AC 154, HL.

Interlocutory appeals and cross-appeal

By writ dated 16 November 1984 and an amended statement of claim the plaintiffs, CBS Songs Ltd (suing on its own behalf and on behalf of other members of Mechanical Rights

a Society Ltd), EMI Records Ltd and Chrysalis Records Ltd (both suing on behalf of themselves and other members of British Phonographic Industry Ltd), sought, inter alia, an injunction against the defendants, Amstrad Consumer Electronics plc (Amstrad) and Dixons Ltd (Dixons), to restrain the defendants from parting with possession of tape recording machines with a tape-to-tape recording facility without taking such steps as were reasonably necessary to ensure that copyrights in sound recordings subsisting in the plaintiffs were not infringed. The plaintiffs also claimed damages. On 8 May 1986 b Whitford J, sitting in chambers, struck out parts of the statement of claim but gave the plaintiffs leave to amend the statement of claim to allege that the defendants had unlawfully incited members of the public to commit offences under s 21(3) of the Copyright Act 1956, and refused the defendants' applications to strike out the plaintiffs' action. The defendants appealed against the grant of leave. The plaintiffs cross-appealed against the striking out of parts of the statement of claim. The facts are set out in the c judgment of Nicholls LJ.

Geoffrey Hobbs for Amstrad.

Michael Fysh for Dixons.

James Munby for the plaintiffs.

d

Cur adv vult

25 February. The following judgments were delivered.

e **NICHOLLS LJ** (giving the first judgment at the invitation of Fox LJ). The Copyright Act 1956 creates rights of property and for their protection confers civil remedies and imposes criminal liabilities. The question arising on this appeal is whether copyright owners who, in respect of the acts complained of, cannot bring themselves within the scope of any of the civil remedies expressly conferred by the statute none the less have a cause of action in equity for the grant of an injunction to restrain defendants from carrying out acts which constitute criminal offences and which damage their copyrights, f this equitable jurisdiction being supplemented by the jurisdiction under Lord Cairns's Act (the Chancery Amendment Act 1858) to award damages in addition to or in lieu of an injunction.

Before the court are two appeals and a cross-appeal from an order of Whitford J of 8 May 1986. They represent the latest stage in what the judge aptly described as the battle g between Amstrad Consumer Electronics plc (Amstrad), the well-known manufacturer of electronics equipment, and those concerned to protect the interests of manufacturers and suppliers of tapes, with Dixons Ltd (Dixons), the well-known retailer of electronics equipment reluctantly tied, as its counsel put it, to Amstrad's coat tails.

h In 1984 Amstrad introduced onto the market three new models of tape-to-tape recording machines, designated TS39, TS87 and SM104. A feature of these models is that they have two cassette decks from which it is possible to reproduce from one tape directly onto another, at twice the normal playback speed. The machines, and this facility, were advertised on television and in the press in terms likely to encourage home copying of favourite tapes. Amstrad sells only to the trade, but in the advertisements Dixons was named as one of the well-known retailers from whom the Amstrad tape decks could be purchased.

i British Phonographic Industry Ltd (BPI) is a trade association whose members comprise record companies making most of the lawful records sold in this country. BPI wrote to Amstrad, and also to its principal trade outlets, asserting that by its advertisements Amstrad was encouraging the public to break the law by inviting them to acquire machines with the double-headed facility for the purpose of copying from tapes containing copyright works.

The upshot was two actions, in the course of which considerable procedural complications, not to say convolutions, have come about. Shorn of all matters not essential to the present appeals, the history is this. The first action, which I shall call 'the declaratory action', was brought by Amstrad against BPI. The writ was issued on 30 October 1984. The only substantive relief claimed was a declaration to the effect that by advertising and offering for sale and selling six specified models of audio systems, including the three I have mentioned, Amstrad had not acted unlawfully 'as alleged in that certain letter from the Defendants' solicitors to the plaintiffs' solicitors dated 26th October 1984 or at all'.

On 16 November 1984 the writ in the present action, which I shall call 'the second action', was issued by CBS Songs Ltd, EMI Records Ltd and Chrysalis Records Ltd. The first plaintiff was expressed to be suing on behalf of itself and of the other members of Mechanical Rights Society Ltd (MRS), and the second and third plaintiffs were expressed to be suing on their behalf and on behalf of all the other members of BPI. Amstrad is the first defendant and Dixons the second defendant.

In the statement of claim in the second action it is alleged that nearly all sound recordings available in this country are copyright and that nearly all the copyrights, or the exclusive licences under such copyrights, to reproduce sound recordings are owned by members of BPI, and also that nearly all the mechanical rights in musical works in this country are owned by or exclusively licensed to the members of the MRS, who comprise nearly all the publishers of music in this country. Having referred to the three new Amstrad models and their introduction onto the market, the statement of claim continues with an allegation that the primary purpose for which that equipment was designed was that the public would buy and use it to make copies of commercially available prerecorded tapes and gramophone discs. It is also alleged that machines purchased will be so used, in infringement of the copyrights in the tapes and recordings, and to the damage of the plaintiffs and those whom they represent, and that in practice, for reasons which are self-evident, the plaintiffs and those whom they represent are unable to stop such use or obtain legal redress for such infringements by individual members of the public.

The various alleged causes of action put forward are these: that Amstrad and Dixons have incited others to infringe copyright; that they have authorised others to infringe copyright; that they are liable, as accessories before the event or as joint tortfeasors, to the infringement of the plaintiffs' copyright; and that the equipment is being supplied in breach of a common law duty of care owed to copyright owners, and also in breach of an equitable duty of care not to allow goods likely to be used for infringement to pass out of Amstrad's and Dixons' hands. The principal relief claimed is an injunction restraining the defendants from parting with possession of the three models complained of—

'without taking such precautions as are necessary reasonably to ensure that copyrights in sound recordings or musical works owned or exclusively licensed to the plaintiffs or a member of [BPI] or [MRS] are not infringed by the use of such machines.'

The plaintiffs also claim an inquiry as to damages and an account of profits.

In a schedule to the defence served by BPI in the declaratory action, the statement of claim in the second action was set out in extenso, and in its defence BPI placed reliance on the matters set out in that statement of claim as justification for the accusations made by BPI in the letters to Amstrad and the trade to the effect that Amstrad was acting wrongfully in its advertising and sale of the new equipment. In this way the causes of action set up in the second action became issues also in the declaratory action.

The declaratory action came to trial comparatively speedily. In March 1985, shortly before the trial of the declaratory action was due to take place, proceedings in the second action were stayed until further order. In consequence, summonses which by then had been issued by Amstrad and Dixons for the striking out of the second action or,

alternatively, to prevent the plaintiffs from suing in a representative capacity stood
a adjourned.

The trial of the declaratory action took place in June 1985. Whitford J found in favour of BPI and dismissed the action. On 24 October 1985 an appeal by Amstrad to this court was dismissed. The judgments of Whitford J and of the Court of Appeal are reported (see [1986] FSR 159). All three members of the Court of Appeal (Lawton, Slade and Glidewell LJ) decided that none of the issues raised in the statement of claim in the second action
b and relied on by BPI in its defence in the declaratory action gave rise to any civil liability on the part of Amstrad. However, during the hearing a further point had been raised, namely that the putting out by Amstrad of the advertising material complained of might be capable of amounting to an incitement to commit the crime created by s 21(3) of the Copyright Act 1956. Section 21(3) provides:

c 'Any person who, at a time when copyright subsists in a work, makes or has in his possession a plate, knowing that it is to be used for making infringing copies of the work, shall be guilty of an offence under this subsection.'

The suggestion was that a tape recording is capable of being a 'plate' within the definition in s 18(3) and that once a person who is in possession of a tape recording consciously forms the intent to use it for the purpose of making an infringing copy he is
d guilty of an offence under s 21(3). The Court of Appeal decided that it was neither necessary nor proper to adjudge whether Amstrad had committed the offence of inciting persons to commit the s 21(3) offence, but in its discretion refused to make the declaration sought by Amstrad.

This outcome placed BPI in the unsatisfactory position that, having obtained from the court the order it sought (the dismissal of the appeal), it was unable to seek to take the
e matter further to the House of Lords, even though on all the substantive issues canvassed and decided in the action BPI had failed. BPI was left to derive such consolation as it could from the views expressed by the Court of Appeal that there was a possibility that Amstrad might have committed the criminal offence of inciting the offence prescribed by s 21(3).

After the trial of the declaratory action, the stay of the second action was lifted. On 4
f March 1986 the plaintiffs in the second action issued a summons for leave to amend the statement of claim in that action. On 8 May 1986 Whitford J had before him that summons and also the two striking-out summonses issued earlier by Amstrad and Dixons and which had meanwhile remained adjourned. The gist of the amendments which the plaintiffs wished to make to the statement of claim was to spell out and allege against
g Amstrad and Dixons the ingredients of the incitement offence.

In short, at this hearing before the judge, Amstrad and Dixons asked that the second action should be struck out on the ground that all the issues raised therein had already been decided adversely to BPI by the Court of Appeal in the declaratory action, and those issues would be bound to be decided in the same way at the trial of the second action. They resisted the proposed amendments raising the incitement issue on the ground that
h they disclosed no cause of action. Whitford J decided that on the incitement issue the plaintiffs had an arguable case for injunctive relief and for at least nominal damages in respect of Amstrad's and Dixons' alleged incitement. Accordingly he permitted the amendments to be made. Having considered the authorities, he expressed his conclusion:

i 'Although [counsel for Amstrad] repeatedly suggested that what the plaintiffs are seeking in the [second] action is damages for infringement of copyright by a route not open to them, in truth it seems to me that basically what they are trying to do by their amended statement of claim is to stop damage occurring, which, if they are right, is only likely to occur as a result of this allegedly criminal offence and which further is damage which they are unlikely ever to be able to prove and so recover. If incited so to do by the Amstrad advertisements purchasers of these equipments start recording from prerecorded cassettes in which some one or more of the plaintiffs

hold a copyright interest, how in any given particular case is any particular person whose interests may have been affected ever going to discover or prove that any infringement has taken place? Over the years in many fields there has been an increasing tendency, particularly in the light of the total failure of penal proceedings to achieve any effective result, to accept that there are circumstances in which relief by way of injunction should be granted in civil proceedings. I am not persuaded that the [second] action, based on the statement of claim as amended, must necessarily fail; and, not being so persuaded, the amendments ought to be allowed to proceed.' a b

The judge also rejected the objection taken by Amstrad and Dixons that this was not a case for a representative action. He struck out those parts of the statement of claim which related only to the issues which this court had decided adversely to BPI in the declaratory action. He gave leave to appeal on all points. c

Pursuant to that leave there are now before the court appeals by all parties against the judge's decision.

I should say at once that counsel for the plaintiffs accepted that, by reason of the decision of this court in the declaratory action, the appeal by the plaintiffs (in respect of the striking out of parts of the statement of claim) cannot succeed in this court. What he seeks is to use this appeal as the means for bringing before the House of Lords the issues decided adversely to BPI by this court in the declaratory action, having been deprived of the opportunity to pursue those issues further in that action by the procedural quirk I have mentioned. d

I turn to consider whether the plaintiffs should have been granted leave to amend. In summary form the material amendments sought to be made are these. A new paragraph, para 6A, is sought to be added, alleging that all or nearly all the persons who use the equipment to make copies of commercially available prerecorded cassette tapes or gramophone discs will thereby be guilty of an offence under s 21(3), and some particulars are given in that regard. e

Paragraph 7, as it stands at present, reads:

'The said equipment has been advertised by [Amstrad] and sold by the Defendants in such a way as to incite members of the public to use it to make cassette recordings from pre-recorded tapes, gramophone discs and broadcast material, with a reckless disregard for the rights of the owners of the copyrights in the sound recordings and musical works contained therein.' f

It is proposed to add these words to the end of that paragraph:

'and in circumstances where (by virtue of the facts and matters referred to in paragraphs 2 and 6A) all or nearly all of the persons making such cassette recordings will be guilty of an offence under the said sub-section. The Plaintiffs will say that the Defendants have thereby unlawfully incited members of the public who buy the said equipment to commit offences under the said sub-section.' g

The relief sought is unchanged, save that the injunction would now inhibit Amstrad and Dixons from advertising and selling the machines in such a way as to incite members of the public to commit offences under s 21(3). h

Before turning to the law, I mention one procedural matter. Whether leave to amend should be granted or refused turns, in this case, on whether the statement of claim as sought to be amended will disclose a reasonable cause of action. In the course of his submissions, however, counsel for the plaintiffs indicated that on this he was content that this court should follow the same approach as in *RCA Corp v Pollard* [1982] 3 All ER 771, [1983] Ch 135. There, with some encouragement from counsel, this court decided a difficult and important issue of law on an appeal from the judge's refusal to strike out a statement of claim. Likewise here, counsel for the plaintiffs accepted that if, having heard the arguments, this court was satisfied that the plaintiffs' pleaded case as amended j

a could not succeed as a matter of law the court should so hold and not leave the question of law to be decided at a later stage in the course of what no doubt would be a protracted and expensive trial. In the event we had the benefit of full argument on the incitement point.

The case of counsel for the plaintiffs was that there are circumstances in which a private individual can properly sue for an injunction to restrain breaches of the criminal law. He submitted that the law today is that whether or not a potential plaintiff can sue in respect of a breach of a statutory prohibition depends on the scope and language of the statute, and that in this regard there is a distinction between two different rights or remedies which statute may confer on persons for whose protection or benefit a statutory obligation or prohibition, backed by an express criminal law sanction, has been passed: (1) as a matter of construction a statute may give rise to a duty owed not merely to the world at large but also to a class of 'protected persons', the breach of which gives a member of the protected class a cause of action in tort for damages; and (2) a statute passed for the benefit of 'protected persons' which does not create any duty, and thus cannot give rise to a claim in tort for damages, may none the less entitle a member of the class of 'protected persons' to apply for an injunction: in such a case the plaintiff's claim is a claim in equity to enforce the observance of the criminal law.

counsel for the plaintiffs accepted that the present case does not fall within his category (1), but he submitted that it falls within his category (2).

In my view, there is no such category as that formulated by counsel as his category (2).

I consider first, in chronological order, the authorities relied on by counsel. He relied on three nineteenth century cases (*Emperor of Austria v Day and Kossuth* (1861) 3 De GF & J 217, 45 ER 861, *Springhead Spinning Co v Riley* (1868) LR 6 Eq 551 and *Dixon v Holden* (1869) LR 7 Eq 488) and on the recent decisions of the House of Lords in *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70, [1978] AC 435 and of the Court of Appeal in *RCA Corp v Pollard* [1982] 3 All ER 771, [1983] Ch 135.

In my view counsel for the plaintiffs is not assisted by the much discussed case of *Emperor of Austria v Day and Kossuth*. There the defendants appealed unsuccessfully from an order of Stuart V-C restraining them from making spurious Hungarian banknotes in this country and ordering the delivery up of notes already made. The three members of the court expressed their reasons in differing terms, but none of the reasoning supports the existence of counsel's category (2). Indeed, the case was not one where the acts complained of were criminal.

The basis of Lord Campbell LC's judgment was that the court has jurisdiction to protect property from an act threatened which, if completed, would give a right of action. That by 'right of action' he meant cause of action at law is apparent from his next words (3 De GF & J 217 at 240, 45 ER 861 at 870):

'I by no means say that in every such case an injunction may be demanded as of right, but if the party applying is free from blame and promptly applies for relief, and shews that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, the injunction will be granted.'

The reasoning of Knight Bruce LJ was to the same effect. He said that whether the acts complained of were criminal was not material: the preparation of the notes with the intention of issuing them in Hungary was by the law of England—

"'civilly unlawful,'" as regards rights of property, that is to say, the public revenues, the fiscal resources, the pecuniary means of the realm of Hungary, which rights the Plaintiff is entitled to represent here.'

(See 3 De GF & J 217 at 247, 45 ER 861 at 873.) The plaintiff was entitled therefore to the protection of the court 'according to its ordinary course in analogous cases, from the infliction of such a wrong' (see 3 De GF & J 217 at 248, 45 ER 861 at 873).

Before us counsel had some difficulty in identifying with any confidence the cause of

action at law possessed in that case by the plaintiff. Passing off and injurious falsehood were suggested. But I do not think that it is material for me to pursue this. a

Turner LJ expressed himself in wider terms. He considered that the introduction of the spurious notes constituted an injury to the private rights of the plaintiff's subjects. He said (3 De GF & J 217 at 253-255, 45 ER 861 at 875-876):

'I agree that the jurisdiction of this Court in a case of this nature rests upon injury to property actual or prospective, and that this Court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property, but I think that there are here rights of property quite sufficient to found jurisdiction in this Court. I do not agree to the proposition, that there is no remedy in this Court if there be no remedy at law, and still less do I agree to the proposition that this Court is bound to send a matter of this description to be tried at law . . . If the property of an individual is affected by an undue and unauthorized use of his name, the law would no doubt give a remedy. I am not satisfied that the law would not give the same remedy in the case of the undue and unauthorized use of the name of a nation or state; but whether it would do so or not . . . I think . . . that the case falls within the jurisdiction of this Court.'

b
c

Thus Turner LJ expressly did not base his decision on the existence of a cause of action of law. d

If one stopped there, one might perhaps be forgiven for thinking that, on the basis of this reasoning, an argument could be mounted in the present case along the lines that, even though the incitement alleged did not found an action at law against Amstrad or Dixons for infringement of copyright, because the incitement constituted criminal acts which affected the plaintiffs' copyrights, a court of equity would restrain those acts at the suit of the copyright owners. e

However, and this is an important feature of this case, counsel for the plaintiffs accepted that it was now established that to enable a plaintiff to sue for an injunction to restrain a criminal act it is not enough for him to show that the criminal act interferes with some property interest of his. Having regard to the decision in *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456, [1982] AC 173 as interpreted by this court in *RCA Corp v Pollard* [1982] 3 All ER 771, [1983] Ch 135 and in *Rickless v United Artists Corp* [1987] 1 All ER 679, [1987] 2 WLR 945, that concession seems to me to have been inevitable. f

This being so, I am unable to see how the views expressed in *Emperor of Austria v Day and Kossuth* assist the plaintiffs in the present case. I can find in that case no other proposition which might assist them. g

I am able to deal with the next two cases more shortly. *Springhead Spinning Co v Riley* (1868) LR 6 Eq 551 was a demurrer to a bill alleging that the printing and publishing of advertisements by the defendants for the purpose of intimidating workmen from entering the employment of the plaintiffs were unlawful acts, punishable by statute and as a common law crime. The relief sought was an injunction and damages. Malins V-C overruled the demurrer, relying mainly on the passage, set out above, in the judgment of Turner LJ in *Emperor of Austria v Day and Kossuth* 3 De GF & J 217 at 253, 45 ER 861 at 875. Malins V-C said (at 558): h

'The jurisdiction of this Court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate, destruction of property, or make it less valuable or comfortable for use or occupation.'

i

Dixon v Holden (1869) LR 7 Eq 488 was another decision of Malins V-C. In that case he applied the same principle when restraining the publication of a libel.

Here again, it seems to me that the concession rightly made by counsel destroys any value that these cases might, at first sight, seem to have for him. Given the concession, I cannot see what is left in these decisions which advances the present plaintiffs' case.

So I come to the recent authorities. In *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70, [1978] AC 435, as is well known, Mr Gouriet sought an injunction restraining the defendant union from endeavouring to procure any person to delay post in the course of transmission between this country and South Africa, contrary to statute. Mr Gouriet did not claim that he had any special interest in the transmission of such post, or that he would suffer any special damage from non-transmission. The House of Lords struck out the proceedings on the ground that the court had no jurisdiction to grant Mr Gouriet the relief sought by him. Viscount Dilhorne made passing reference, without disapproval, to *Springhead Spinning Co v Riley* (1868) LR 6 Eq 551 but this was in the context of distinguishing from the instant case, where the plaintiff had not suffered any loss or damage, the 'long line of cases dealing with the rights of individuals to secure injunctions and declarations when their private rights are threatened' (see [1977] 3 All ER 70 at 92, [1978] AC 435 at 492–493). Lord Edmund-Davies made a statement to the same effect (see [1977] 3 All ER 70 at 104, [1978] AC 435 at 506).

I do not think those passages assist the plaintiffs. Apart from anything else, even if, read out of their context, these passages might, at first sight, be thought to countenance a proposition that a plaintiff can sue for an injunction to restrain a criminal act which interferes with some property right of his, this would afford no support for the proposition embraced by counsel's category (2). The two propositions are quite distinct.

Before coming to the last authority on which counsel for the plaintiff replied, *RCA Corp v Pollard* [1982] 3 All ER 771, [1983] Ch 135, I must refer to *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456, [1982] AC 173, which was the subject of consideration in *RCA Corp v Pollard*.

It will be recalled that one of the questions before their Lordships in the *Lonrho* case was whether, although no breach of contract was involved, delivery to Southern Rhodesia by Shell and BP of petroleum products contrary to the sanctions order gave Lonrho a cause of action for damages, assuming Lonrho suffered loss in consequence of the activities of BP and Shell. In answering that question in the negative, in a speech concurred in by Lord Edmund-Davies, Lord Keith, Lord Scarman and Lord Bridge, Lord Diplock referred to the principle that the question whether legislation which makes the doing or omitting to do a particular act a criminal offence renders the person guilty of such offence liable also in a civil action for damages at the suit of any person who thereby suffers loss or damage is a question of construction of the legislation (see [1981] 2 All ER 456 at 460, [1982] AC 173 at 183). Having set out the terms of the sanctions order, he pointed out that the order created a statutory prohibition on the doing of certain classes of acts and provided the means of enforcement by prosecution for a criminal offence which was subject to heavy penalties. Lord Diplock continued ([1981] 2 All ER 456 at 461, [1982] AC 173 at 185):

'So one starts with the presumption laid down originally by Lord Tenterden CJ in *Doe d Bishop of Rochester v Bridges* (1831) 1 B & Ad 847 at 859, [1824–34] All ER Rep 167 at 170, where he spoke of the "general rule" that "where an Act creates an obligation, and enforces the performance in a specified manner . . . that performance cannot be enforced in any other manner", a statement that has frequently been cited with approval ever since, including on several occasions in speeches in this House. Where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform the statutory obligation or for contravening the statutory prohibition which the Act creates, there are two classes of exception to this general rule.'

The first of the two exceptions stated by Lord Diplock was 'where on the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation' (see [1981] 2 All ER 456 at 461, [1982] AC 173 at 185). In that type of case those intended to be benefited who were injured by contravention of the statute had a right at common law against the person who contravened the statute.

I pause to observe that this is counsel for the plaintiffs' category (1), which it is admitted does not assist the plaintiffs in the present case. a

The second exception stated by Lord Diplock was—

'where the statute creates a public right (ie a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers what Brett J in *Benjamin v Storr* (1874) LR 9 CP 400 at 407 described as "particular, direct and substantial" damage "other and different from that which was common to all the rest of the public".' b

He referred to *Boyce v Paddington BC* [1903] 1 Ch 109 as a case of a public right conferred by statute, and said ([1981] 2 All ER 456 at 461-462, [1982] AC 173 at 185-186):

'It is in relation to that class of statute only that Buckley J's oft-cited statement (at 114) as to the two cases in which a plaintiff, without joining the Attorney General, could himself sue in private law for interference with that public right must be understood. The two cases he said were: "first, where the interference with the public right is such as that some private right of his is at the same time interfered with . . . and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right." The first case would not appear to depend on the existence of a public right in addition to the private one; while to come within the second case at all it has first to be shown that the statute, having regard to its scope and language, does fall within that class of statutes which create a legal right to be enjoyed by all of Her Majesty's subjects who wish to avail themselves of it. A mere prohibition on members of the public generally from doing what it would otherwise be lawful for them to do is not enough.' c
d
e

I pause again to observe that the present case does not fall within this second exception.

Having concluded that the case before their Lordships' House fell within neither of the exceptions, Lord Diplock then considered the decision in *Ex p Island Records Ltd* [1978] 3 All ER 824, [1978] Ch 122, this having been relied on as showing that— f

'some broader principle has of recent years replaced those long-established principles that I have just stated for determining whether a contravention of a particular statutory prohibition by one private individual makes him liable in tort to another private individual who can prove that he has suffered damage as a result of the contravention'. g

(See [1981] 2 All ER 456 at 462, [1982] AC 173 at 187.)

Suffice it to say, Lord Diplock rejected the existence of any wider general rule.

I make one observation on this case before turning to *RCA Corp v Pollard*. Although the question before the House of Lords concerned the existence of a cause of action for damages, I read the passages cited above from the speech of Lord Diplock as intended to be a comprehensive statement of the circumstances in which, in general, some manner of enforcing performance of a statutory obligation or prohibition, other than prosecution for the criminal offence prescribed by the statute, is permissible. Their Lordships had before them, in the judgments in *Ex p Island Records Ltd*, references to the principle in equity said to be derived from cases such as *Springhead Spinning Co v Riley* (1868) LR 6 Eq 551, but Lord Diplock's speech contains no suggestion that, founded on these cases or otherwise, there might be a third exception to Lord Tenterden CJ's 'general rule', whereby a court of equity would grant an injunction and damages to an individual plaintiff in a case not within either of the other two exceptions. h
j

I come at last to *RCA Corp v Pollard* [1982] 3 All ER 771, [1983] Ch 135. The question in that case was the one left open by Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd*:

- whether recording companies have a cause of action against those making or distributing 'bootleg' records in contravention of the Dramatic and Musical Performers' Protection Act 1958. This court held that they do not. Thus the actual decision is not in point in the present case, but counsel for the plaintiff relied strongly on one passage in the judgment of Oliver LJ, where Oliver LJ set out three ways in which, until recently, a claim by the recording company to have a right to restrain the sale of 'bootlegged' recordings and for damages could have been framed ([1982] 3 All ER 771 at 779, [1983] Ch 135 at 150). He later stated the second of these as ([1982] 3 All ER 771 at 780, [1983] AC 135 at 150):

'where there is a breach of a statutory provision for the protection of a class of whom the plaintiff is one and he can show that he is specially damaged by the breach, he may bring proceedings to enforce, not his own civil right of action, but the public duty which has been interfered with or not observed.'

- c Counsel for the plaintiff submitted that that is this case.

I do not think that this passage in Oliver LJ's judgment can sustain the burden which counsel requires it to bear. As I read Oliver LJ's judgment, the three ways set out by him are his paraphrase of (1) Lord Diplock's first exception, (2) Lord Diplock's second exception and (3) the wider principle of equity upheld by the majority of the Court of Appeal in *Ex p Island Records Ltd* but rejected by the House of Lords in the *Lonrho* case.

- d These were the three principles which had so recently been the subject of exegesis by the House of Lords. I do not think that in his summary Oliver LJ could have been intending to depart from those principles, and to do so without any explicit indication that he was so doing and without stating his reasons for so doing.

In my view, therefore, the authorities relied on by counsel for the plaintiff do not establish his proposition. Furthermore, the proposition is contrary to established principle. In considering whether a plaintiff has a right to obtain an injunction in this area of the law, it is necessary to identify what is the legal or equitable right of the plaintiff whose violation the plaintiff is seeking to prevent: see *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corp* [1981] 1 All ER 289 at 296-297, [1981] AC 909 at 979-980 and *British Airways Board v Laker Airways Ltd* [1984] 3 All ER 39 at 46, [1985] AC 58 at 81. The proposition under consideration identifies that right as a claim in equity to enforce the observance of the criminal law. The proposition is framed in this way, as I understand it, to avoid the argument that the plaintiffs are seeking to set up and enforce a private right in respect of infringement of copyright which is not provided for in the Copyright Act 1956.

- g But, apart from express statutory provision, persons other than the Attorney General (acting either ex officio or ex relatione) have no standing to seek to enforce, through a civil court, the observance of the criminal law as such: their remedy is to bring a private prosecution: see *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 at 79, [1978] AC 435 at 477 per Lord Wilberforce. As Lord Eldon LC pointed out in *Macaulay v Shackell* (1827) 1 Bli NS 96 at 127, 4 ER 809 at 820 a court of equity has no criminal jurisdiction.

- h Of course, if the criminal activity will infringe a property right of the plaintiff, the plaintiff has standing to enlist the civil court's aid in preventing that infringement. But in assisting such a plaintiff the court is not compelling the observance of the criminal law as such: it is giving effect to a cause of action, at law or in equity, possessed by the plaintiff as owner of the property right. If a person threatens to steal another's car, the court would have jurisdiction to grant the owner of the car an injunction restraining that person from taking the car. But that injunction would not have the observance of the criminal law as its justification or purpose. The justification and purpose of such an injunction would be the restraint of the would-be thief from committing against the car owner the tort or torts which the theft of the car would involve. That the tort or torts would also give rise to criminal liability would be, essentially, irrelevant to the cause of action.

- j Furthermore, as appears from the rejection in *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456, [1982] AC 173 of the views espoused by Lord Denning MR and Waller LJ

in *Ex p Island Records Ltd* [1981] 2 All ER 456 at 463, [1982] AC 173 at 187, activity which is damaging to property of the plaintiff but which, if the activity were not criminal, would afford no cause of action to the plaintiff does not become remediable in civil suit at the investigation of the plaintiff by reason only that the activity is criminal. That the activity attracts criminal liability cannot by itself, in this field, convert into a cause of action acts which would otherwise not be sufficient for that purpose. (I confine my comments to the field of damaging a plaintiff's private rights of property, because different considerations apply elsewhere, for instance, where a party is seeking to enforce a contract, the making or performance of which is rendered illegal by statute.)

Whether the plaintiffs have any cause of action in respect of Amstrad's and Dixons' alleged incitement of others to infringe the plaintiffs' copyrights was not a matter argued before us. That was one of the questions decided by this court, in favour of Amstrad, in the declaratory action. The only question argued before us on the incitement issue was the narrow one of whether the alleged incitement of others to commit the s 21 offence gave rise to claims in equity as set out above. For the reasons I have stated, in my view it does not.

Counsel for the plaintiff sought to make his submission more attractive by confining the cases in which an individual has standing to obtain an injunction compelling the observance of the criminal law where the activity complained of would damage a property right to cases of a statutory prohibition enacted for the benefit or protection of a class of persons of whom the plaintiff is one. In my view, far from helping, this suggested limitation gives rise to further difficulties. In the first place, this limitation involves drawing a distinction between statutory crimes and common law crimes for which I can see no sound justification (and, in passing, I note that the crime alleged against Amstrad and Dixons is not a statutory one, but is the common law crime of incitement of others to commit an offence which is statutory in source).

Secondly, this limitation involves construing a statute, but leads to a result which attributes to Parliament a very odd legislative intention. The exercise required by counsel's category (1) is the familiar, if sometimes difficult, one of construing a statute to see whether a breach of the statutory prohibition or obligation makes the person committing the breach liable in damages at the suit of a person damaged thereby. Counsel's category (2) envisages that the court has undertaken that exercise and concluded (a) that the statutory prohibition or obligation was imposed for the protection or benefit of a particular class of persons, but (b) that the contravention of the prohibition or obligation gave rise to no right for a member of that class to sue for damages at law, yet (c) the contravention did give rise to a right for a member of the class to sue in equity for an injunction, with (because this also is claimed by counsel) a claim for damages added, by a sidewind, by Lord Cairns's Act.

I do not find this at all persuasive. I am unable to see what are the circumstances in which, or the purpose for which, Parliament would be concerned to draw the distinction between a claim for damages at law on the one hand, and a claim in equity for an injunction with damages in addition to or in lieu of an injunction on the other hand, and then enact a prohibition having the effect of conferring on members of the 'protected' class a right extending to the latter claim but not the former. Counsel conceded, in my view rightly, that s 21(3) does not itself confer on copyright owners a right to sue at law for damages for breach of a statutory duty. I can see no basis for construing the subsection in such a way that none the less committing the offence of inciting others to commit the s 21(3) offence has the effect of conferring on copyright owners a right to sue in equity for an injunction and damages in lieu of or in addition thereto.

In the end, therefore, for the reasons I have sought to state, in my judgment the plaintiffs' incitement claim formulated in the amendment is not legally sustainable. Accordingly, I would allow the appeals by Amstrad and Dixons, and discharge the judge's order giving leave to amend.

a For the further reason I have already stated, the question whether the plaintiffs have a good cause of action against Amstrad or Dixons otherwise than by reference to s 21(3) has not been argued before us, counsel accepting that on this he is bound to fail in this court. Accordingly, I would dismiss the plaintiffs' appeal and, since this would leave no live issue in the proceedings, strike out the writ and statement of claim. I would do so, I must confess, with a feeling of profound dissatisfaction. The narrow issue argued before us was the criminal incitement point, which is, in my view, misconceived. But the overall result of these appeals is that if the facts alleged against Amstrad and Dixons are correct, substantial manufacturers and distributors are, on a large scale, inciting others to infringe copyright in circumstances where the copyright owners have no practical remedy against the actual infringers, and there is nothing the copyright owners can do through the courts to stop them. If, indeed, that is so, the present state of the law is, in my view, gravely defective.

c **SIR DENYS BUCKLEY.** The facts of this case, and what I may perhaps call the strategic positions of the parties, have been set out in the judgment of Nicholls LJ, a draft of which I have already had an opportunity of reading. I will not recapitulate them. I remark, however, that the underlying cause of this action is the present apparent inefficacy of the law to protect those proprietary rights which statutes have conferred on owners of copyrights against widespread infringement of their copyrights by the use of modern electronic copying devices. Either the means and methods of detection and control require improvement or the very nature of copyright in works exposed to these risks of infringement calls for reconsideration. I understand that legislation in this field is already being considered.

e The appeals presently before us are interlocutory appeals. The defendants, Amstrad and Dixons, both seek to have the action stayed in limine. The plaintiffs seek to restore to their statement of claim certain passages struck out by Whitford J on 8 March 1986 on the ground that they no longer supported sustainable causes of action, having regard to the judgments given in this court on 29 October 1985 in the earlier action of *Amstrad Consumer Electronics plc v British Phonographic Industry Ltd* [1986] FSR 189 (the declaratory action), in which substantially the same issues were raised as in the present action.

f Counsel for the plaintiffs concedes that he cannot dispute in this court the correctness of the Court of Appeal's decisions of 29 October 1985 in the declaratory action, but he would seek to do so in any appeal to the House of Lords. He has not contended that in the event the reasons given by this court which would have resulted in its making the declaration asked for but for the circumstance which I shall next mention were obiter dicta. He does, however, seek to support before us the view that the plaintiffs have a cause of action against the defendants which was not originally pleaded in the statement of claim in this action but has been introduced by amendments permitted by Whitford J on 8 March 1986. This suggested cause of action was first propounded by counsel for the defendants in the Court of Appeal on Amstrad's appeal in the declaratory action (see [1986] FSR 189 at 208). It was on this account that the Court of Appeal, in the exercise of its discretion, refused Amstrad a declaration to the effect that it had acted lawfully in respect of the matters in issue in that action.

g In this state of affairs, the only live issue before us is whether (1) the plaintiffs have a reasonable chance of success on what I may call the new cause of action or (2) the plaintiffs having no reasonable chance of success in that respect and being unable to contend in this court that they have any reasonable chance of succeeding on any other pleaded cause of action, the action should be stayed in limine. Whitford J was not satisfied that the plaintiffs must necessarily fail on the new cause of action, and accordingly he allowed the amendments necessary to introduce it to the pleading and refused a stay.

j It will be convenient first to deal with the matter as between the plaintiffs and Amstrad.

The proposed new cause of action does not arise under the Copyright Act 1956, s 21(3) but is a consequence of the provisions of that subsection, which provides: a

'Any person who, at a time when copyright subsists in a work, makes or has in his possession a plate, knowing that it is to be used for making infringing copies of the work, shall be guilty of an offence under this subsection.'

It is to be observed that the offence so created does not consist of infringing the copyright: it consists of making or possessing a plate, knowing that it *'is to be used'* for making infringing copies. b

Paragraph 6A of the amended statement of claim reads:

'All or nearly all of the person who use the said equipment to make copies of commercially available pre-recorded cassette tapes or gramophone discs will thereby be guilty of an offence under section 21(3) of the said Act. The Plaintiffs will say that: (a) any person who uses the said equipment to make such copies will necessarily at the time of such copying have in his possession (within the meaning of the said sub-section) the tape or disc being copied; (b) the tape or disc being copied as aforesaid will necessarily be a plate within the meaning of the said sub-section; (c) by virtue of the facts and matters referred to in paragraph 2, copyrights will subsist in all or nearly all of such tapes or discs being copied as aforesaid; and (d) by virtue of the facts and matters referred to in paragraph 2, all or nearly all of the persons making such copies will know the same to be infringing copies within the meaning of the said sub-section.' c
d

The facts and matters referred to in para 2 are these:

'... All or nearly all of the pre-recorded cassette tapes and gramophone discs (being tapes or discs in respect of which copyright subsists) commercially available in this country carry a warning notice to the effect that the unauthorised copying of the tape or disc is prohibited.' e

Paragraph 7 of the amended statement of claim reads:

'The said equipment has been advertised by the First Defendants and sold by the Defendants in such a way as to incite members of the public to use it to make cassette recordings from pre-recorded tapes, gramophone discs and broadcast material, with a reckless disregard for the rights of the owners of the copyrights in the sound recordings and musical works contained therein and in circumstances where (by virtue of the facts and matters referred to in paragraphs 2 and 6A) all or nearly all of the persons making such cassette recordings will be guilty of an offence under the said sub-section. The Plaintiffs will say that the Defendants have thereby unlawfully incited members of the public who buy the said equipment to commit offences under the said sub-section.' f
g

The allegation is that the defendants have unlawfully incited members of the public who buy 'the said equipment' (ie Amstrad's high-speed copying double cassette units, SM104, TS87 and TS39) to commit offences under s 21(3). h

Paragraph 7 of the amended statement of claim proceeds to set out in seven sub-paragraphs, (a) to (g), some material in the nature of particulars. I will not set these out in extenso. The sub-paragraphs are introduced by the words 'Pending discovery the Plaintiffs point to the following facts and matters'. These 'particulars' do not, in my view, have the effect of confining the plaintiffs to the matters so set out. Sub-paragraphs (a) to (c) refer to three published leaflets disseminated by Amstrad promoting the three equipments, drawing attention to the high-speed copying facilities, and saying, amongst other things: 'you can even make a copy of your favourite cassette.' j

Sub-paragraphs (d) and (e) relate to a newspaper advertisement and a television

commercial broadcast put out by Amstrad to much the same effect as the leaflets. Sub-
 a paragraphs (f) and (g) relate to two occasions on which retail customers inquired about or bought Amstrad equipments of the relevant types from Dixons.

Counsel for Amstrad in his clearly presented argument in this court, as in the court below, contended that by this plea the plaintiffs are seeking to obtain a remedy for infringement which is nowhere provided in the Copyright Act 1953, and is consequently not available to them.

b In my view, this argument is founded on a misconception. I can see no ground on which it could be suggested that by selling its audio equipments, Amstrad has infringed any copyright in any work a recording of which might thereafter be copied by the use of such an equipment. (See, in this connection, that section of Lawton LJ's judgment on the appeal in the declaratory action, which is headed 'Knowledge and intent' ([1986] FSR 189 at 205).)

c Nor, for the purposes at any rate of the cause of action with which I am concerned, does the amended statement of claim contain any such allegation. The allegation is that, by selling its audio equipment and thus providing members of the public with the means to copy prerecorded tapes, in the very great majority of which copyright will subsist, and by seeking to promote the sale of those equipments by such advertisements as it used, Amstrad has unlawfully incited members of the public to commit offences under s 23(1).

d It is not, I think, contended that Amstrad has itself committed that offence; nor do I think that that could be suggested. The audio machines cannot come within the meaning of the word 'plate', which is defined in s 18(3) of the 1956 Act as including 'any stereotype, stone, block, mould, matrix, transfer, negative or other appliance'. Those last three words must, in my judgment, be construed ejusdem generis with the preceding words. An electronic copying machine of the kind with which we are concerned is not, in my
 e judgment, of that genus, and does not fall within any natural meaning of the word 'plate'.

So the question for us, in my view, is whether, if Amstrad is found in fact to have incited members of the public to commit offences under s 21(3), that conduct by Amstrad entitles the plaintiffs, or any of them, or any of the persons on whose behalf the plaintiffs
 f respectively purport to sue, to a remedy in a civil court.

If it is reasonably arguable that some civil remedy would or might be available, the defendants cannot be entitled to have the action dismissed or struck out, or stayed, at the present stage. For the purpose of considering the question, it should be assumed that Amstrad is guilty of incitement. Only if, on that assumption, the plaintiffs would nevertheless be bound to fail in securing any civil relief of a kind claimed can the defendants succeed. Counsel for the plaintiffs is content that we should entertain and
 g decide this question of law.

Counsel for Amstrad's sheet anchor on this part of the case is the House of Lords decision in *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456, [1982] AC 173. In that case the defendant company, Shell, was alleged to have breached an order having statutory force, which prohibited the supply of oil to Southern Rhodesia. The plaintiff
 h company, Lonrho, asserted that this damaged a business of delivering oil by a certain pipeline which it carried on in Southern Rhodesia. Shell was held to have been guilty of no breach of contract with Lonrho. The question thereupon arose whether Shell was liable in tort.

The only reasoned speech delivered in that case was Lord Diplock's, with which the other members of the House of Lords who participated in the decision all agreed. In the
 j forefront of his reasons Lord Diplock said that it was well settled that the question whether legislation which makes the doing or omitting to do a particular act a criminal offence renders a person guilty of such offence liable also in a civil action for damages at the suit of any person who thereby suffers loss or damage is a question of construction of the legislation. He pointed out that the statutory order in question in that case created a statutory prohibition on the doing of certain classes of acts, and provided the means of

enforcing the prohibition by prosecution for a criminal offence, and said ([1981] 2 All ER 456 at 461, [1982] AC 173 at 185):

'So one starts with the presumption laid down originally by Lord Tenterden CJ in *Doe d Bishop of Rochester v Bridges* (1831) 1 B & Ad 847 at 859, [1824-34] All ER Rep 167 at 170, where he spoke of the "general rule" that "where an Act creates an obligation, and enforces the performance in a specified manner . . . that performance cannot be enforced in any other manner" . . .'

Lord Diplock then went on to discuss two classes of exception to that general rule, all in the context of a statutory obligation or prohibition. The *Lonrho* case teaches this and, in my opinion, only this: where a statute, or a regulation having statutory force, creates a new statutory offence by imposing a new duty or a new prohibition on the public, or some section of the public, specifying a particular method of enforcing compliance, a court of construction will, in the absence of special considerations, such as give rise to Lord Diplock's two exceptions, impute to the legislature an intention that an offender shall not be liable in any other way than to that specified sanction or penalty, thus precluding the possibility of a claim in damages.

It will be observed that Lord Diplock, when he criticised what Lord Denning MR had said in *Ex p Island Records Ltd* [1978] 3 All ER 824, [1978] Ch 122, formulated the proposition of law from which he, Lord Diplock, was dissenting thus:

' . . . whenever a lawful business carried on by one individual in fact suffers damage as a consequence of a contravention by another individual of any statutory prohibition the former has a civil right of action against the latter for such damage'

making clear that he was concerned with circumstances arising under a statute (see [1981] 2 All ER 456 at 463, [1982] AC 173 at 187).

That part of Lord Diplock's speech indicates what is, I think, an important distinction between the facts in the *Lonrho* case and those in the instant case.

There is no allegation in the present case that Amstrad has been guilty of any breach of a statutory prohibition, or of a failure to observe any statutory obligation, as there was in the *Lonrho* case and also *RCA Corp v Pollard* [1982] 3 All ER 771, [1983] Ch 135. There is, in the present case, no legislative provision which falls to be construed in order to identify the remedies available for any breach of it. What is asserted by para 7 of the amended statement of claim is that Amstrad has unlawfully incited members of the public to commit offences under s 21(3) of the 1956 Act, that is to say that Amstrad has been guilty of the common law criminal offence of inciting others to commit criminal acts (see 11 Halsbury's Laws (4th edn) para 53). Can that give rise to a liability in tort on the part of the inciter in favour of anyone injured by a criminal act incited by him? We have been shown no authority to the contrary.

If A, without justification, induces B to commit a breach of a contract existing between B and C, whereby C is damaged, A may be liable to a claim in damages for tort at the suit of C. It seems to me at least arguable by analogy that, if A unlawfully incites B to commit an offence under s 21(3) which will, or may, damage C, the owner of a copyright which is liable to be infringed as a consequence of that offence, A may be held to be actually or potentially liable for damages in tort at the suit of C, at any rate if that damage is a foreseeable consequence of the unlawful incitement, and a fortiori if the consequence was intended or contemplated by A. If that is so, it cannot, in my judgment, be asserted that the amended statement of claim does not show a reasonable cause of action, that is a cause of action which is not bound to fail in any event.

It is true, however, that in this court counsel for the plaintiffs has disclaimed any intention to rely on a common law liability in tort, and has contented himself with asserting an equitable right to injunctive relief with (as I understand) a claim for damages under Lord Cairns's Act (the Chancery Amendment Act 1858) appended to it, so I will not rest my decision of this appeal on the ground of tort.

Counsel's argument in support of that equitable claim has been founded on *Emperor of Austria v Day and Kossuth* (1861) 3 De GF & J 217, 45 ER 861, *Springhead Spinning Co v Riley* (1868) LR 6 Eq 551 and *Dixon v Holden* (1869) LR 7 Eq 488.

The first of these was a decision of the Court of Appeal; the other two were decisions of Malins V-C in which he sought to apply the principles enunciated in the *Emperor of Austria* case. It is true that Malins V-C's two decisions have been the subject of criticism in later cases (see *Prudential Assurance Co v Knott* (1875) LR 10 Ch App 142 and *Temperton v Russell* [1893] 1 QB 435 at 438). But the *Emperor of Austria* case has never, so far as I am aware, been disapproved. It appears to be binding on us.

Turner LJ there, in a passage already cited by Nicholls LJ, regarded the importation of spurious Hungarian bank notes to Hungary as an injury to unidentified individuals in Hungary on whose behalf the plaintiff emperor could sue (see 3 De GF & J 217 at 253–254, 45 ER 861 at 875 at 876). The act complained of was not a criminal act by English law, but it was regarded by the court as an unjustified invasion of private property rights. Neither Lord Campbell LC nor Knight Bruce LJ seem to have considered that the absence of identification of the parties injured was a bar to relief. All three members of the court regarded themselves as exercising an equitable jurisdiction based on a risk of injury to property.

That decision appears to me to afford at least an arguable basis of support for the claim by counsel for the plaintiffs to injunctive relief in the present case, irrespective of whether the plaintiffs have a good common law cause of action for damages. I do not think that that decision is in any way affected by the *Lonrho* decision, or by anything said in *RCA Corp v Pollard* or in *Rickless v United Artists Corp* [1987] 1 All ER 679, [1987] 2 WLR 945, both cases concerned with statutory prohibitions.

I do not think the claim to damages under Lord Cairns's Act presents any difficulty. The award of such damages would be discretionary. If no damages could be recovered at common law, a court of equity might well regard this as a proper circumstance to take into account in the exercise of its discretion.

I am not entirely clear what stage discovery has reached in the action. It is not, I believe, complete. It is not, I think, impossible that the plaintiffs may want to make further amendments in their statement of claim as discovery proceeds.

Taking all these considerations into account, this case is not one in which I, for my part, would feel disposed to assume the task of determining on these interlocutory appeals the point of law which I referred to earlier. It seems at least possible, and indeed probable, that any decision on the trial of the action will be appealed as far as the House of Lords. I think that it is most desirable that, if and when that occurs, the relevant facts should all have been investigated and determined so that the House of Lords may be fully and precisely informed of the facts so as perhaps to be able to illuminate this area of the law.

I now turn to Dixons' appeal. Whereas Amstrad does not sell its audio equipments direct to retail customers, Dixons does so. Amstrad has advertised its equipments in print and by television; there is no assertion in the amended statement of claim that Dixons has done so. Dixons clearly has greater opportunities to make oral representations to retail customers than has Amstrad. Amstrad very possibly has the greater incentive to build up a market for the equipments. The facts of the two cases are different, and the findings whether either of the defendants has been guilty of any such incitement as is alleged may well be different. But the nature of the problems which arise in each case are very similar.

The allegation against Dixons in para 7 of the amended statement of claim is that Dixons has sold the equipments in such a way as unlawfully to incite members of the public to commit offences under s 21(3). Whether such has been the case must be a question of fact, or of mixed fact and law. It is not a pure question of law, the determination of which adversely to the plaintiffs might justify striking out in limine against Dixons.

Counsel for Dixons has submitted that the only specific events referred to in the amended statement of claim relating to alleged incitement by Dixons are the events mentioned in sub-paras (f) and (g) of the so-called particulars set out in para 7. These two sub-paragraphs may be thought to afford slender material for concluding that Dixons has incited members of the public to commit offences under s 21(3), but, as I have already observed, I do not think that, as the pleading stand, the plaintiffs are confined to that material in this respect. a

In these circumstances, and for the reasons which I have discussed, I for my part would not stay or strike out this action against either defendant. b

There remains the question whether the action can properly proceed as a representative action. The question can, I think, for present purposes, be formulated in this way. If a large number of potential plaintiffs all have distinct but similar causes of action against a potential defendant arising out of a particular act or course of conduct on the part of that defendant, which are alleged to give rise to relief of the same kind, though not necessarily of the same measure in the case of each potential plaintiff, can one or a number of those potential plaintiffs sue as representing themselves and all or a number of the rest of the potential plaintiffs? c

A leading authority in this field is *Duke of Bedford v Ellis* [1901] AC 1, [1900-3] All ER Rep 694, which related to Covent Garden market. Six plaintiffs, who were growers of fruit, flowers, vegetables, roots and herbs, sued on behalf of themselves and all other such growers. They alleged that the defendant, the Duke of Bedford, who owned and managed the market, had contravened the Covent Garden Market Act 1828 (9 Geo 4 c cxiii), which governed the management of the market. The Act established preferential rights to use certain pitches at the market in favour of growers of the products in question at rates of rent and toll more favourable to growers than those prescribed for middlemen traders. The plaintiffs claimed a declaration as to the construction of the Act, injunctive relief restraining breaches of the Act and an account of the amounts by which growers were alleged to have been severally overcharged. The defendant applied interlocutorily claiming that the action could not be pursued as a representative action. That interlocutory application was carried to the House of Lords, where it was held that the action was properly brought as a representative action. d

The leading speech was delivered by Lord Macnaghten, who said ([1901] AC 1 at 8, [1900-3] All ER Rep 694 at 697): e

‘Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.’ f

He drew attention to the fact that all the growers had the same rights, for which they relied on one and the same Act of Parliament. g

Similarly, in the instant case the plaintiffs, and all the persons who they purport to represent, have statutory rights of the same character under the Copyright Act 1956 which the action is designed to protect from infringement resulting from the conduct of the defendants which is complained of. They share, in my judgment, a common interest and a common grievance, such as Lord Macnaghten had in mind. The relief which is primarily claimed is injunctive in a form which would benefit the plaintiffs and all whom they purport to represent in the same way, that is to say by protecting them from the risk of infringements incited by the defendants. h

As Whitford J has pointed out, there would be likely to be formidable difficulties in the way of discovering the precise measure of any damage already suffered by any individual copyright owner. It seems improbable that any claim to damages will be pursued, but it seems to me that the possibility of such a claim is no greater bar to a representative action than was the claim to an account in *Duke of Bedford v Ellis* (see also *EMI Records Ltd v Riley* [1981] 2 All ER 838, [1981] 1 WLR 923, where, in an i

infringement action, representative plaintiffs claimed an inquiry as to damages as well as an injunction).

- a It has been argued that a representative action is not permissible where there is a claim to damages, because each claimant would have to establish his individual damage. We were referred to *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021, where a claim in damages was brought against the owners of a ship lost at sea by plaintiffs suing on behalf of themselves and other owners of cargo on board the ship, which was also lost.
- b The Court of Appeal held that the plaintiffs could not sue in a representative capacity. Vaughan Williams LJ said (at 1029):

- c '... in the present case there is no common origin of the claims of those who shipped goods on board the *Knight Commander*—the contracts were constituted by the bills of lading, which manifestly might differ much in their form, and as to the exceptions, and probably would vary somewhat according to the nature of the goods shipped.'

Fletcher Moulton LJ said (at 1035): '... where the claim of the plaintiff is for damages the machinery of a representative suit is absolutely inapplicable'; but he subsequently made clear that what he had in mind was a case in which damages was the sole relief sought (at 1040). Buckley LJ, who dissented on the ground that any difficulty about the action continuing as a representative action could be cured by an amendment of the pleadings, said (at 1045):

'It may be, and I think it is the case, that in a representative action the plaintiff must be in a position to claim some relief which is common to all, but it is no objection that he claims also relief personal to himself.'

- e In the instant action, the claims of the plaintiffs and those of the persons whom they purport to represent all have a common basis; damages are not the sole relief claimed and can, in my opinion, be regarded as a quite subsidiary form of relief, capable of being pursued by any individual claimant taking out a summons under any order for an inquiry that the court might make to have his individual claim in damages assessed; and the major relief claimed is common to all the plaintiffs and those whom they purport to represent.

In my judgment, this action has been properly framed as a representative action.

- f For these reasons I, for my part, would dismiss the defendants' two appeals in their entirety. In consequence of the decision of this court in the declaratory action, I would also dismiss the plaintiffs' appeal. If this interlocutory appeal is taken to the House of Lords, it will be open to the plaintiffs to seek to have those words which have been deleted from the statement of claim restored. If after trial any party wishes to appeal, it might be thought that the case would be a suitable one for the leap-frog procedure. This, to some extent, would mitigate the expense of those unfortunately duplicative proceedings.

- g **FOX LJ.** I have had the advantage of reading in draft the judgment of Nicholls LJ. I agree with it, and do not wish to add to it.

Defendants' appeals allowed. Plaintiffs' cross-appeal dismissed.

10 April. The Court of Appeal granted the plaintiffs leave to appeal to the House of Lords.

- j Solicitors: Herbert Smith (for Amstrad); Wilkinson Kimbers (for Dixons); Hamlin Slowe (for the plaintiffs).

Rignall Developments Ltd v Halil

CHANCERY DIVISION

MILLETT J

19 FEBRUARY, 10 MARCH 1987

Sale of land – Title – Defect – Disclosure of defect – Local land charge – Notice of charge – Purchaser deemed to have made searches and inquiries – Contract at auction for purchase of freehold property – Property subject to local land charge – Contract containing condition that purchaser deemed to have searched local land charges register – Purchaser failing to make search and unaware of local land charge – Vendor serving notice to complete – Whether vendor able to show good title – Whether vendor required to make full and frank disclosure of incumbrance – Whether purchaser deemed to have notice of land charge – Law of Property Act 1925, s 198(1) – National Conditions of Sale (20th edn), condition 11.

The defendant was the owner of a house which she had purchased knowing it to be subject to a charge relating to an improvement grant which had been paid to her predecessor in title. The charge was registered in the register of local land charges and could be removed on payment being made to the local authority. The defendant put the property up for auction, where the plaintiff agreed to purchase it for £16,000 under a contract incorporating the National Conditions of Sale (20th edn), condition 11 of which provided that the purchaser 'shall be deemed to have made Local Searches and Enquiries and to have knowledge of all matters that would be disclosed thereby and shall purchase subject to such matters'. The plaintiff did not search the local land charges register before the auction and was unaware of the charge. When the plaintiff did discover the charge it refused to complete and the defendant served a notice to complete. The plaintiff subsequently obtained the removal of the charge and indicated that it was willing to complete, but the defendant then refused to complete unless the plaintiff paid interest on the purchase price from the date of the notice to complete. The plaintiff sought a declaration that the defendant had not been entitled to serve the notice to complete because, having regard to the charge, she had not been able to show good title at that date. The defendant relied on condition 11 and s 198(1)^a of the Law of Property Act 1925, which provided that registration of a local land charge constituted 'actual notice' of the charge 'to all persons and for all purposes connected with the land affected'.

Held – (1) The defendant had failed to show good title to the property at the date of completion of the contract, notwithstanding the wording of condition 11, because the defendant, as vendor, was subject to the equitable rule that, if there was a defect in title or an incumbrance of which the vendor was aware, he could not rely on exempting conditions in the contract unless he made full and frank disclosure of the existence of the defect or incumbrance. Since the defendant had been aware that the charge had been registered when she had purchased the property, it had been incumbent on her to disclose the existence and nature of the charge before the contract with the plaintiff was concluded, and in the absence of such disclosure the conditions of the contract could not be relied on by her (see p 174 *h* and p 175 *c* to *e*, post); dictum of Wills J in *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 QBD at 271 applied.

(2) The 'notice' which a person derived from registration under s 198(1) of the 1925 Act could not be equated with knowledge sufficient to imply a term into an open contract for the sale of land, since such an implication depended on the purchaser's state of mind, whereas notice under s 198(1) was not concerned with such matters and, in the absence of actual knowledge, could not support the necessary implication. Accordingly, the defendant could not rely on s 198(1) to relieve her from her obligation to make full and

^a Section 198(1), so far as material, is set out at p 176 *b*, post

- a frank disclosure of the existence of the registered charge before relying on the conditions of sale (see p 177 e f j and p 178 f, post); *Re Forsey and Hollebone's Contract* [1927] All ER Rep 635 distinguished.

- (3) It followed that the defendant had not shown a good title before the removal of the charge and was thus not entitled to interest on the balance of the purchase money, and a declaration to that effect would be granted. Furthermore, specific performance of the contract would be ordered on payment by the plaintiff of the balance of the purchase price less the cost of removing the charge from the register (see p 178 h, post).
- b

Notes

For defects in the vendor's title, see 42 Halsbury's Laws (4th edn) para 60, and for cases on the subject, see 40 Digest (Reissue) 712-728, 95-98.

For the Law of Property Act 1925, s 198, see 27 Halsbury's Statutes (3rd edn) 618.

c

Cases referred to in judgment

Ellis v Rogers (1885) 29 Ch D 661, CA.

Faruqi v English Real Estates Ltd [1979] 1 WLR 963.

Forsey and Hollebone's Contract, *Re* [1927] 2 Ch 379; *affd* [1927] 2 Ch 379, [1927] All ER Rep 635, CA.

- d *Gloag and Miller's Contract*, *Re* (1883) 23 Ch D 320.

Nottingham Patent Brick and Tile Co v Butler (1885) 15 QBD 261; *affd* 16 QBD 778, [1886-90] All ER Rep 1075, CA.

Summons

- e On 3 December 1985 the plaintiff, Rignall Developments Ltd, contracted to purchase from the defendant, Gulseren Halil, a freehold property at 218 Bellenden Road, Peckham, London SE15, for the sum of £16,000 of which £1,600 was paid as deposit. The plaintiff objected to an adverse entry against the property in the local land charges register and refused to complete. On 31 December 1985 the defendant served the plaintiff with a notice to complete. The plaintiff obtained the removal of the charge on 14 April 1986 and then expressed willingness to complete. The defendant then refused to complete unless the plaintiff paid interest on the purchase price from 31 December 1985. The plaintiff issued a summons seeking, inter alia, a declaration that the defendant had not shown good title to the property until 14 April 1986 and so was unable to claim interest, and an order of specific performance on payment of the balance of purchase price without interest. The facts are set out in the judgment.
- f

- g *Jonathan Ferris* for the plaintiff.
Justin Fenwick for the defendant.

Cur adv vult

- h 10 March. The following judgment was delivered.

MILLETT J. For 60 years, ever since the judgment of Eve J in *Re Forsey and Hollebone's Contract* [1927] 2 Ch 379, a prudent purchaser has searched the register of local land charges before contract, and has not relied exclusively on making his search in the course of the normal process of investigation of title between contract and completion. Recently, however, the time taken by many local authorities, particularly in London, to reply to inquiries and to deal with applications for official searches of the registers kept by them has become a scandal which threatens to impede the proper working of a free market. Where land is sold by auction, it may be impossible for prospective bidders to obtain official searches in the time available. Where residential property is sold by private treaty, delay can cause havoc with the long chain of transactions which may be involved. There

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is a growing and useful practice for the vendor's solicitor to obtain and supply the purchaser's solicitor with a copy of the entries on the register at the same time as the draft contract. The present case calls for reconsideration of the consequences of the purchaser's failure to search the register or to obtain copies of the entries thereon before contract, and the correctness of the decision in *Re Forsey and Hollebone's Contract* has been challenged. a

The case concerns a freehold dwelling in Peckham known as 218 Bellenden Road (the property). At an auction held on 3 December 1985 the plaintiff agreed to purchase the property from the defendant for £16,000 and paid a deposit of £1,600 to the auctioneers as stakeholders. The contract incorporated the National Conditions of Sale (20th edn) as well as certain general and special conditions. These included the following. General condition 11: b

'The Purchaser shall be deemed to have made Local Searches and Enquiries and to have knowledge of all matters that would be disclosed thereby and shall purchase subject to such matters.' c

Special condition 5:

'The property is also sold subject to any matters which might be disclosed by a Search and/or Enquiries of the relevant Local Authority either at the date of sale or at the date of completion and (whether or not he has carried out any such Search and/or Enquiries) the Purchaser shall be deemed to buy with full notice and knowledge of all such matters, and shall not raise any objection thereon or requisition relating thereto.' d

The date fixed for completion was 31 December 1985. The plaintiff did not complete on that date because of a subsisting entry on the register of local land charges to which it took objection. The defendant, relying on the conditions which I have read, denied that this was an objection which the plaintiff was entitled to raise, and served notice to complete. e

The plaintiff's solicitors eventually obtained the removal of the entry, but not until 14 April 1986. The plaintiff then sought to complete, but the defendant refused to complete unless the plaintiff paid interest on the balance of the purchase price since 31 December 1985, which the plaintiff declined to do. The amount involved was small, and the sensible course would have been for the parties to complete and leave the question of interest to be resolved later. Instead, both sides took up entrenched positions, and the sale has still not been completed. The plaintiff now seeks specific performance on payment of the balance of the purchase price, but without interest; and the defendant seeks to rescind the contract and forfeit the deposit. The case turns on whether the defendant had by 31 December 1985 shown a good title to the property in accordance with the contract, and this depends on whether the plaintiff was entitled to object to the entries on the register, notwithstanding the conditions of the contract which I have read. f

At all material times the property was let to a protected tenant, and it was sold to the plaintiff subject to the tenancy. In 1978 the freehold owner had applied to the local authority for an improvement grant under the Housing Act 1974. The application was accompanied by a certificate of availability for letting dated 10 November 1978. It was approved on 4 April 1979, and registered in the register of local land charges on 6 April 1979. The date which the local authority in due course certified as the date on which the property first became fit for occupation, after the completion of the relevant works (the certified date) was 2 June 1980. The grant was paid on 15 February 1982. g

The plaintiff had not searched the register of local land charges prior to the auction, and was unaware of the entries it contained. They were not disclosed by the defendant. On 11 December 1985 the plaintiff's solicitors applied to the local authority for an official search of the register, and on the same day they submitted requisitions on title. One of these asked whether any improvement grant had been obtained in respect of the property. The defendant's solicitors replied, disputing the plaintiff's right to make the h

a inquiry, and claiming that it was barred by the contract. Without prejudice to that contention, however, they disclosed that there was with the deeds a search dated October 1984, which revealed that a certificate of availability for letting had been issued on 10 November 1978 and an improvement grant had been paid on 15 February 1982. Eventually the plaintiff's solicitors received the official certificate of search, which confirmed the existence of the relevant entries. They disclosed the dates of the certificate of availability for letting and of the approval and payment of the grant, but not the certified date.

b The proprietorship register at the Land Registry shows that the defendant was registered as proprietor of the property with title absolute on 1 November 1984. It does not disclose whether she was a purchaser for value; but a donee does not normally investigate his donor's title, and, from the proximity of the dates, I infer that the search of the local land charges register, made in October 1984, was made on her behalf at the time of her acquisition of the property, and that she was.

c The significance of the entries on the register cannot be understood without reference to the relevant provisions of the Housing Act 1974. With immaterial passages omitted, they are as follows:

d '73.—(1) ... where an application for an improvement grant ... has been approved by a local authority, the provisions of this section shall apply with respect to the occupation, during the period of 5 years beginning with the certified date (in this section referred to as "the initial period"), of the dwelling ... to which the grant relates ...

e (3) For the purposes of this section, the following are "qualifying persons" in relation to a dwelling, namely—(a) the applicant for the grant and any person who derives title to the dwelling through or under the applicant, otherwise than by a conveyance for value ...

f (4) In any case where the application for the grant was accompanied by a certificate of availability for letting with respect to the dwelling, it shall be a condition of the grant that throughout the initial period, (a) the dwelling will be let or available for letting as a residence, and not for a holiday, by a qualifying person ...

g 75.—(1) The provisions of this section shall apply in any case where, under or by virtue of any provision of this Part of this Act, a condition (in this section referred to as a "grant condition") is imposed as a condition of a grant.

(2) If and so long as a grant condition remains in force—(a) it shall be binding on any person ... who is for the time being the owner of the dwelling to which the grant relates ...

(3) ... a grant condition shall be in force throughout the period of 5 years beginning on the certified date ...

h (5) A grant condition shall be treated as not being registrable by virtue of section 15 of the Land Charges Act 1925 but, as soon as may be after an application for a grant has been approved, any condition of that grant shall be registered in the register of local land charges ...

(6) In this Part of this Act "the certified date", in relation to a dwelling in respect of which an application for a grant has been approved means the date certified by the local authority by whom the application was approved as the date on which the dwelling first becomes fit for occupation after completion of the relevant works to the satisfaction of the local authority.

i 76.—(1) The provisions of this section shall have effect in the event of a breach of a condition of a grant (in this section referred to as "the relevant grant") at a time when the condition is binding on the owner of the dwelling concerned by virtue of section 75(2) above.

(2) Where the relevant grant related to a single dwelling, an amount equal to the amount of the relevant grant, together with compound interest thereon as from the

certified date, calculated at the appropriate rate . . . shall, on being demanded by the local authority, forthwith become payable to the authority by the owner for the time being of the dwelling . . .

(4) Nothing in subsection (2), or as the case may be, subsection (3) above, shall prevent a local authority from determining not to demand any such amount as is referred to in that subsection, or from demanding an amount less than that which they are entitled to demand under that subsection.

(5) Upon satisfaction of the liability of an owner of a dwelling to make a payment under this section to a local authority in respect of a breach of a condition of a grant, the condition shall cease to be in force with respect to that dwelling . . .

77.—(1) If, at any time while a condition of a grant remains in force, the owner of the dwelling to which the condition relates . . . pays to the local authority by whom the grant was made the like amount as would (on a demand by the local authority) become payable under section 76 above in the event of a breach of that condition, all conditions of the grant shall cease to be in force with respect to that dwelling . . .

The definition of 'qualifying person' in s 73(3)(a) has the result that a grant is repayable on any sale of the property during the initial period, even though the property continues to be occupied by a protected tenant. The object evidently is to prevent short-term speculators from buying properties, improving them at the expense of the ratepayers and then selling them at a profit which reflects the expenditure of public money. The sale to the defendant in 1984, if, as I infer, she had bought the property, and the present sale to the plaintiff, if within the initial period, would both constitute breaches of a condition of the grant and make the grant repayable. The certified date did not appear on the register but, from the information available to the plaintiff's solicitors in December 1985, it must have seemed probable that there had been a breach of condition in 1984, and possible that another would occur if completion took place on 31 December. In those circumstances, the plaintiff refused to complete in the absence of confirmation from the local authority that it would not seek to recover the amount of the grant from the plaintiff, or from the defendant that, if required, she would repay it out of the proceeds of sale.

On 14 April 1986 the local authority's legal department, whose dilatoriness had largely caused the problem, finally notified the plaintiff's solicitors that the initial period had expired in June 1985 that there would not be a breach of grant condition if the plaintiff completed its purchase, and that it had given instructions for the entries on the register of local land charges to be removed. The plaintiff then offered to complete, and the parties adopted the positions I have described.

The defendant relied on the express terms of the contract. The property, it was submitted, was not sold free from incumbrances, but subject to the entries on the register of local land charges; and the plaintiff had no right to object to them. The defendant had, therefore, shown a good title to that which she had agreed to sell, and was entitled to serve notice to complete. Moreover, by general condition 11 the plaintiff was deemed to have searched the register and to have knowledge of the entries thereon.

It is, however, a well-established rule of equity that, if there is a defect in title or incumbrance of which the vendor is aware, the vendor cannot rely on conditions such as those in the present case unless full and frank disclosure is made of its existence. The leading authority is *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 QBD 261. Wills J said (at 271):

'The 4th condition provides that the property is sold subject to any matter or thing affecting the same, whether disclosed at the time of the sale or not. Such a condition, however, does not relieve the vendor from the necessity of disclosing any incumbrance or liability of which he is aware, but simply protects him if it should afterwards turn out that the property is subject to some burden or right in favour of

a a third person of which he is unaware . . . It would be nothing short of a direct encouragement to fraud if a vendor were at liberty by a condition of this kind to sell to a purchaser as an absolute and unburdened freehold a property which he knew to be subject to liabilities which would materially reduce its market value . . . In honesty and in law alike he was bound to give the purchaser full and fair information what it was that he had for sale, and was inviting him to buy, and having failed to do so, he cannot insist upon the bargain procured by the suppression of material facts affecting the nature of the subject of sale. I entirely acquit the defendant of anything like intentional misconduct, but in the preparation of the particulars of sale he unfortunately relied upon his solicitor, who, as I cannot help believing, was under the mistaken impression that he could better the position of the vendor by abstaining from making himself acquainted with the contents of the earlier deeds in his possession, and open to his perusal.'

c As that case shows, the knowledge of the vendor's solicitor is treated as that of the vendor, and it is no answer for him to say that he has not read the contents of his own conveyancing file. In the present case, therefore, the defendant must be taken to have known of the entries on the register, since a search had been made on her behalf at the time of her purchase and a copy of the entries was with the deeds in her solicitor's possession. To entitle her to rely on the relevant conditions of the contract in these d circumstances, it was incumbent on her to disclose the existence and nature of the entries to the plaintiff before contract. Had the information disclosed in the answers to requisitions been included in the particulars of sale, there could have been no objection to conditions precluding all further inquiry and making the sale subject to the entries in question. In the absence of such disclosure the conditions cannot be relied on. It is hardly e necessary to add that the equitable principle cannot be circumvented by the inclusion in the contract of a condition deeming the purchaser to have searched the register and to know of its contents. The purchaser's acceptance of such a condition is on the basis that the vendor has made the disclosure required of him.

f In answer to this, it was first submitted on behalf of the defendant that the conditions of grant did not create an incumbrance or burden on the property, but only a personal liability on the owner. But the grant is repayable on demand by the owner for the time being of the property, so that the potential liability binds successive owners of the property affected (which is why it is required to be registered) and in my judgment that is enough. Then it was submitted that the entries on the register were only 'bare' entries, without any reality behind them. Unknown to the parties, it was said, the initial period had expired, so that the grant was not repayable and the entries were obsolete. In fact g that appears to be incorrect if, as I infer, there had been a breach of grant condition in 1984. As I read the statutory provisions, once there has been a breach of grant condition during the initial period, repayment may be demanded, even after the expiration of that period, from the owner of the property at the date of the demand. But in any case, neither the entries on the register nor the defendant's answers to requisitions disclosed h the certified date or showed that the initial period had expired. It was for the defendant to show a good title to the property free from the risk that repayment of the grant might be demanded from the plaintiff, and she failed to do so.

Next it was submitted that the plaintiff could have inspected the register before the auction, that a prudent purchaser would have done so, and that there was no reason for equity to come to the assistance of the imprudent. I cannot accept that submission. In *Faruqi v English Real Estates Ltd* [1979] 1 WLR 963 the equitable principle was applied in j a case where the relevant documents were made available for inspection and the vendors had given the purchasers a fair and proper opportunity of seeing what they were buying. But, as Walton J pointed out, any purchaser reading the conditions of sale would be entitled to assume that, while there were no doubt entries on the register, they were only the usual sort of entries which would not adversely affect the value of the property (at 968). That observation applies with equal force to the present case.

As to the plaintiff's alleged imprudence, the modern practice of making pre-contract searches dates only from 1927 and is a result of the decision in *Re Forsey and Hollebone's Contract* [1927] 2 Ch 379. But, even if that is the only safe and prudent course, why should the purchaser's imprudence relieve the vendor of the obligation of candour? a

Finally, and most formidably, reliance was placed on s 198(1) of the Law of Property Act 1925, as amended by the Local Land Charges Act 1975. That deems the registration of any instrument or matter in any local land charges register to constitute 'actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected . . .' b

Equity, it was submitted, and I agree, does not insist on the performance of idle rituals, and does not require a vendor to disclose to a purchaser matters already known to him. For this submission to help the defendant, however, the actual notice, of which s 198 speaks, must be equated with knowledge. That is the crucial equation which was made in *Re Forsey and Hollebone's Contract*. c

In that case, land was sold free from incumbrances. In accordance with normal conveyancing practice, the purchaser's solicitor did not search the local land charges register until after exchange of contracts and shortly before the date fixed for completion. He then discovered that the local authority had resolved to prepare a town planning scheme. The resolution had been registered as a local land charge, but neither the vendor nor the purchaser was aware of its existence at the date of the contract. d

The purchaser applied for a declaration that the vendor had not shown a good title to the property sold in accordance with the contract and for repayment of the deposit. Her application was dismissed by Eve J and the Court of Appeal on the ground that a resolution to prepare a town planning scheme did not operate to impose a subsisting incumbrance on the land affected. At first instance, however, Eve J gave a second ground for this decision, on which the Court of Appeal expressed no opinion, that even if the registered resolution was an incumbrance, it was an incumbrance of which the purchaser must, under s 198, be deemed to have contracted with actual notice, and she was therefore precluded from refusing to complete the contract. He said ([1927] 2 Ch 379 at 387): e

[The vendor] has only to point to the section . . . to show that when the contract was entered into vendor and purchaser must alike *be deemed to have known* of the existence of the incumbrance which the purchaser insists on as a good ground for avoiding the contract.' (My emphasis.) f

Eve J thus equated the actual notice attributed to the purchaser by s 198 with knowledge for the purpose of the well-known rule that, in the case of an open contract for the sale of land, a purchaser cannot object to an irremovable incumbrance of which he was aware at the date of the contract. An incumbrance is irremovable if the owner of the land is not entitled as of right to procure its discharge by the payment of money. The rule rests on implication. A person who knows that a property has some incurable defect or is subject to some irremovable incumbrance, and yet contracts to buy it, must impliedly be taken to have agreed to accept the vendor's title despite the existence of that defect or incumbrance. To this extent the implication in an open contract that the property is sold free from incumbrances is negated. (Normally, the purchaser's knowledge of the state of the title cannot deprive him of the benefit of an express term that the land is sold free from incumbrances. Eve J attributed this to the parol evidence rule, but it would, I think, be more accurate to attribute it to the obvious impossibility, even if the evidence were received, of implying a term inconsistent with an express term of the contract.) The rule has no application to an incumbrance like that in the present case, which can be removed on payment: see s 77 of the 1974 Act. The purchaser's knowledge of such an incumbrance is not inconsistent with the vendor's obligation to make the payment necessary to obtain its discharge on completion: see *Re Gloag and Miller's Contract* (1883) 23 Ch D 320. Hence the crucial importance of the contractual provisions on which the defendant relies. g
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This part of Eve J's judgment represents an alternative ground for his decision, and cannot be dismissed as merely obiter. It has stood for nearly 60 years, but not without challenge. It was greeted at the time by conveyancers with consternation and incredulity. Its interpretation of s 198 was described as 'startling' and its effect as 'revolutionary'. It has since been subjected to severe criticism by the editors of *Emmett on Title* (see, e.g. 19th edn (1986), para 1.013) and other eminent conveyancers. It has led to a change in conveyancing practice, which is both inconvenient and time-consuming, and which is unlikely to be adopted by those who buy at auction or who contract before consulting solicitors. For such purchasers, the decision constitutes a potential trap. Even in ordinary sales by private treaty, the need to search the local land charges register before contract rather than at the same time as the other registers, that is to say shortly before completion, is inconvenient and entails a delay which can put the contract at risk. Pre-contract searches of the land charges register, to which s 198 also applied, are, of course, impractical, since registration in that register (unlike the local land charges register) is effected against the name of the estate owner for the time being, and until contract it is not known against what names the search should be made.

These problems, aggravated by the reduction in the statutory period of title from 30 to 20 years, led to the reversal of the relevant part of Eve J's decision by s 24 of the Law of Property Act 1969, following the Law Commission Report on Land Charges Affecting Unregistered Land (Law Com no 18). That section, however, does not apply to local land charges, in respect of which pre-contract searches are feasible and had by 1969 become normal practice. In relation to local land charges, therefore, the decision in *Re Forsey and Hollebone's Contract* has not been reversed by statute, but neither has it been confirmed thereby.

In my judgment, the equation of the actual notice referred to in s 198 with the state of mind required for terms to be implied into an open contract is deeply suspect. I find it impossible to reconcile with principle or authority. If a purchaser knows, or even mistakenly believes, that he cannot expect to obtain a title free from incumbrances, and yet enters into a contract of purchase on that basis, the inference is obvious. But the inference depends on his state of mind, which may be affected by error, or ignorance, or forgetfulness. Notice (even actual notice), however, has nothing to do with the person's state of mind, and is not affected by such matters. In the absence of knowledge, notice cannot support the necessary inference.

This is neatly demonstrated by the decision of the Court of Appeal in *Ellis v Rogers* (1885) 29 Ch D 661. In that case the purchaser knew before he entered into the contract that the land was subject to restrictive covenants, but he wrongly believed that they had been extinguished when the land had been compulsorily acquired by a railway company. He later discovered that the covenants were still extant and would bind him if he completed. When he refused to complete, the vendor contended that, having known of the existence of the covenants from the outset, the purchaser must be taken to have agreed to accept the title subject to them. The Court of Appeal rejected this contention. As Cotton LJ put it (at 671):

'The vendor knew nothing of the covenants. The purchaser knew of them, but thought they had been discharged, so that both parties were contracting on the footing that a good title was to be made, and as a good title cannot be made, the purchaser is not bound.'

This shows that notice and knowledge are not synonymous. The purchaser had actual notice of the existence of the covenants. Had he completed before discovering his error, he would unquestionably have been bound by them as a purchaser with notice. His ignorance of their continuing subsistence, while negating any inference which might otherwise have been drawn from his knowledge of them, would not avail him against the covenantee, for it would not affect his notice of them.

There are two further grounds for suspecting Eve J's reasoning. Firstly, in *Ellis v Rogers* 29 Ch D 661 at 666 Kay J pointed out that to force the title on the purchaser it is essential

that he should have knowledge, not only of the existence of the incumbrance, but of the vendor's inability to remove it. Section 198 cannot help with this. Unless consciously aware of the existence of an incumbrance, a purchaser cannot form any useful opinion on the vendor's ability to remove it. a

Secondly, it is unlikely that the notice attributed to the purchaser by s 198 was intended to have any greater effect than actual notice would have had before 1926; and notice of equities before 1926 had nothing to do with the relationship of vendor and purchaser or with the interpretation and effect of their contract of sale. It was concerned exclusively with the enforcement of third parties' rights. The fundamental rule of equity is that an equitable interest is binding on everyone, except a bona fide purchaser for value without notice. The Land Charges Act 1925 substituted registration for notice, and was likewise concerned exclusively with the protection of third parties' rights. Section 198 of the Law of Property Act 1925 forms an integral part of the machinery of registration. In this context, the natural reading of s 198 is that registration constitutes actual notice to all persons and for all purposes *for which such notice is material*, that is to say for the purpose of the enforcement of third parties' rights against the land affected. b

In the present case the defendant asks me not merely to apply the decision in *Re Forsey and Hollebone's Contract*, but to extend it by applying it in a different though closely related context. There, both vendor and purchaser were equally ignorant of the existence of the local land charge: it constituted an irremovable incumbrance; and the question was whether s 198 had the effect of modifying the vendor's contractual obligation to make a good title. Here, the defendant, through her solicitor, knew of the existence of the entry on the register; she could have procured its removal by repaying the grant if necessary; and the question is whether her failure to disclose what she knew prevents her from relying on the express terms of the contract. I cannot think that a vendor who knew of the existence of a registered charge, and who deliberately deceived the purchaser by telling him that there was no such charge, or that it was not registered, could escape liability for fraud by claiming that by virtue of s 198 the purchaser must be taken to have had actual notice of the truth. Similarly, I am not prepared to hold that a vendor who knows of a registered charge, and who wishes to make the sale subject to it, is exonerated by s 198 from his obligation to make full and frank disclosure of its existence before he can take advantage of an appropriate condition of sale. c

It is, therefore, not strictly necessary to reach any conclusion whether the decision in *Re Forsey and Hollebone's Contract* can be supported where the existence of a registered local land charge is unknown to the vendor at the date of contract, so that it is not unconscionable for him to rely on a special condition of sale without disclosing it, or where it represents an irremovable defect of title, so that he does not need to rely on any special condition. Such cases can be dealt with as and when they arise. In my judgment, the reasoning of the decision is too unsound to permit of any extension, however logical, to a situation not directly covered by it. d

I shall grant a declaration that the defendant failed to show a good title in accordance with the contract before 14 April 1986 and that the defendant is not entitled to interest on the balance of the purchase money; and I shall grant a decree of specific performance of the contract on payment by the plaintiff of the balance of the purchase price, less the costs of the plaintiff of obtaining the removal of the relevant entries on the local land charges register. e

Declarations and order accordingly.

Solicitors: *Armstrong & Co* (for the plaintiff); *Bazley White & Co* (for the defendant). f

Jacqueline Metcalfe Barrister. g

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Smith v Eric S Bush (a firm)

COURT OF APPEAL, CIVIL DIVISION

DILLON, GLIDEWELL LJ AND SIR EDWARD EVELEIGH

25 FEBRUARY, 13 MARCH 1987

b

Contract – Unfair terms – Exclusion of liability for negligence – Surveyor – Surveyor making report to building society for mortgage application – Survey carried out negligently – Report containing disclaimer of responsibility – Purchaser relying on report – Surveyor knowing purchaser likely to rely on report – Whether fair and reasonable for surveyor to rely on disclaimer – Unfair Contract Terms Act 1977, ss 2(2), 11(3).

c

The plaintiff applied to a building society for a mortgage to enable her to purchase a house. She paid an inspection fee of £38.89 and signed an application form which stated that a copy of the survey report and mortgage valuation obtained by the society would be given to the plaintiff. The form contained a disclaimer to the effect that neither the society nor its surveyor warranted that the report and valuation would be accurate and that the report and valuation would be supplied without any acceptance of responsibility.

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The society instructed the defendant surveyors, who carried out the inspection. In due course the plaintiff received a copy of their report, which contained a disclaimer in terms similar to those on the application form. On the strength of the report the plaintiff purchased the property. In their inspection the defendants failed to notice that the chimney breasts had been removed and 18 months after the plaintiff purchased the house the flues collapsed, causing substantial damage. The plaintiff brought an action

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against the defendants for negligence and was awarded damages in the county court. The defendants appealed to the Court of Appeal, contending that it was 'fair and reasonable', within ss 2(2)^a and 11(3)^b of the Unfair Contract Terms Act 1977, for them to rely on their disclaimer of liability.

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Held – A professional surveyor who prepared a report on a property for a building society knowing that the potential purchaser would be supplied with a copy of the report and was likely to rely on it without instructing his own surveyor was not entitled to rely on an all-embracing disclaimer of liability for negligence if his inspection was carried out without reasonable care because he had failed to exercise a reasonable degree of skill and competence. Although the defendants were under no duty to provide a full structural survey they were under an obligation to carry out a reasonably careful visual inspection and had that been done the defect which caused the damage would have been discovered. Accordingly, although the disclaimer would otherwise have been effective to relieve the defendants of liability, it would not in the circumstances be 'fair and reasonable', within ss 2(2) and 11(3) of the 1977 Act, for them to rely on it, because they knew that the report would be sent to the plaintiff and that she was likely to rely on it (see p 184 h, p 185 b to e, p 186 h to p 187 a d to g, post).

h

Notes

For agreements to exclude or restrict liability for negligence, see 34 Halsbury's Laws (4th edn) para 67.

For the Unfair Contract Terms Act 1977, ss 2, 11, see 11 Halsbury's Statutes (4th edn) 217, 222.

j

Cases referred to in judgments

Alderslade v Hendon Laundry Ltd [1945] 1 All ER 244, [1945] KB 189, CA.

^a Section 2(2) is set out at p 183 j to p 184 a, post

^b Section 11(3) is set out at p 184 a b, post

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, [1964] AC 465, [1963] 3 WLR 101, HL.
White (Arthur) (Contractors) Ltd v Tarmac Civil Engineering Ltd [1967] 3 All ER 586, [1967] 1 WLR 1508, CA.

Cases also cited

Hadden v City of Glasgow DC 1986 SLT 557, Outer House.
Stevenson v Nationwide Building Society (1984) 272 EG 663.
Yianni v Edwin Evans & Sons (a firm) [1981] 3 All ER 592, [1982] QB 438.

Appeal

The defendants, Eric S Bush (a firm), appealed against the decision of Mr Gerald Draycott sitting as an assistant recorder in the Norwich County Court on 17 April 1986 whereby in an action brought by the plaintiff, Jean Patricia Smith, against the defendants for damages for professional negligence in relation to a survey carried out by their senior partner, Mr Cannell, in relation to 242 Silver Road, Norwich, he awarded the plaintiff the sum of £4,379.97 damages including interest. The facts are set out in the judgment of Dillon LJ.

Nigel Hague QC and *Jane Davies* for the defendants.
Robert Seabrook QC and *Philip Havers* for the plaintiff.

Cur adv vult

13 March. The following judgments were delivered.

DILLON LJ. The defendants in this action, a firm of surveyors, appeal against a judgment against them for damages for professional negligence awarded to the plaintiff by Mr Gerald Draycott, sitting as an assistant recorder, at the trial of this action in Norwich County Court on 17 April 1986. The appeal raises a question of some general importance as to the application of the Unfair Contract Terms Act 1977.

The story begins in 1980. At that time the plaintiff lived at Coulsdon in Surrey in a house which she owned and which was subject to a mortgage in favour of the Abbey National Building Society. She decided, however, to move to Norwich. Her personal circumstances were that she was a state enrolled nurse, but had been working for some months as a clerk for a well-known firm; she had divorced or was separated from her husband, and she had two children, both living with her, a girl of 15 and a boy of 12.

She found a purchaser for her house in Surrey, and she also offered for a house at Horsham St Faiths near Norwich. But that purchase fell through. By the beginning of October 1980 she was, as the judge's note of her evidence records, desperate to get another house in Norwich, because she had been offered a good price for her house in Surrey and did not want to lose her purchaser. She then found the house with which this action was concerned, 242 Silver Road, Norwich. It was on offer at an asking price of £17,250, but the vendor said that he already had someone else interested at that price, and so she agreed to buy the house, subject to contract, for £17,500. It was a terraced house, some 70 years old, at the lower end of the housing market, but the plaintiff regarded it as suitable for herself and her children as it was well decorated, had central heating, and she could move in without doing any work to it.

To raise the price she needed a mortgage, and so on 6 October 1980 she applied to the Abbey National for a mortgage and completed their standard mortgage application form. In fact she only required a mortgage for £3,500 which was well below the price of the house, but nothing turns on that.

Under s 25 of the Building Societies Act 1962 (now s 13 of the Building Societies Act 1986) a building society which makes an advance on the security of a freehold or

a leasehold property has to get a report from an appropriately experienced person as to the value of that property and as to any matter likely to affect the value thereof. Building societies satisfy this requirement either by instructing firms of surveyors in general practice or by using their own in-house employed surveyors. In the present case, the Abbey National instructed the defendants, a firm of surveyors and valuers carrying on practice in Norwich; they acted by their senior partner, Mr Cannell, a chartered surveyor who was amply qualified for the job.

b It has always been the case that applicants for mortgages are required by the building society to pay the fees for the valuation reports which the societies are by the statute required to get. It used for many years to be the practice that the building societies refused to disclose the reports to the applicants, on the footing that they were only obtained for the building societies' own purposes. But this practice gave rise to widespread discontent in that applicants could not see why they should not have copies of reports for which they had paid. Before October 1980, therefore, the building societies had adopted instead a new practice of making copies of the reports available to the applicants for mortgages, but with extensive disclaimers of liability.

c In accordance with this new practice, there was included on a somewhat lengthy set of declarations just above the place where the plaintiff signed the mortgage application form the following:

d 'I/We have read the Notes for the guidance of Mortgage Applicants and accept that if the loan is approved the Mortgage Guarantee Policy Premium will be added to the Loan. I/We accept that the Society will provide me/us with a copy of the report and mortgage valuation which the Society will obtain in relation to this application. I/We understand that the Society is not the agent of the Surveyor or firm of Surveyors and that I am making no agreement with the Surveyor or firm of Surveyors. I/We understand that neither the Society nor the Surveyor or the firm of Surveyors will warrant, represent or give any assurance to me /us that the statements, conclusions and opinions expressed or implied in the report and mortgage valuation will be accurate or valid and the Surveyor(s) report will be supplied without any acceptance of responsibility on their part to me/us.'

f Just below her signature it is recorded that she had paid the inspection fee which was £36.89. There is a somewhat similarly worded disclaimer of liability in printed notes for the guidance of mortgage applicants which it was the practice of the Abbey National to supply to all mortgage applicants, but I need not refer to those notes because the disclaimer there adds nothing to what appears in the mortgage application form, as above set out, and in the copy of the defendants' report which was supplied to the plaintiff as mentioned below.

g Mr Cannell inspected the property on 8 October 1980. It is common ground that he was not required to carry out a structural survey. What he was required to do was to make a reasonably careful visual inspection of the property, and to fill in the Abbey National's standard printed form headed 'Report and Mortgage Valuation'. Mr Cannell h said that he would usually spend about half an hour on an inspection for a building society; that was generally in line with the evidence, as to their own practice, given at the trial by two other experienced surveyors, Mr Manwaring and Mr Wreford. It seems that thousands of such inspections and reports are made by surveyors for the purpose of building society mortgage applications every year over England and Wales as a whole.

j A copy of Mr Cannell's report was sent by the Abbey National to the plaintiff under cover of a letter from the Abbey National dated 9 October 1980. The report gives the value of the property for mortgage purposes, with vacant possession, as £16,500. It answers affirmatively the printed question whether the property was readily saleable for the purposes of owner occupation and was likely to remain so at or about the mortgage valuation. The report states that the property had been modernised in recent years to a fair standard and that no essential repairs were required. The report amply warrants the plaintiff's reaction to it, as expressed in her evidence at the trial:

'The impression I got from the Report was that I was very pleased with it; it did not show anything seriously wrong with the property'.

On the third page of the copy of the report sent to the plaintiff there was the disclaimer on which the defendants particularly rely, distinctively printed in red, whereas the rest of the form is printed in black. It is as follows:

'TO THE MORTGAGE APPLICANT(S):

IMPORTANT

1. THIS DOCUMENT IS NOT A MARKET VALUATION. IT IS NOT AND SHOULD NOT BE TAKEN AS, A STRUCTURAL SURVEY. It has been obtained by the Society from a qualified surveyor or firm of surveyors to comply with Section 25 of the Building Societies Act 1962.
2. If you are purchasing the property, you will receive a notice that the Society does not warrant that the purchase price is reasonable.
3. This is a report to the Society by its surveyor(s) and neither the Society nor the surveyor(s) give any warranty representation or assurance to you that the statements, conclusions and opinions expressed or implied in the document are accurate or valid.
4. The surveyor(s) has/have made this report without any acceptance of responsibility on his/her part to you.'

The plaintiff admits that she read this.

The plaintiff then proceeded to buy the property. She was forced by her vendor to increase her offer to £18,000, but nothing turns on that. She did not have any other survey of the property done because, as she said in evidence and the judge accepted, she relied on the building society survey.

Unfortunately, in his inspection of the property Mr Cannell overlooked a serious defect. He noticed that the chimney breasts in two of the first floor rooms, including the main bedroom, had been cut away, but it did not occur to him to check whether that had been done in a way which left the chimneys adequately supported. Had it occurred to him to check, it would have been easy to have done so (since there was a trap door through which he could have looked into the roof space with the aid of the ladder he had with him) and it would have taken him no more than ten minutes. Had he checked he would have seen at once that the brickwork of the chimneys had been left unsupported by the removal of the chimney breasts. The absence of adequate supports meant inevitably, as explained by Mr Manwaring at the trial, that the flues would collapse at some time. The house was thus in truth a dangerous structure, and unfit for habitation until adequate support for the flues had been provided.

Some 18 months later, at about 10.30 pm on 1 June 1982, the inevitable happened. One of the flues collapsed through the main bedroom and landing ceilings, bringing down part of another flue with it. Rubble came down the stairs into the lounge. Fortunately the plaintiff was downstairs at the time; had she been in her bed she might have been killed or seriously injured. The building work to get the place right was put in hand at once by the plaintiff, but it was five weeks before she could move back into her bedroom.

By this action the plaintiff claimed damages from the defendants for the negligence of Mr Cannell in failing to check whether the removal of the chimney breasts had left the chimneys without adequate support and consequently failing to give in his report correct advice as to the condition of the property. The assistant recorder upheld the plaintiff's claim, and awarded her £4,379.97 damages, including interest.

On this appeal two points only are raised to which I shall come. The defendants do not dispute the assistant recorder's findings (i) that in preparing his report Mr Cannell owed a duty of care to the plaintiff, apart from the disclaimers which I have mentioned, since he knew that she was likely to rely on his report, (ii) that she did indeed rely on his

report, (iii) that he was negligent in the sense that in carrying out a reasonably careful visual inspection of the property he ought to have looked to see whether the chimneys
a above had been left with adequate support after the removal of the chimney breasts and (iv) that there was no contributory negligence on the plaintiff's part.

The defendants do not in this court dispute the amount of damages awarded in the court below, if liability is established.

b The defendants submit, however, (1) that the disclaimers, ie the provisions set out above in the form of mortgage application signed by the plaintiff and in the notice in red on the copy of Mr Cannell's report which was supplied to the plaintiff, have the effect of absolving the defendants from all liability for negligence which would otherwise have fallen on them and (2) that the 1977 Act does not preclude the defendants from relying on the disclaimers because, they submit, the requirement of reasonableness under s 11(3) of the 1977 Act is satisfied in relation to the disclaimers.

c The assistant recorder held against the defendants on issue (1) because he found that it was an implied condition of the disclaimers that if the disclaimers were to apply there should have been a complete visual inspection of all parts of the fabric of the house. In other words, the disclaimers would have applied if Mr Cannell had looked into the roof space but had then negligently failed to see what was plain before his eyes there, but they did not apply as he negligently failed to look into the roof space at all. Counsel for the
d plaintiff in this court have, rightly, felt unable to support the reasoning of the assistant recorder on this issue, but they have submitted that the wording of the disclaimers is not sufficiently explicit to exempt the defendants from liability for negligence. They say that so far as the defendants' position is concerned (as opposed to the Abbey National's position) the disclaimers merely told the plaintiff that the defendants had not carried out a full structural survey of the property and that she had no contract with the defendants.

e Reference was made in a general way in the course of argument to the well-known line of authorities, stemming from *Alderslade v Hendon Laundry Ltd* [1945] 1 All ER 244, [1945] KB 189 in which the courts have considered the principles which are applicable to clauses which purport to exempt one party to a contract from liability to the other party for the consequences of the first party's own negligence. Assuming, however, that
f those are the principles which ought to be applied to the construction of these disclaimers, I find it impossible to conclude that the disclaimers do not cover tortious liability of the defendants for negligence. The final words in the notice on the copy of the report supplied to the plaintiff: 'The surveyor(s) has/have made this report without any acceptance of responsibility on his/their part to you' and the corresponding words at the end of the declaration in the form of mortgage application are really meaningless if they do not extend to responsibility or liability in negligence. If authority is required, it is to
g be found in the speeches of Lord Upjohn and Lord Pearson in *Arthur White (Contractors) Ltd v Tarmac Civil Engineering Ltd* [1967] 3 All ER 586 at 597, 599–600, [1967] 1 WLR 1508 at 1526, 1529.

h At common law, as is recognised in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 at 586–587, 595, [1964] AC 465 at 492, 504 per Lord Reid and Lord Morris, where there is no contract the assumption of a duty of care can by appropriate words be avoided, eg where a reference is given 'without responsibility'; and where a report is supplied subject to stipulations disclaiming responsibility the recipient cannot accept the report and ignore the stipulations. Apart, therefore, from the 1977 Act, the disclaimers relied on would, in my judgment, have provided an effective defence for the defendants against the plaintiff's claim.

j I turn, therefore, to consider issue (2), the effect of the 1977 Act. The relevant sections of the 1977 Act are as follows:

'2.—(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his

liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness . . .

II . . . (3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen . . .

Under s 11(5) the onus is on those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

The assistant recorder includes in his judgment a finding that he had not been satisfied by the defendants that in all the circumstances of this case it would be fair and reasonable to allow reliance on the disclaimers. But this is tacked on to the section of his judgment which deals with the quantum of damages and it may relate back to the assistant recorder's view that the disclaimers were inadequate because Mr Cannell had never looked into the roof space at all.

The question is whether the requirement of reasonableness, referred to in s 2(2) of the 1977 Act is satisfied, i.e. whether, on the words of s 11(3), it is fair and reasonable to allow reliance on the disclaimers, having regard to all the circumstances obtaining at the relevant time. In view of the generality of the words 'all the circumstances', counsel for the defendants concedes that the court is not limited to considering merely the questions whether the notice referred to in the section was sufficiently clearly brought to the attention of the person concerned or was sufficiently clearly expressed for that person to have been able to understand it.

Whether in any particular case it is fair and reasonable in all the circumstances to allow reliance on a notice excluding liability for negligence must, of course, depend on the circumstances of the particular case. In that sense no case is a precedent for any other case. But the circumstances of the present case are very ordinary, and we are told that there were many other cases waiting the outcome of this appeal. That is not surprising considering the number of building society surveys that are carried out. It appears that it is the practice of very many, if not all, building societies to include as a matter of course in their printed forms disclaimers, to protect the society itself and its surveyors from all liability, in substantially the same terms as the disclaimers in the present case.

It is common ground that it was no part of Mr Cannell's duty to carry out a full structural survey of the house, and this was understood by the plaintiff. She knew that she was taking a chance on there being no hidden defects in the house which would not have been apparent on a reasonably careful visual inspection of the house. To hold that the surveyor in such a case as the present cannot rely on the disclaimers does not involve extending the surveyor's obligations so as to make it incumbent on him to detect such hidden defects. His obligation is still merely to carry out a reasonably careful visual inspection.

But where he is dealing with a property at the lower end of the market and he knows that the purchaser is likely to rely on his report, and not instruct his or her own surveyor, I find it very difficult to see why it should be fair and reasonable to allow him to rely on an automatic blanket exclusion of all liability for negligence if his visual inspection of a property turns out not to have been reasonably careful.

The defendants have urged various considerations as showing that it is fair and reasonable that they should be allowed to rely on the disclaimers. They are all general considerations, unrelated to the particular facets of this case, and they are said to warrant an automatic blanket exclusion of all liability to mortgage applicants for negligence in respect of building society surveys. They say, for instance, they, the surveyors, never meet the mortgage applicants and so have no opportunity of clarifying or explaining anything they may have put in a report for a building society. They say also that it is of great benefit to the mortgage applicants that the report required by a building society under the statute, before it can agree to make a mortgage advance, should be available

a quickly and cheaply, and they suggest that neither of these ends will be attained if the surveyor has always in his mind the fear of litigation and the need to satisfy his insurers. They also naturally point to the fact that the interests of the building society, merely as mortgagee and the interest of the purchaser as owner of the equity of redemption are not the same; but this point is greatly weakened when it is seen that the report covers such questions, in which the purchaser is vitally interested, as the marketability of the property and whether urgent repairs to the property are required.

b Giving full consideration to all that has been urged by counsel for the defendants, I cannot see that it is fair or reasonable that a professional surveyor making a mortgage report at the lower end of the property market, when he knows that the would-be purchaser who is applying for a mortgage on the property has paid the fee for the report, will be supplied with a copy of the report and is likely to rely on the report and so is not likely to instruct any other surveyor, should be able to rely on any general disclaimers, c such as those in the present case, unrelated to any special factors affecting the particular property, to exempt him from liability to the purchaser for negligence if it should happen that he, the surveyor, carries out his visual inspection of the property without due care.

d It may be different, I express no opinion, where the mortgage applicant who chooses to rely on a building society's surveyor's report, despite having read such disclaimers, is himself a surveyor or a lawyer who understands these matters. So far as the plaintiff was concerned, and I fancy this would go for most purchasers, I do not think she would have seen any reason to incur the additional cost of instructing a second surveyor after she had read the copy of Mr Cannell's report.

e I do not doubt that Mr Cannell, when he makes a visual inspection of a property with a view to making a mortgage report to a building society, intends to act with reasonable care. I do not see why he should not be liable in damages like any other professional man who fails to show reasonable care if on a particular occasion he has failed to take reasonable care in his inspection.

I would accordingly dismiss this appeal.

f **GLIDEWELL LJ.** I have had the advantage of reading in draft the judgment of Dillon LJ. I gratefully adopt his recital of the facts, including the relevant documents.

There are two issues in this appeal: (1) on their face, did the words of the disclaimer suffice to prevent any duty of care being owed by the defendants to the plaintiff? (2) if so, did the disclaimer satisfy the requirement of reasonableness in the Unfair Contract Terms Act 1977, ss 2(2) and 11(3).

g (1) *The effect of the disclaimer*

h The documents which are particularly important are the declaration on the mortgage application form signed by the plaintiff and the notice at the end of the defendants' report of 8 October 1980, below their valuation. Dillon LJ has set this out in his judgment. The plaintiff said in evidence that she read this notice. We are thus not concerned with the question whether the disclaimer was brought to her attention. Clearly it was.

The reason which the assistant recorder gave for holding that the disclaimer was not sufficient to avoid responsibility, ie that there was an implied condition that, if the disclaimer is to apply, there should have been a complete visual inspection, is unsound. Counsel for the plaintiff did not attempt to rely on it.

i Counsel's argument is that the disclaimer did not cover liability for negligence. If that is correct, the disclaimer did not cover anything. The plaintiff was never in a contractual relationship with the defendants. If they were or could be liable to her, that liability could only be in the tort of negligence, which is how the plaintiff's claim is framed.

The payment by the plaintiff of £36.89 was not a payment of a fee for the provision of a report to her. The building society required the inspection, report and valuation by a

surveyor for their own purposes and to comply with s 25 of the Building Societies Act 1962. At 6 October 1980 the only contract was a promise by the building society to obtain a report and valuation and then consider whether to make to the plaintiff the mortgage loan she required in consideration of the payment of £36.89 to them. a

In my view, the wording of the disclaimer set out in the notice on the defendants' report and valuation did suffice to prevent the defendants' owing any duty of care to the plaintiff. In other words, it was so worded as to relieve them of all liability in negligence. b

(2) Did that notice satisfy the test of reasonableness in the 1977 Act?

In other words, is it 'fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining' at 8 October 1980, i.e. the date of the report? This is a question of policy, which could sensibly be answered either way.

The argument for the plaintiff, as it eventually emerged, is that it is necessary to distinguish between a disclaimer of liability for not doing something which the defendants were not purporting to do, i.e. carrying out a full structural survey, and doing incompetently that which Mr Cannell was purporting to do, i.e. making a visual inspection sufficient to reveal any state of disrepair which would affect the value of the property, to ascertain the general condition of the property, and to place a value on it. It is submitted that it is unfair to exclude liability for negligence in the latter category. c

Counsel for the defendants has two main arguments on this. (a) The lack of support for the chimney flues in the roof space and the chimney stack above would only have been revealed by a full structural survey, not by a visual inspection of the sort Mr Cannell was carrying out. In my view this is not correct. The judge accepted the evidence of Mr Manwaring, a chartered building surveyor called as an expert witness for the plaintiff, that the fact that the chimney breasts had been removed (which Mr Cannell observed) should have put him on inquiry as to whether the flues and stack above had been left unsupported. That inquiry would have involved no more than putting his head and shoulders through the trap door into the roof space, when the lack of support would at once have been apparent. The judge said that it would have taken no more than ten minutes to check, and that Mr Cannell should have looked through the trap door but did not. I agree with him. In my view Mr Cannell was guilty of lack of proper care in doing the sort of inspection he was purporting to do. (b) That Mr Cannell was carrying out the inspection for, and reporting to, the building society and for nobody else. Counsel argues that it is not fair or reasonable that the defendants should be under any duty of care to a potential purchaser, with whom they had no contractual relationship, simply because the building society chose to supply a copy of their report to the plaintiff. This is the nub of the case. If a surveyor's inspection is completely carried out, a potential purchaser who chooses not to commission his own inspection, despite the warning notice, will obtain the benefit of the report. But, counsel argues, he cannot justifiably complain if the inspection failed to reveal some defect which a reasonably competent inspection should have revealed. d
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It is my opinion that this argument fails because its basic premise is incorrect. While it is true that the surveyor carried out his inspection and wrote his report and valuation because he was commissioned to do so by the building society, he knew that a copy of his report would be sent to the plaintiff and that most probably she would rely on his report and valuation without obtaining any other advice. In my judgment a professional man, who knows that a potential purchaser of a house (herself possessed of no special skill) will most probably rely on his skill and competence, should not be allowed to relieve himself of liability if he fails to exercise a reasonable degree of skill and competence in the task on which he is engaged. h
j

In agreement with Dillon LJ I would thus hold that, in so far as the disclaimer excluded liability for negligence in the carrying out of the limited sort of inspection Mr Cannell was engaged to do and was purporting to do, the notice of disclaimer did not satisfy the

a requirement of reasonableness within ss 2(2) and 11(3) of the 1977 Act. For this reason I, too, would dismiss the appeal.

SIR EDWARD EVELEIGH. Section 2(1) of the Unfair Contract Terms Act 1977 prevents the defendant firm from excluding 'liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness'.

b In the present case it is first necessary to decide whether or not there would be liability for negligence apart from the notice which seeks to exclude that liability.

The words in red displayed prominently in the report are not simply a disclaimer of liability. They also constitute a warning that the report is of limited value as a survey report. If the plaintiff had relied on the report to an extent which would be unreasonable bearing in mind the warning, there would be no liability on the defendants and no need to consider the efficacy of a notice excluding liability.

c However, in so far as the words constitute a warning, they do not in my opinion warn a person to place no reliance at all on the report. They do not say that it is dangerous to rely on the report for what it purports to be or for what it says.

d The report did not reveal what a valuation report would have revealed if properly prepared, albeit for its limited purpose. On the contrary, it asserted that the property was readily saleable for the purpose of owner occupation. The plaintiff relied on it in this respect but the report did not merit even that degree of confidence. The warning, in my opinion, was not such as to make it unreasonable for the plaintiff to rely on the report as she did. Therefore, the defendants will be liable to the plaintiff unless the notice is effective to exclude liability.

e In this court counsel has not sought to argue that the defendants would not have been liable in the absence of a notice of disclaimer. None the less, I have analysed the position because I think it is important to bear in mind the basis of the defendants' liability when considering whether or not it would be fair and reasonable to allow reliance on the notice, having regard to all the circumstances obtaining when the liability arose.

f A relevant part of the circumstances obtaining when liability arose was the fact that the report stated that the house was readily saleable for the purpose of owner-occupation and was likely to remain so. There was no warning that this assertion was unreliable. It would have been perfectly simple to discover the dangerous state of the premises. No structural survey was needed for that. The least attention to the task that the plaintiff was entitled to expect from the defendants would have revealed the fault. The defendants' fault can hardly be regarded as a mere accidental error or omission.

g I therefore am of the opinion that it would not be fair and reasonable to allow reliance on a disclaimer which might, I know not, be effective in other circumstances.

Appeal dismissed. Leave to appeal to House of Lords refused.

Solicitors: Barlow Lyde & Gilbert (for the defendants); Hood Vores & Allwood, Dereham (for the plaintiff).

Sophie Craven Barrister.

Maples (formerly Melamud) v Maples

Maples v Melamud

FAMILY DIVISION

LATEY J

17, 18, 19, 26 MARCH 1987

Divorce – Foreign decree – Recognition by English court – Recognition of foreign judgment – Judgment conclusive between the parties – Jewish get divorce obtained in London – ‘Judgment of confirmation’ by rabbinical court in Israel – Whether Jewish get divorce capable of recognition by English court – Whether statutory provisions relating to reciprocal enforcement of foreign judgments applying to judgments of marital status – Whether Jewish get an extra-judicial proceeding – Foreign Judgments (Reciprocal Enforcement) Act 1933, s 8(1) – Domicile and Matrimonial Proceedings Act 1973, s 16(1).

The wife married her first husband in 1968 in Israel. In 1974 they settled in England. The marriage subsequently broke down and on 2 June 1977 they went to the Beth Din, a religious court staffed by rabbis, in London where the husband granted and the wife accepted a Jewish get divorce, ie a paper stating that the marriage was dissolved according to Jewish law. A rabbinical court in Israel subsequently issued a ‘judgment of confirmation’ certifying that the requirements of the get had been complied with according to Jewish law. On 7 August 1978 the wife went through a ceremony of marriage with another man. On the breakdown of that relationship the wife presented two petitions, firstly a petition (which was not defended) for a decree of nullity of the second marriage, on the ground that her first marriage had not been validly dissolved according to English law, and secondly a petition for a decree of divorce in respect of her first marriage, on the ground of five years’ separation. The first husband contested that petition, contending that the marriage had been dissolved by the get together with the judgment of confirmation, which was entitled to recognition under s 8(1)^a of the Foreign Judgments (Reciprocal Enforcement) Act 1933 because it was ‘conclusive between the parties thereto in all proceedings founded on the same cause of action’.

Held – On its true construction, s 8(1) of the 1933 Act did not apply to judgments of marital status, since such judgments did not solely affect the ‘parties thereto’ but had a wider significance and affected the interests of others, such as the state and any children of the marriage. Furthermore, the ‘cause of action’ in the proceedings before the court was not the same as that which had been before the rabbinical court and accordingly, s 8(1) had no application. The get was an extra-judicial proceeding and as such was expressly excluded by s 16(1)^b of the Domicile and Matrimonial Proceedings Act 1973 from validly dissolving the wife’s first marriage under English law because the get was not a proceeding instituted in an English court of law, with the result that the second marriage was void. Both petitions would therefore be granted (see p 190 g h and p 192 a to d, post).

Notes

For recognition of foreign decrees of nullity of marriage, see 8 Halsbury’s Laws (4th edn) paras 500–502, and for cases on the subject, see 11 Digest (Reissue) 557–560, 123 2–1246.

^a Section 8(1), so far as material, provides: ‘... a judgment to which Part I of this Act applies ... whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action ...’

^b Section 16(1) is set out at p 190 h, post

For the recognition of foreign judgments, see 8 Halsbury's Laws (4th edn) para 767.

a For the Foreign Judgments (Reciprocal Enforcement) Act 1933, s 8, see 22 Halsbury's Statutes (4th edn) 291.

For the Domicile and Matrimonial Proceedings Act 1973, s 16, see 27 *ibid* 781.

Cases referred to in judgment

b *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810, [1975] AC 591, [1975] 2 WLR 513, HL.

Vervaeke v Smith (Messina and A-G intervening) [1981] 1 All ER 55, [1981] Fam 77, [1981] 2 WLR 901, CA.

Cases also cited

Fatima v Secretary of State for the Home Dept [1986] 2 All ER 32, [1986] AC 527, HL.

c *Flynn (decd)*, *Re* [1968] 1 All ER 49, [1968] 1 WLR 103.

Qureshi v Qureshi [1971] 1 All ER 325, [1972] Fam 173.

Petitions

d The petitioner, Louise Rachel Maples (formerly Melamud) (the wife), presented two petitions. The first, filed on 2 April 1984 and amended on 15 January 1986, prayed for the dissolution of her marriage with her first husband, Mr Yair Melamud, which had taken place on 3 September 1968, on the ground that they had been separated for five years or more. The first husband contested the petition on the ground that the marriage had been validly dissolved by a Jewish get divorce obtained from the Beth Din, London on 2 June 1977 coupled with a 'judgment of confirmation' issued by the Haifa Rabbinical Court on 31 July 1977 which ought to be recognised under the Foreign Judgments (Reciprocal Enforcement) Act 1933. The wife's second petition filed on 31 May 1985 was an undefended petition for a decree of nullity of the ceremony of marriage between the wife and Mr Stephen Maples on 7 August 1978 at the registry office in St Albans, on the ground that her marriage to the first husband had not been dissolved according to English law. The facts are set out in the judgment.

f *E James Holman* for the wife.

Hugh Morgan for the first husband.

Cur adv vult

26 March. The following judgment was delivered.

g **LATEY J.** The petitioner (the wife) presents two petitions. She asks for a decree of nullity of her ceremony of marriage with Mr Maples on 7 August 1978; and she asks for a decree of divorce of her marriage with Mr Melamud on 3 September 1968. The result of both petitions depends on whether a Jewish get divorce dissolved the marriage according to English law.

h What happened was this. In September 1968 the wife and Mr Melamud married in Haifa. The wife's mother was Jewish; her father was British and Christian. Mr Melamud is Jewish. There are two children, boys: Eytan (born 27 July 1970), 16½ years old and Daniel (born 23 October 1974), 12 years old.

j Between 1968 and 1974 they lived together in Haifa. Then, in September 1973, there was the Yom Kippur War and the husband was called up as an army reservist. In January 1974 the wife's father died and her mother was ill. In May 1974 the wife and Eytan came to England. At that time the wife was carrying Daniel. In August 1974, on release from the army, the husband joined them in England and obtained employment here. In October 1974 Daniel was born, and in 1973 they bought a house in London.

It is convenient to say here, that after the issues on the petitions are decided there will, or may, be financial issues to be decided; and they may involve questions of conduct. At

this stage I am dealing solely with the two petitions and the question of marital status they involve.

Late in 1976 and early in 1977 the marriage went adrift. For present purposes the reasons do not matter. Divorce was discussed. The husband, Mr Melamud, was ready to agree to a Jewish get divorce, but not to an English civil divorce which would have involved allegations of one kind or another being made, which neither wished to make against the other. So, after preliminary inquiries, on 2 June 1977 they went to the Beth Din, Tavistock Square. There, with the formalities which are required duly complied with, the husband granted and the wife accepted a get, a paper stating and acknowledging that their marriage was dissolved according to Jewish law. The wife went to live with Mr Maples. On the advice of the Beth Din, Mr Melamud wrote to the rabbinical court at Haifa. On 31 July 1977 the District Rabbinical Court of Haifa issued a 'judgment of confirmation' of the London Beth Din divorce; a 'judgment of confirmation' is how the Hebrew is translated in the translation prepared for these proceedings.

The wife and Mr Maples wanted to marry. The Registrar General refused to authorise a marriage between them because of his understanding of the position in English law. The wife says she told the husband about this and asked for a civil divorce. Her husband refused that but said he would 'sort it out'.

In April 1978 the husband, when next in Haifa, went to the Rabbinical Court and there emerged another 'judgment of confirmation', which omitted mention that the divorce had taken place in the Beth Din in London. It is agreed that this was a colourable transaction with no materiality to the issues in this case; but it sufficed to enable the wife and Mr Maples to go through a ceremony of marriage, though the Registrar General wrote a cautionary letter stressing that it was questionable whether the marriage would be valid in English law. On 7 August 1978 the wife and Mr Maples went through a ceremony of marriage.

This brief history omits much which may be relevant in any ancillary financial proceedings. As I have said, I am dealing now solely with the two petitions concerned with matrimonial status.

The wife now petitions (1) for a decree of nullity of the ceremony of marriage with Mr Maples, on the ground that her marriage with Mr Melamud was not dissolved according to English law; Mr Maples does not contest that petition, (2) for a decree of divorce of her marriage with Mr Melamud on the ground that they have been separated for five years or more. Mr Melamud contests the petition, on the ground that their marriage was in fact validly dissolved. He accepts that if he is mistaken about that, she is entitled to a divorce decree on the ground of five years' separation.

Both petitions depend on one question only: was the get, coupled with the judgment of confirmation, a dissolution of the marriage valid in English law? The experts in Israeli law are agreed that the granting by the husband of the get, and the acceptance of it by the wife, at the Beth Din in London effectively and finally dissolved their marriage according to Israeli law.

This was an extra-judicial proceeding and, if the matter stopped there, it would have no validity in English law by reason of the provisions of s 16(1) of the Domicile and Matrimonial Proceedings Act 1973. This provides:

'No proceeding in the United Kingdom, the Channel Islands or the Isle of Man shall be regarded as validly dissolving a marriage unless instituted in the courts of law of one of those countries.'

It is a simple, straightforward enactment. The proceeding in the Beth Din, London, was not a proceeding instituted in an English court of law. It is, no doubt, because of this that the guidance issued by the Jewish Marriage Council and the Beth Din, London stresses the importance, indeed the necessity, of obtaining a civil divorce in the courts.

So, the get of 2 June 1977 is only valid in English law if there is some basis of recognition other than pursuant to the 1973 Act. For Mr Melamud it is contended that

such basis is to be found in the Foreign Judgments (Reciprocal Enforcement) Act 1933.

a For the wife it is contended that the 1933 Act does not provide any such basis.

Counsel remarked that the decision may have far-reaching implications for the Jewish community, and probably for the Muslim and other communities, here where there is extra-judicial 'divorce'. They have researched widely and have argued the case fully and helpfully.

b Counsel for Mr Melamud bases his contention on a passage in the judgment of Sir John Arnold P in the Court of Appeal in *Vervaeke v Smith* (Messina and A-G intervening) [1981] 1 All ER 55 at 89–90, [1981] Fam 77 at 125–126. In that passage Sir John Arnold P sets out the relevant sections of the 1933 Act which led him to the view that, contrary to its seeming tenor, the Act does apply to judgments of marital status.

c It is to be observed, firstly, that what the President said was obiter. Secondly, that on this particular point he was in a minority. Both Cumming-Bruce and Eveleigh LJ were doubtful whether the 1933 Act applied to matrimonial cases involving judgments of status. The fact that matrimonial causes are mentioned in the Act could be explained on the basis that money judgments in matrimonial causes are envisaged. Thirdly, the 'judgment' in that case was a decree of nullity given in the Belgian courts.

d Counsel for the husband accepts that the get granted at the Beth Din was what dissolved the marriage in Israeli law, and that he cannot rely on that as dissolving the marriage in English law, or, of course, as something to which the 1933 Act could apply. But he submits that the 'judgment' in the Haifa Rabbinical Court is covered by the Act.

e What did that 'judgment' do? It did not dissolve the marriage. The marriage had already been dissolved in Israeli law by the get in England. That is agreed. All it did was to certify that the requirements for a valid get (valid, that is to say, in Israeli law) had been met at the Beth Din. It would be strange indeed, if that certification could be registered and recognised under the 1933 Act as validly dissolving the marriage in English law.

Counsel for the wife argues that the whole ring and tenor of the 1933 Act concerns commercial and tortious situations and the normal range of civil actions not involving status.

f In the field of matrimonial law there are express statutory provisions dealing with validity and recognition of divorce and nullity decrees: the Recognition of Divorces and Legal Separations Act 1971 and the Domicile and Matrimonial Proceedings Act 1973. Are the provisions of those Acts outflanked by the 1933 Act? The language of the relevant parts of that Act, especially s 8(1), is convoluted and difficult to fathom, at any rate in this context. I am not alone in finding it so. Lord Reid described it as 'obscure'. In *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 at 817, [1975] AC 591 at 617 Lord Reid said:

h 'It is said that the effect of these obscure words in s 8(1) is to make the section apply to all judgments which would come within the terms of s 1(2) if condition (b) were omitted. Besides the fact that this would be a very odd way of bringing in another section of the Act that cannot be right. If (b) is omitted then s 1(2) would apply to every kind of judgment including judgments on status, family matters and in rem. No one suggests that s 8 was meant to deal with them.'

Those dicta were obiter but, coming from such a source, they are powerful and persuasive.

j Sir John Arnold P, in the *Vervaeke* case said that s 8 'is not framed so as to yield up its meaning easily or quickly' (see [1981] 1 All ER 55 at 89, [1981] Fam 77 at 125). In *Dicey and Morris on the Conflict of Laws* (10th edn, 1980), vol 2, p 1075 it is described as a 'tortuously drafted provision'.

In my opinion, it can indeed lead to the interpretation which Sir John Arnold P reached in the *Vervaeke* case. But if that is the correct interpretation it has odd results, some of which I have already described.

But in my judgment, looking at the relevant provisions as a whole, the correct interpretation is that the 1933 Act does not apply to judgments of marital status. a

As well as those already mentioned, there are other indications pointing in that direction. There are the words in s 8(1), omitting immaterial words, 'a judgment . . . shall be recognised . . . as conclusive between the parties thereto in all proceedings founded on the same cause of action . . .' A decree or judgment affecting marital status has a wider significance than solely to 'the parties thereto'. The state has an interest. So may others: children, for example. Nor is 'cause of action' apt language for such proceedings. In the instant case, in fact, the 'cause of action,' if it can be so described, in these proceedings is not the same as that in the Rabbinical Court in Haifa. b

Counsel for the wife advanced some further supplementary arguments. I do not reject them, but I think it unnecessary to repeat them.

For the reasons already given, in my judgment the 1933 Act does not apply to the Haifa judgment or certification. It follows that s 16(1) of the 1973 Act does apply, and that the get did not, in English law, validly dissolve the Melamud marriage. Accordingly, the ceremony of marriage with Mr Maples was void and on that petition there will be a decree of nullity. c

The marriage with Mr Melamud has irretrievably broken down and they have lived apart for more than five years. On that petition there will be a decree of divorce.

There will be a declaration that there are the two relevant children, Eytan and Daniel, and a certificate of satisfaction as to the arrangements for their care. d

To provide for certain possibilities and contingencies, counsel have asked that there be findings as to the parties' domicile at material times. Evidence has been given and the position is clear, in my judgment: Mr Melamud's domicile of origin was Israel and he has at no time abandoned it; that is conceded. The wife's father was and remained domiciled in England and that was her domicile of origin. She retained it until she married Mr Melamud. In January 1974 she ceased to be dependently domiciled in Israel but in fact remained so until some time after she came, and then he came, to live in England later in 1974. In 1975 they bought their house in London. The marriage went wrong. Her domicile of choice withered away during those years, and before the Beth Din get she had reverted to her domicile of origin in England, and she has never abandoned it. e
f

Decrees and declaration accordingly.

Solicitors: *Peter Nash*, Guildford (for the wife); *H C L Hanne & Co* (for the first husband).

Bebe Chua Barrister.

Lloyds Bank plc v Duker and others

CHANCERY DIVISION

JOHN MOWBRAY QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

13 MARCH, 8 APRIL 1987

Administration of estates – Distribution – Shares – Gift of shares in private company – Majority shareholding – Majority shareholding worth more per share than minority shareholdings – Beneficiary entitled to 46/80ths of estate – Whether beneficiary entitled to 46/80ths of shares in company or to 46/80ths of value of estate – Whether trustee required to sell company on open market and distribute proceeds in specified proportions.

The testator owned 999 of the 1,000 shares in a company of which he was chairman, the one remaining share being held by his wife. The testator died on 8 December 1979 and by his will the shares formed part of his residuary estate, which was bequeathed to his wife and other beneficiaries in specified proportions, the wife's share being 46/80ths, with the result that she claimed to be entitled to 574 shares. The shares were never transferred to the wife, who died on 26 January 1982. By her will she left her whole estate to D, who requested the executor of both estates to transfer the 574 shares to him. Other beneficiaries objected on the ground that since the majority shareholding was worth more per share than the other shares D would be getting a greater value than 46/80ths of the testator's estate if the shares were transferred to him. The objecting beneficiaries submitted that all 999 shares should be sold on the open market and the proceeds divided among the beneficiaries according to their respective proportions. The executor sought the court's determination whether the 574 shares could be transferred to D or whether they should be sold on the open market.

Held – Although as a general rule a person entitled to an aliquot share of an estate was entitled to insist on a corresponding part of the estate property being distributed to him intact if it was readily divisible, rather than the whole property being sold and the proceeds distributed, the trustees of an estate were bound to hold an even hand among the beneficiaries and not to favour one as against the others. Accordingly, since the majority shareholding which D had requested be transferred to him was worth markedly more per share than the minority holdings, whether taken singly or as a whole, so that D would receive more than 46/80ths of the estate if the 574 shares were transferred to him, the executor's duty was to sell all the shares on the open market and then distribute the proceeds according to the proportions specified in the will (see p 197 c to g, p 198 h and p 199 a b d to f, post).

Re Marshall [1911–13] All ER Rep 671, *Re Sandeman's Will Trusts* [1937] 1 All ER 368, and *Re Weiner's Will Trusts* [1956] 2 All ER 482 distinguished.

Notes

For the transfer of trust property on termination of the trust, see 48 Halsbury's Laws (4th edn) paras 636–637, and for cases on the subject, see 48 Digest (Reissue) 326–327, 2930–2936.

For the trustees' (or executors') discretion as to conversion or non-conversion or sale or retention of the property, see 16 Halsbury's Laws (4th edn) paras 1372–1377, 45 *ibid* para 834, and for cases on the subject, see 48 Digest (Reissue) 514–516, 4676–4684.

Cases referred to in judgment

Crowe v Appleby (Inspector of Taxes) [1975] 3 All ER 529, [1975] 1 WLR 1539; *aff'd* [1976] 2 All ER 914, [1976] 1 WLR 885, CA.

Howe v Earl of Dartmouth, *Howe v Countess of Aylesbury* (1802) 7 Ves 137, [1775–1802] All ER Rep 24, 32 ER 56, LC.

Marshall, Re, Marshall v Marshall [1914] 1 Ch 192, [1911-13] All ER Rep 671, CA.

Sandeman's Will Trusts, Re, Sandeman v Hayne [1937] 1 All ER 368.

Stephenson (Inspector of Taxes) v Barclays Bank Trust Co Ltd [1975] 1 All ER 625, [1975] 1 WLR 882.

Weiner's Will Trusts, Re, Wyner v Braithwaite [1956] 2 All ER 482, [1956] 1 WLR 579.

Originating summons

By summons dated 1 July 1986 the plaintiff, Lloyds Bank plc (the bank), sought (i) the determination of the question whether in the due administration of the estate of Rowland Smith (the testator) it was the duty of the bank (a) to comply with the request of the first defendant, Vernon Terence Dudley Duker, that the bank transfer to him at least 574 shares of £1 each in Rowland Smith Hotels Ltd out of the testator's holding of 999 shares in that company, or (b) to comply with the request of the second, third and fourth defendants, Violet Rose Smith, Leslie Brian Smith and Irene Lilian Smith, that the bank sell all the testator's holding of 999 shares in the open market, or (c) to take some other (and if so, what) steps in relation to such shareholding, and (ii) such further direction as might be given by the court concerning all or any of the 999 shares. The other respondents to the summons were the fifth and sixth defendants, Joan Muriel Belleini and Irene Madge Gladman, who together with the second, third and fourth defendants were the minority beneficiaries of the testator's estate. The facts are set out in the judgment.

Robert Pearce for the bank.

Henry Harrod for Mr Duker.

Ian Romer for the minority beneficiaries.

Cur adv vult

8 April. The following judgment was delivered.

JOHN MOWBRAY QC. The late Mr Rowland Smith was the registered holder of all but one of the 1,000 issued shares in Rowland Smith Hotels Ltd, and his wife, Mrs Smith, held the other. Mr Smith was chairman of the company and Mrs Smith was a director too. It is a private company and it owns the Palace Hotel at Torquay, which is a well-known luxury hotel with (as counsel on instructions agreed) 142 rooms set in 25 acres of grounds.

Mr Smith died on 8 December 1979. He made a will on 15 March 1973 and Mrs Smith and Lloyds Bank plc (the bank) proved it as his executors on 12 May 1980. Mr Smith's 999 shares in the company fall into his residuary estate. In cl 8 of his will he gave these directions about it:

'MY TRUSTEES shall hold the remainder of my estate Upon Trust either to retain or sell it on the following trusts: (a) To pay debts estate duty and executorship expenses (b) If my said Wife shall survive me by one calendar month to pay to her one half of what is left absolutely and beneficially but if she shall not survive me this half shall accrue to the other half and be dealt with as is provided in clause 8(c) of this my Will (c) To divide the other half of what is left into five equal parts and to pay one of such parts to each of the following person or persons absolutely and beneficially: (i) My Brother Arnold Smith and his Wife Violet Smith equally between them (ii) My Brother Brian Smith and his wife Irene Smith equally between them (iii) My Sister Doris Smith (iv) My Sister Muriel Belleini (v) Mrs. Irene Gladman of 17 Rowben Close London N20 PROVIDED that if any of them shall die in my lifetime (whether before or after the date of this my Will) leaving issue living at my death and who attain the age of Twenty-one years such issue shall take by substitution that which such deceased person would have taken had he or she survived me.'

a Mr Smith's brother, Mr Arnold Smith, and his sister, Miss Doris Smith, died before him without leaving any issue to take under the proviso, so their shares lapsed into a partial intestacy. Also there was a deed of family arrangement on 7 July 1980 under which Mr Smith's sister, Mrs Belleini, transferred her interest to her daughter, Miss Belleini. The result was that Mr Smith's residuary estate, including his shares in the company, became divisible like this:

b	Mrs Smith	46/80ths
	Mrs Arnold Smith	4/80ths
	Mr Brian Smith	7/80ths
	Mrs Brian Smith	4/80ths
	Miss Belleini	11/80ths
	Mrs Gladman	8/80ths

c I shall call the fractions I have just mentioned 'the 1/80th fractions'. (It is common ground that two of them were mistakenly transposed in para 12 of an affidavit of a Mr Kirkby of the bank which is before me.)

d Mr Smith's shares in the company are not needed to pay his debts, testamentary expenses or taxes. Mrs Smith asked the bank in writing to transfer 574 of the shares to her, together with if possible a further 100 shares, but no such transfer was made. (574 is the nearest whole number to 46/80ths of 999.) Mrs Smith did not live for long after her husband. She died on 26 January 1982. By her will, which she had made on 21 August 1952, long before Mr Smith acquired the company, she had appointed the bank her executor and left her whole estate to Mr Duker, who is now the managing director of the company. The bank proved her will on 28 October 1982. The shares in the company had still not been distributed (though one was transferred to Mr Duker as nominee so that e there should be two members of the company), and Mrs Smith's will gave Mr Duker the right to her 46/80ths of Mr Smith's residuary estate as well as her own one share in the company.

f Mr Duker asked the bank to proceed with the transfer of at least 574 of the shares in the company to him. Other beneficiaries of Mr Smith's residuary estate objected and the bank has issued an originating summons asking whether it is its duty to comply with Mr Duker's request or to sell all the shares in the open market. It is common ground that on any such sale Mr Duker should be at liberty to buy.

g The whole net estate is ready for immediate distribution. I assume, for the purpose of answering the question, that anyone entitled to an aliquot part of such an estate as this is normally entitled to insist on a corresponding part of any easily divisible property being distributed to him as it is, rather than the whole property being sold and the money proceeds distributed. Other beneficiaries, if they like, can ask the executors to sell their parts of the property, or they can do it for themselves.

h What the other beneficiaries say here is that if the shares are transferred out in the 1/80 fractions, Mr Duker will not take 46/80ths of the total value received by all the beneficiaries as a group, but much more, because a majority holding is worth more per share than a minority holding.

i I turn first to consider whether that is so on the evidence about values before me. This is not very full and not entirely satisfactory, but I can make a finding about values which will serve my purpose. I have no proper valuation of the hotel. Mrs Arnold Smith's solicitor got some indications about it, though, from a firm of surveyors and valuers who are well known in this field. The solicitor asked what a formal valuation would cost. A gentleman from the firm telephoned her, and said, and now I quote from her affidavit:

'... that they would charge a quarter per cent of the value plus VAT. He could not quote an exact charge for such a valuation but for a four star hotel of approximately 140 rooms in 25 acres in a popular resort in the South of England he thought the charge would amount to about £7500 plus VAT.'

That is more than Mrs Smith is prepared to pay, but it will be seen that the charge quoted would indicate a valuation of £3m. Then the solicitor asked her informant, and I quote from her affidavit again— a

‘... what sort of figure he would expect the Palace Hotel, Torquay to fetch on the open market. He said on the information he had he could not express a firm view, but that from his knowledge of recent hotel sales he would guess a value based on about £25000 per bedroom for a four star hotel in Torquay such as the Palace Hotel.’ b

That would make £3½m. I have no expert evidence of the value of the company, but its balance sheet at 30 September 1985 is in evidence, and I do not think that the price which would be fetched by the company as a whole from anyone who wanted to retain and run the hotel would be markedly different from the value of the hotel. That would make each share worth £3,000 or £3,500, though perhaps some allowance would have to be made for tax on the capital gain standing unrealised on the building, above its acquisition price of £627,420. c

There is nothing in the evidence to counter these obvious deductions from the solicitor's affidavit, so it seems safe to make them. I do not think that a holding of only 574 of the 1,000 issued shares would be as high as 574/1000ths of the value of the hotel, notwithstanding the company's article no 19(A) which gives the holder of a majority of the shares summary power to remove and appoint directors. d

In a winding up I think two sets of capital gains tax might be payable and the holder of 574 shares acting alone could not pass a winding-up resolution to unlock the net assets. On the other hand the other shareholders would jump at the chance of joining in such a resolution, for reasons which will shortly appear.

I should expect the asset value of the hotel to find at least a substantial reflection in the value of a holding of 574 shares in the company. The value would also, I think, reflect at least to some extent the after-tax operating profits of recent years, as shown in the audited accounts, even though none have been distributed as dividends. They were about £181,000 in the years to September 1984 and 1985 and have apparently improved since. e

The votes of a minor holding of shares, for instance, the 50 shares which would represent Mrs Arnold Smith's 4/80ths, or the 87 which would represent Mr Brian Smith's 7/80ths, could not unlock the assets, so such a holding could not be expected to reflect the asset value to any appreciable extent. f

What is more, none of the minority holdings can be expected to participate in dividends for the foreseeable future, if Mr Duker takes 574 shares. That appears from a letter which his (and the company's) accountants wrote to Mrs Arnold Smith on 13 February 1986. I shall read it. It says: g

‘Dear Mrs. Smith,

Palace Hotel, Torquay—Shares

Further to our letter on 21st January, our client wishes us to provide you with further information concerning the shares in Rowland Smith Hotels Limited: 1. It is the opinion of the Executors that the shares in the Company should be allocated pro-rata to the residuary legatees of the Estate of Rowland Smith. 2. This opinion is supported by Counsel's Opinion which has been reiterated recently despite the alternative advice which has been given to some of the “minority” beneficiaries. 3. We believe that in the light of Counsel's Opinion and the offer made by our client, the Court would be unlikely to recommend a sale of the Hotel but should it take this step there are doubts as to whether such a sale could be enforced having regard to the structure of the Company. 4. Although profitability is now running at a more satisfactory level, in order to maintain the Hotel in a competitive position, the Directors have embarked on a number of major projects. Accordingly, profits will need to be retained in the business for the foreseeable future and shareholders are unlikely, therefore, to receive dividends during this time. 5. In view of the lack h
j

a of good dividend prospects, the value of the minority shareholdings in the Company is certainly substantially lower than the offer of £403 per share recently made to you by our client.'

b As I understand it, Mr Duker offered £403 a share to all the other beneficiaries, and has subsequently increased this offer to £510 a share. (Counsel for the minority beneficiaries' confirmed this on instructions.) At that price, the minority's 425 shares would be worth a total of £216,750. The minority could, on any view, insist on their joint holding of 425 shares being sold as a single block, and I think that en bloc they might fetch more than that. None the less, the want of any dividends for the foreseeable future, and the inability of the buyer of any minority block to force a dividend would be bound to have a definite depressing effect on the value of the holding.

c Mr Duker could not be expected to join in a winding-up resolution, and he would not need dividends, because he could pay himself a salary as managing director.

d So, though the state of the evidence does not enable me to make any precise finding about values, I can find this much, which is all I need for the present purpose: the value per share of a holding of 574 shares in the company is markedly higher than the value per share of a holding even of 425 shares. The result is that, if Mr Duker takes 574 shares, the value of what he takes will be markedly more than 46/80ths of the aggregate values of his and the other holdings.

e Is that finding of fact enough to override what I am assuming is the normal rule by which Mr Duker would be entitled to call for a transfer of 574 of the shares? It seems clear to me that such a transfer would not be in accordance with Mr Smith's will. When he gave one half of his residuary estate to his wife and the other half to his brothers and sisters and others, he must have meant half by value. The partial intestacy does not affect the meaning of the will. No one is suggesting that the shares should be distributed otherwise than in the 1/80th fractions.

To bring about a fair division in the 1/80th fractions, according to values, it would be necessary for the bank to sell all 999 shares and distribute the money proceeds in those fractions.

f How do the authorities stand on such facts? Counsel for Mr Duker said they require a distribution of the 574 shares to Mr Duker and forbid any sale. He urged that they establish the general rule stated in *Snell's Principles of Equity* (28th edn, 1982) p 233 like this:

g 'The general rule is that in the absence of some good reason to the contrary a person who is indefeasibly entitled to a share in divisible personality is entitled to have his share transferred to him, even if the property is held on trust for sale with power to postpone sale and the transfer would diminish the value of the other shares.'

h For that proposition *Snell*, and counsel for Mr Duker, cite *Re Marshall, Marshall v Marshall* [1914] 1 Ch 192, [1911-13] All ER Rep 671, *Re Sandeman's Will Trusts, Sandeman v Hayne* [1937] 1 All ER 368 and *Re Weiner's Will Trusts, Wyner v Braithwaite* [1956] 2 All ER 482, [1956] 1 WLR 579. There is also a useful summary by Walton J in *Stephenson (Inspector of Taxes) v Barclays Bank Trust Co Ltd* [1975] 1 All ER 625 at 637-638, [1975] 1 WLR 882 at 889-890, which was adopted and commented on by Goff J in *Crowe v Appleby (Inspector of Taxes)* [1975] 3 All ER 529 at 537, [1975] 1 WLR 1539 at 1543 and which is to the same effect. I was helpfully referred to these two later authorities by counsel who appeared for the minority beneficiaries.

i Those authorities all concerned the case where only one out of several aliquot parts of an estate had become distributable. I am assuming that the same rule applies in a case like the present where all are immediately distributable. Nevertheless, as *Snell* indicates, the rule is not without exceptions. The general rule requiring a distribution was applied in the first three authorities I have mentioned, but in *Re Marshall* [1914] 1 Ch 192 at

199–200, [1911–13] All ER Rep 671 at 674–675 Cozens-Hardy MR recognised that it could be excluded by ‘special circumstances’ and in *Re Sandeman’s Will Trusts* [1937] 1 All ER 368 at 371 Clauson J said the court would not order a transfer if there was some good ground to the contrary, and a little later he said (at 373):

‘I can conceive that there might be circumstances—they would have to be very special—which would justify the court in refusing to give effect to the plaintiff’s rights.’

The plaintiff there was the beneficiary whose aliquot part had become distributable. Likewise in *Re Weiner’s Will Trusts* [1956] 2 All ER 482 at 486, [1956] 1 WLR 579 at 584 Harman J recognised that special circumstances could justify him in holding up the shares.

Are the circumstances in the present case such as to require the bank to sell all 999 shares, rather than distributing 574 of them to Mr Duker? To answer this question, I need to see what kind of circumstances would exclude his normal right to have this aliquot part of the shares distributed to him. Clauson J ruefully said in *Re Sandeman’s Will Trusts* [1937] 1 All ER 368 at 372:

‘The court has, I think, been rather careful never to define in precise terms exactly what would be good ground to the contrary.’

The first three decisions I have named do not, as decisions, throw any light on the question whether the discrepancy between share numbers and values is to be considered a sufficiently special circumstance to exclude the general rule. The reason is that there was no such discrepancy in those cases. In all of them, beneficiaries immediately entitled called for transfers of their aliquot parts of a block of shares held in residue by the trustees, and this was ordered. In *Re Marshall* the block only formed about a sixth of the issued shares in a public company with some 360 shareholders. It was not suggested (and could not have been) that shares in the part of the block to be distributed were worth more per share than the shares retained. The block of shares in *Re Sandeman’s Will Trusts* was a controlling interest which carried 1,018 out of the 1,927 votes which would be cast at general meetings of a private company. Half the estate was distributable, and half the holding was ordered to be distributed. Nothing at all seems to have been said about differential share values, and naturally enough, because the half distributed would have had just the same value per share as the half retained. In the third case, *Re Weiner’s Will Trusts* the block in the estate was 75% of the shares in a private company and 45% of this was ordered to be distributed. Again, the shares in such a holding could not have been worth more per share than the shares in the 55% of the block that remained with the trustees.

I accept *Re Sandeman’s Will Trusts* and *Re Weiner’s Will Trusts* as authorities which ought to be followed at first instance that the general rule is not excluded by the fact that the distribution breaks up a controlling interest, and so reduces the value of the whole.

I assume that is correct, and if that were the only reason for ordering a sale of the 999 shares as a whole in the present case, the decisions in *Re Sandeman’s Will Trusts* and *Re Weiner’s Will Trusts* would be against it. But it is not the only reason for a sale in the present case, as I see it. The operative reason is that, if the shares were transferred out in the 1/80th fractions, Mr Duker would get a greater value per share than the other beneficiaries and so would get more than his 46/80ths of the total value received by the beneficiaries as a body.

I have not had much help from dicta in the authorities I have mentioned. In *Re Marshall* [1914] 1 Ch 192 at 199, [1911–13] All ER Rep 671 at 674 Cozens-Hardy MR gave it as the reason why the general rule did not apply to land that to allow one of the beneficiaries to take an undivided share of the land would be detrimental to the others, because it would leave them with undivided shares, which would be worth less than their proper proportion of the proceeds of sale of the entire estate. But the later authorities

have decided that with shares in a private company it is no objection that those remaining undistributed lose value, so I am not able to build on Cozens-Hardy MR's dictum.

a I have not found any helpful dicta in the later authorities.

I can, though, get some help from another general principle. I mean the principle that trustees are bound to hold an even hand among their beneficiaries, and not favour one as against another, stated for instance in *Snell* p 225. Of course Mr Duker must have a larger part than the other beneficiaries. But if he takes 46/80ths of the shares he will be favoured beyond what Mr Smith intended, because his shares will each be worth more than the others'. The trustees' duty to hold an even hand seems to indicate that they should sell all 999 shares instead. Counsel for the minority beneficiaries pointed out that it is this duty which imposes a trust for sale under the first branch of the rule in *Howe v Earl of Dartmouth*, *Howe v Countess of Aylesbury* (1802) 7 Ves 137, [1775-1802] All ER Rep 24. Here, too, it points in the direction of a duty to sell.

b Counsel for Mr Duker pointed out that, if Mr Duker's shares are sold, immediate capital gains tax will be incurred on the unrealised capital appreciation which has accrued since the death of Mrs Smith (or it may be Mr Smith) whereas if the bank transfers them to Mr Duker as a residuary legatee no capital gains tax will be immediately payable. This is something I must take into account, though I think it might be tempered to some extent by a sale of the whole company realising more per share than even a majority holding of 574 shares.

c I must bear counsel for Mr Duker's point in mind but I have in mind, too, some things which point the other way, which I can summarise from what I have already said. A block of 574 shares would be worth markedly more per share than any minority holding, so that if Mr Duker took 46/80ths of the shares, he would have markedly more than that fraction of the total value of all the shareholdings. His accountants have indicated that, in that event, no dividends would be paid for the foreseeable future. Consequently, the shares of the minority beneficiaries would yield no income to them or to anyone who bought their holdings, whereas Mr Duker, as controlling shareholder and managing director, could take an income by way of salary without declaring a dividend for the other beneficiaries.

d In all the circumstances, to prevent the unfairness which would result from a transfer of 574 of the shares to Mr Duker, and to ensure that he takes 46/80ths of the residuary estate measured by value, I consider that the bank should not transfer any of the shares to him, but should sell all 999 on the general market, Mr Duker being left free to become the buyer.

e Order accordingly.

Solicitors: *Sharpe Pritchard & Co*, agents for *Kitsons*, Torquay (for the bank); *Simmonds Church Smiles & Co* (for Mr Duker); *Pettit & Westlake* (for the second defendant); *Eastleys, Paignton* (for the third and fourth defendants); *P A S Mulready & Co* (for the fifth and sixth defendants).

Hazel Hartman Barrister.

Bradshaw and another v University College of Wales, Aberystwyth and another

CHANCERY DIVISION

HOFFMANN J

6 MAY 1987

Charity – Proceedings – Parties – Permissible parties – Person interested in charity – Executors of will of founder of charity – Founder conveying land on valid charitable trusts during her lifetime – Executors covenanting not to institute proceedings to enforce or challenge performance of trusts – Executors subsequently challenging performance of trusts – Whether executors ‘person interested in charity’ for purposes of charity proceedings – Whether executors bound by covenant not to institute proceedings to challenge performance of trusts – Charities Act 1960, s 28(1).

In 1976 the deceased conveyed certain farmland to the defendant college on charitable trusts for certain educational purposes. After the conveyance various disputes arose between the college and the deceased which were taken up by her executors after her death. In 1982 the executors and the college executed a deed of compromise to resolve the dispute and the executors covenanted that they would not institute or instigate any proceedings to enforce or challenge performance of the trusts created by the 1976 conveyance. Subsequently the executors brought an action against the college seeking an order that the college furnish full particulars and accounts of its administration of the charitable trusts and, if it should appear that the college had been in breach of its duty in the administration of the trusts, that it be ordered to pay an appropriate sum to the trust and be removed as trustee and replaced by persons nominated by the executors. The college applied to have the executors’ action struck out, contending that the executors had no interest in the charity and that they were in any event bound by the deed of compromise not to institute the proceedings. The executors contended (i) that as representatives of the founder of the charity they had an interest in seeing that the charity was administered in accordance with the trusts imposed by the conveyance and that accordingly, they were a ‘person interested in the charity’ within s 28(1)^a of the Charities Act 1960 and (ii) that the covenant was not binding on them since it was contrary to public policy for executors to contract that they would not invoke the jurisdiction of the court for the enforcement of charitable trusts.

Held – On the true construction of s 28(1) of the 1960 Act a person who could not in any circumstances be a beneficiary of the charity or take any interest under the trusts applicable to the property of the charity could not be a ‘person interested in the charity’. Since it was clear that the executors had no interest in the charity and could not in any sense be regarded as beneficiaries under any of the charitable purposes of the trusts, it followed that they had no locus standi to bring the action. Furthermore, there was no public policy which restrained the executors from entering into the covenant in the deed of compromise not to invoke the jurisdiction of the court for the enforcement of the

^a Section 28, so far as material, provides:

(1) ‘Charity proceedings may be taken with reference to a charity either by the charity, or by any of the charity trustees, or by any person interested in the charity, or by any two or more inhabitants of the area of the charity, if it is a local charity, but not by any other person . . .’

(8) In this section “charity proceedings” means proceedings in any court in England or Wales brought under the court’s jurisdiction with respect to charities, or brought under the court’s jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes . . .’

- a charitable trusts, and the proceedings were in breach of that covenant. Accordingly, the summons would be struck out (see p 202 b and p.203 b d to f, post).
Haslemere Estates Ltd v Baker [1982] 3 All ER 525 considered.

Notes

- b For permissible parties to charity proceedings, see 5 Halsbury's Laws (4th edn) paras 926, 946, and for cases on the subject, see 8(1) Digest (Reissue) 466-468, 223 2-2264.
 For the Charities Act 1960, s 28, see 5 Halsbury's Statutes (4th edn) 729.

Case referred to in judgment

Haslemere Estates Ltd v Baker [1982] 3 All ER 525, [1982] 1 WLR 11.

c Case also cited

Gouriet v Union of Post Office Workers [1977] 3 All ER 70, [1978] AC 435, HL.

Adjourned summons

- d By an adjourned summons dated 7 February 1987, the first defendant, the University College of Wales, Aberystwyth, applied for an order pursuant to RSC Ord 18, r 19 that the originating summons dated 19 September 1986 issued by the plaintiffs, Anthony David Bradshaw and Anne Rosemary Fowler, the executors of the will of Enid Lewis deceased, against the college and the second defendant, the Attorney General, be struck out. The facts are set out in the judgment.

David Unwin for the college.

- e *D G Cracknell* for the executors.

Christopher McCall QC for the Attorney General.

- f **HOFFMANN J.** This is an application by the first defendant, the University College of Wales, Aberystwyth, under RSC Ord 18, r 19 to strike out the plaintiffs' summons on the grounds that it is vexatious and an abuse of the process of the court or, alternatively, that the plaintiffs have no locus standi to bring the proceedings.

- g The plaintiffs are the executors of the will of Enid Lewis deceased. In 1976 the deceased conveyed certain farmland to the college on charitable trusts. These are set out in para 3 of a conveyance dated 12 May 1976 and include trusts for certain educational purposes concerning Welsh ponies, cattle and other farm animals, the advancement of the science of agriculture generally, use as a farming centre for the education of students at the college and the general purposes of the college. It appears that the property has since been sold and applied to this last purpose. These trusts are all admitted to be valid charitable trusts.

- h After the conveyance to the college various disputes arose between the college and the deceased which, after her death, were taken up by her executors, the plaintiffs in this action. Litigation ensued. On 12 August 1982 the executors, the college and certain other parties executed a deed of compromise to resolve their differences. By para (1) of the second part of the fifth schedule to the deed the executors covenanted that they would not—

- i 'at any time hereafter institute or be relator or relators in or instigate or assist in any action or proceedings to enforce or challenge performance of the trusts created by the 1976 Conveyance.'

By their originating summons in this action the executors claim, firstly, an order that the college furnish full particulars and accounts of its administration of the charitable trusts and, secondly, if it should appear that the college has been in breach of its duty in the administration of the trusts, that the college be ordered to pay an appropriate sum to

the trust and that the college be removed as trustee and replaced by five persons nominated by the executors.

The grounds for this application to strike out are, firstly, that the plaintiffs as executors have no interest in the charity and, secondly, that they are bound by the deed of compromise not to institute these proceedings.

In my judgment, it is plain that the executors have no interest in this charity. Neither they nor the estate of the deceased could in any sense be regarded as beneficiaries under any of the charitable purposes, nor could the land comprised in the conveyance in any circumstances revert to the deceased's estate. The executors therefore have no more interest in the charity than any other member of the public. The guardian of the public interest in the enforcement of charities is the Crown, represented by the Attorney General. No attempt has been made to institute relator proceedings. The Attorney General has not been asked to give his fiat, and he appears by counsel in support of the college's application to strike out.

These are charity proceedings within the meaning of s 28 of the Charities Act 1960, that is to say they are proceedings 'brought under the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes'. By s 28(1) such proceedings may be taken by 'any person interested in the charity'.

Counsel who appeared for the executors said that this provision created an exceptional locus standi in addition to that of the Attorney General for the particular kind of proceedings mentioned in s 28, namely the enforcement of the trusts. The question is, however, what is meant by a 'person interested'. No definition has been attempted in any previous case. In *Haslemere Estates Ltd v Baker* [1982] 3 All ER 525, [1982] 1 WLR 1109 Megarry V-C was concerned with a claim that a party who had a contract for the grant of a lease of property owned by a charity was a person 'interested' in the charity. The Vice-Chancellor said ([1982] 3 All ER 525 at 536-537, [1982] 1 WLR 1109 at 1122):

'Now I do not aspire to define the meaning of the phrase "any person interested in the charity" in this context. That I shall leave for others; I am merely concerned to find a safe resting place for my decision in this case . . . I do not think that to contract with the trustees of a charity turns the contractor into a "person interested in the charity", even if the contract relates to land or other property of the charity. I do not think that the phrase includes every tenant of charity land, or those who have easements or profits or mortgages or restrictive covenants over charity land, or those who contract to repair or decorate charity houses, or those who agree to buy goods from the charity or sell goods to the charity. An interest which is adverse to the charity is one thing, an interest in the charity is another. Those who have some good reason for seeking to enforce the trusts of a charity or secure its due administration may readily be accepted as having an interest in the charity, whereas those who merely have some claim adverse to the charity, and seek to improve their position at the expense of the charity, will not. The phrase, I think, is contemplating those who are on the charity side of the fence, as it were, however much they may disagree with what is being done or not being done by or on behalf of the charity. The phrase does not refer to those who are on the other side of the fence, even if they are in some way affected by the internal affairs of the charity.'

Counsel for the executors said that his clients are on the charity side of the fence. They have what they regard as a good reason for seeking to enforce its trusts. Megarry V-C was, however, only concerned to exclude those persons whose interests were adverse to the charity. Not everyone who volunteers himself as interested in the proper administration of the trust will be a person 'interested' within the meaning of s 28(1). But counsel for the executors submitted that the executors, as representatives of the founder of the charity, must have an interest in seeing that the charity was administered in accordance with the trusts imposed by the conveyance to which the deceased had been a party. He referred me to *Encyclopaedia of the Laws of Scotland* (1927) vol 3, para 500, in

a which it is said that 'The heir-at-law or the executor of the founder of a charity has an interest which entitles him to see that the trust is properly administered'. I do not think, however, that authority on the law of Scotland is any help in deciding this question. The two systems of law are in this area very different. In my view, there is no authority in English law for any such retention of an interest in the charity by the founder.

b Even assuming, which, as I have said, I do not accept, that the settlor could have been a person interested on the grounds that she would wish to see the trusts of the charity enforced, I do not see how an interest of this kind could have been transmitted to the executors. Executors succeed to the property of the deceased, not to her spirit and disembodied wishes. It is perhaps pertinent that RSC Ord 93, r 6(2), which exceptionally requires the settlor to be joined in an application under the Variation of Trusts Act 1958, limits the requirement to cases in which the settlor is alive. Similarly, s 2(4) of the Charities Act 1985, which provides that the trustees of a charity which it is sought to vary under the terms of that provision—

c 'must take such steps as are reasonably open to them to secure the approval to the proposed alteration of [the] objects of any person identifiable as having been the founder of the charity'

d is, in my judgment, plainly confined to cases in which the founder is still alive.

d Without, as Megarry V-C said in *Haslemere Estates Ltd v Baker*, in any way wishing to essay a definition of a person interested, I do not consider that a person who could not in any circumstances be a beneficiary of the charity or take any interest under the trusts applicable to the property of the charity can be within that expression. Accordingly, in my judgment, the summons must be struck out.

e If I am wrong on the question of locus standi, I would, in any event, strike out the proceedings on the ground that they are in breach of the covenant. The action seems to me to fall squarely into what the executors covenanted not to do. Counsel for the executors submitted that the covenant was not binding on the executors because it was contrary to public policy for the executors to be able to contract that they would not invoke the jurisdiction of the court for the enforcement of the charitable trusts. I see no public policy which restrains them from entering into such a covenant. So far as the enforcement of the trust is a matter of public interest, the guardian of that interest is the Attorney General. So far as they are seeking to enforce some interest of their own, there is no reason why they should not contract not to do so. The summons will, therefore, be struck out.

f
g Order accordingly.

Solicitors: Collyer-Bristow, agents for *Collins Woods & Vaughan Jones*, Swansea (for the college); *A R Fowler*, Llanbedr (for the executors); *Treasury Solicitor*.

Evelyn M C Budd Barrister.

R v University of London, ex parte Vijayatunga

QUEEN'S BENCH DIVISION

KERR LJ AND SIMON BROWN J

6, 7, 8, 9 APRIL, 13 MAY 1987

University – Visitor – Jurisdiction – Refusal by university to award degree – Academic staff appointing examiners to assess thesis – Applicant claiming examiners not qualified to assess thesis – Applicant petitioning visitor – Visitor refusing to intervene – Whether visitor having unfettered discretion not to intervene – Whether court should order visitor to intervene.

The applicant, a student for the degree of Doctor of Philosophy at a university, submitted a thesis at the end of her studies. The thesis was considered by two examiners appointed by the university's academic staff in accordance with the relevant statutes and regulations. Following consideration of her thesis and a further re-examination the university refused to award the applicant a doctorate and offered instead the lower degree of Master of Philosophy. The applicant then petitioned the visitor of the university on two occasions challenging the refusal to award her a doctorate, on the grounds that the appointed examiners had not been properly qualified to assess her thesis because they did not specialise in her academic discipline, with the result that her thesis had been misjudged. On both occasions the visitor declined to intervene and dismissed the petitions. The applicant sought judicial review by way of certiorari to quash the visitor's decisions, contending that the visitor had exercised a merely supervisory jurisdiction with regard to the appointment of examiners by the academic staff, whereas it was incumbent on the visitor to investigate all contested issues in full in the same way as the courts did when determining disputes between litigants.

Held – Since the powers of a university visitor fell to be exercised in an almost infinite variety of situations, the mode in which the visitor exercised his powers had necessarily to be left to his discretion, subject to his acting judicially. Accordingly (per Kerr LJ), there were situations where a merely supervisory jurisdiction was the only proper exercise of visitatorial powers, while conversely (per Simon Brown J), the visitor in exercising his untrammelled jurisdiction to right wrongs and redress grievances might on occasion be required to act as an appellate tribunal where it would be inappropriate for the court, exercising its review jurisdiction, to investigate the merits. However, since the appointment of examiners by the academic staff involved matters of purely academic, scientific or technical judgment which the staff were in a unique position to exercise, the visitor had been right to defer to their decision since it was not plainly wrong. It followed that the application would be dismissed (see p 213 b to h, p 214 c, p 216 a, p 217 b, p 219 c d and p 220 g to p 221 d f g, post).

Thomas v University of Bradford [1987] 1 All ER 834 applied.

Notes

For the nature of visitatorial powers, and for a visitor's powers and jurisdiction, see 5 Halsbury's Laws (4th edn) paras 872–873, 877, 879–885, and for cases on the subject, see 8(1) Digest (Reissue) 452–453, 456, 2018–2030, 2078–2089.

Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Chichester (Bishop) v Harward and Webber (1787) 1 Term Rep 650, 99 ER 1300.

Herring v Templeman [1973] 2 All ER 581; *aff'd on different grounds* [1973] 3 All ER 569, CA.

- Kirkby Ravensworth Hospital, Ex p* (1808) 15 Ves 305, 33 ER 770, LC.
- a *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA.
- Philips v Bury* (1694) Skin 447, 1 Ld Raym 5, [1558–1774] All ER Rep 53, 90 ER 198, HL.
- R v Bishop of Chester* (1747) 1 Wm Bl 22, 96 ER 12.
- R v Bishop of Ely* (1788) 2 Term Rep 290, [1775–1802] All ER Rep 70, 100 ER 157.
- R v Bishop of Ely* (1794) 5 Term Rep 475, 101 ER 267.
- R v Chancellor of St Edmundsbury and Ipswich Diocese, ex p White* [1947] 2 All ER 170, [1948] 1 KB 195, CA.
- b *R v Dunsheath, ex p Meredith* [1950] 2 All ER 741, [1951] 1 KB 127, DC.
- R v HM Treasury, ex p Smedley* [1985] 1 All ER 589, [1985] QB 657, [1985] 2 WLR 576, CA.
- Race Relations Board v Associated Newspapers Group Ltd* [1978] 3 All ER 419 [1978] 1 WLR 905, CA.
- c *Thomas v University of Bradford* [1987] 1 All ER 834, [1987] 2 WLR 677, HL.
- Thomson v University of London* (1864) 33 LJ Ch 625.

Cases also cited

- Brown v Dean* [1910] AC 373, [1908–10] All ER Rep 661, HL.
- London Tramways Co v LCC* [1898] AC 375, HL.
- d *Patel v University of Bradford Senate* [1979] 2 All ER 582, [1979] 1 WLR 1006, CA.
- Puhlhofer v Hillingdon London BC* [1986] 1 All ER 467, [1986] AC 484, HL.
- R v Archbishop of Canterbury and the Bishop of London* (1812) 15 East 789.
- R v Secretary of State for the Environment, ex p Hillingdon London BC* [1986] 2 All ER 273, [1986] 1 WLR 807n, CA.
- e **Application for judicial review**
- By notice of motion dated 5 March 1985 the applicant, Janaki Vijayatunga, applied, with the leave of Forbes J given on 19 February 1985, for judicial review of the decisions dated 16 March 1983 and 26 October 1984 of the Committee of Lords acting for the Visitor (HM the Queen in Council) of the University of London dismissing petitions submitted by the applicant in November 1981 and May 1984 in which the applicant sought to challenge the university's refusal to award her the degree of Doctor of Philosophy. The applicant sought relief in the form of (1) orders of certiorari and/or prohibition to quash the committee's decisions, (2) orders of mandamus to grant her petitions, and (3) declarations that the committee's decisions were ultra vires and void and/or that her case had not been fully heard. The facts are set out in the judgment of Kerr LJ.
- f
- g *Stephen Sedley QC and Philip Engelman* for the applicant.
John Laws and Robert Jay for the visitor.
George Newman QC and Sally Hine for the university.

Cur adv vult

- h 13 May. The following judgments were delivered.

j **KERR LJ.** This is an application for judicial review by Miss J Vijayatunga pursuant to leave given by Forbes J on 19 February 1985. The applicant seeks to challenge the dismissal by the visitor of London University of two petitions which challenged the university's refusal to award her the degree of Doctor of Philosophy in zoology. It appears that this is the first challenge to the exercise of the so-called visitatorial jurisdiction for just under 200 years, since *R v Bishop of Ely* (1788) 2 Term Rep 290, [1775–1802] All ER Rep 70 by what is now the machinery of judicial review.

The university is governed by the University of London Act 1978 and the statutes set out in Sch 2 to that Act. Section 6 of these statutes provides that '[Her] Majesty in Council

shall be the Visitor of the University'. By an Order in Council dated 24 November 1981 Her Majesty referred the first petition to a Committee of the Lords of the Privy Council for consideration and report, and it is not in dispute that this delegation also covered the applicant's second petition, which was for a rehearing of the first petition. The committee consisted of Lord Brightman, Mr Fred Mulley (subsequently Lord Mulley) and Mr Mark Carlisle QC, MP. The committee reported to Her Majesty that the prayers in the first petition should be refused, as they were by Order in Council dated 16 March 1983, and dismissed the second petition for a rehearing on 26 October 1984. Counsel who is instructed by the Treasury Solicitor on behalf of the visitor, made some brief submissions at our invitation in connection with the identity of the visitor in the present case. I will refer to these in a moment, but for the present it is sufficient to say that I accept his submission that the jurisdiction of this court to hear the present application is not affected by the identity of the visitor. Moreover, in referring to the facts and contentions it will be convenient, albeit strictly inaccurate, to refer to the Committee of the Lords of Privy Council (the committee) as though it had itself been acting in the capacity of the visitor; and I hope that I may also be forgiven if I refer to a visitor in general as 'he' for convenience.

The history

The applicant held honours degrees in Science from the Universities of Reading and Salford. In September 1974 she became a research assistant to Professor R P Dales, the head of the department of zoology of the University of London. In October 1975 she registered as an internal student at Bedford College, one of the schools of the university, for the degree of Doctor of Philosophy (PhD) in zoology, her supervisor being Professor Dales. For this purpose it was necessary for her to submit a thesis under a title approved by her supervisor. Over the next three to four years she prepared one under the title 'Lysosomes in the coelomocytes of three species of polychaete annelids with particular reference to *Nereis diversicolor*'. The subject matter, to use lay terms, was a study of cell constituents (lysosomes) in the free cells (coelomocytes) found in the body cavity of three species of ragworm, in particular the species *nereis diversicolor*.

It seems that the applicant learned in July 1979, shortly before she completed her thesis, that Professors P B Gahan and S J Holt of the University of London might be appointed as her examiners. The applicant was unhappy about this choice, because she did not regard either of them as qualified to examine for a PhD in zoology, as explained hereafter. She said, and subsequently wrote, that she had mentioned this to Mr Turnbull, the registrar of Bedford College, and had then been told that Professor Dales had informed Mr Turnbull that these professors would not be her examiners. Counsel who appeared on behalf of the university, told us that he had no instructions about this incident. However, when these professors were in fact appointed as her examiners shortly thereafter and she had submitted her thesis to them in August 1979, she wrote to Mr Turnbull on 5 September 1979 to express her unhappiness about this choice, and mentioned the earlier conversation referred to above, though adding that she did not feel that she could strongly object at that stage.

On 5 November 1979 the applicant attended a viva voce conducted by Professors Gahan and Holt as part of her examination. On 7 November Professor Dales wrote a most unfortunate letter to the applicant. He said that Professor Holt had come to see him with copies of the thesis issued to the examiners 'together with a list of page numbers on which the many corrections must be made before they can make their recommendations to the university'. Professor Dales went on:

'As I understand the University regulations, these corrections must be made within one calendar month following the viva (5 November), that is, not later than 5 December 1979.'

- It is convenient to interrupt the history at this point to deal with the implications and consequences of this letter. In their report to Her Majesty, to which I will refer for convenience, albeit again inaccurately as 'the decision', the committee were highly critical of the terms of this letter. Although counsel for the applicant rightly abandoned any reliance on it in the course of his submissions to this court, in fairness to the applicant this unfortunate aspect should be emphasised, since it probably triggered off her subsequent resentment and suspicions, as reflected in the lengthy history that followed.
- a* In that connection it is also unfortunate that the applicant appears to have been on bad terms with Professor Dales, though we do not know the reasons for this.

- The committee said in their decision that they had no doubt that this letter from Professor Dales was a source of justifiable grievance on the part of the applicant and that it was misleading and unfair to her as a candidate. The reason was that the references to the regulations, and to the requirement for corrections to be made within one month pursuant to them, could only reasonably be understood as intended to refer to what was then reg 24.7 (now reg 25.7). This applied and referred to a thesis submitted by PhD candidates which, apart from the need for minor amendments, was 'otherwise adequate' for the grant of this degree. That, undoubtedly, was how the applicant understood the letter, whereas, as pointed out in the committee's decision, its terms were 'regrettable' and it 'was almost certain to be misunderstood'. However, the committee also added
- d* that, albeit with regret, they had reached the conclusion that they could not advise intervention by the visitor on the ground that, notwithstanding the terms of this letter and the fact that the applicant made the required corrections in time, she was informed by the academic registrar of the university on 14 December 1979 that she had failed her PhD.

- In his opening of the application counsel for the applicant relied on this aspect, which
- e* had formed a prominent part of the grounds for judicial review. But after the matter had been discussed in the course of his opening and he had reflected on it overnight, he rightly concluded that the committee's decision, that they could not grant any relief to the applicant beyond expressing their strong regrets, was not open to any criticism, let alone relief by way of judicial review. Counsel for the applicant had to accept that the unfortunate terms of the letter could not found an estoppel or any other basis for
- f* contending that the applicant thereupon became entitled to the grant of a PhD as of right. He also agreed that he had to accept that, despite the terms of the letter, the applicant had in fact failed to satisfy her examiners. Indeed, the fact that her thesis had been misjudged by her examiners, on the ground that they were unqualified to judge it properly, was the essence of the applicant's complaint throughout. The implications of the unfortunate letter of 7 November 1979 accordingly cease to play any part in these
- g* proceedings beyond remaining a cause for regret and no doubt providing some explanation for all that followed.

- I then return to the history. When writing to the applicant on 14 December 1979 with the unexpected news that she had failed her PhD, the academic registrar informed her that she had been adjudged to have reached the standard required for the award of the degree of MPhil and that it would be open to her to apply for this within two months.
- h* However, the applicant did not accept this offer. On 20 December 1979 she wrote to the Vice-Chancellor and applied for a re-examination. This second chance had been available to unsuccessful candidates in the higher degrees for some years unless the Vice-Chancellor considered their application to be frivolous. The prescribed procedure was for the appointment of a board of examiners consisting of the original examiners and at least
- j* two others from outside the University of London. The regulations provided that their decision was final. The additional examiners in the present case included Professor Mitcheson, then chairman of the board of studies in zoology at London University, Professor Lloyd of Keele University who acted as chairman, and Dr Dean of Brunel University. Apart from pointing out that this board included the original examiners,

which counsel for the applicant rightly accepted was a recognised practice and in itself unobjectionable, the applicant has at no time raised any criticism of the qualifications of the additional three examiners. She was re-examined in May 1980. Unfortunately she was again unsuccessful, and in June 1980 she again declined to accept the offer of a degree of MPhil. a

In November 1981 the applicant submitted a petition to the visitor which had been settled by counsel on her behalf. The relief which she requested was to the effect that in all the circumstances she should be awarded a PhD or the opportunity of a further re-examination. For the purposes of the hearing her solicitors asked for discovery from the solicitors acting for the university, and in particular for the disclosure of the examiners' reports. This was refused on the ground that such reports are regarded as confidential, and an application to the committee for an order for their production was also unsuccessful. The applicant's first petition was heard on 25 February 1983. She was represented by counsel, but the petition was dismissed on 16 March 1983 as already mentioned. During the remainder of 1983 the applicant then lodged a complaint with the European Commission of Human Rights in Strasbourg, but this was ruled to be inadmissible in April 1984. On 11 May 1984 she submitted a second petition to the visitor for a rehearing of her first petition. She represented herself on this application, and it was heard and dismissed on 26 October 1984. She then applied for leave to move for judicial review in January 1985. After an original refusal by Hodgson J she obtained leave from Forbes J in February 1985. However, *Thomas v University of Bradford* was then on its way through the courts and clearly of great relevance for present purposes. Accordingly, in November 1986 Russell J ordered by consent that the present application should be stood out pending the decision of the House of Lords in that case. The appeal in that case was heard by the House of Lords in December 1986 (see [1987] 1 All ER 834, [1987] 2 WLR 677). b
c
d
e

As can be seen from this lengthy history, the applicant clearly feels that she has a considerable grievance. Apart from what has already been said by the committee in relation to the letter from Professor Dales to which I have referred, which may well be the mainspring of all that followed, it should also be mentioned that we have been shown a number of subsequent testimonials from zoologists at other universities expressing the view that her original thesis had been worthy of the grant of a PhD. However, while these matters naturally cause us to feel some sympathy with the applicant, it also goes without saying that they cannot affect the principles which fall to be applied to her application for judicial review. f

As to this, the nature of the relief requested by the applicant takes various forms, including certiorari, mandamus and declaratory orders. In effect, the applicant claims that the committee's decisions on both petitions should be quashed and that the committee should be ordered either to grant the relief prayed for in the first petition or to rehear the whole matter. g

Thomas v University of Bradford

This recent decision of the House of Lords is a landmark and of fundamental importance to the nature and scope of the authority exercised by visitors of foundations such as universities. I must briefly refer to the facts. The plaintiff had been appointed a lecturer in sociology at the University of Bradford. In the result she became an employee of the university under a contract of service and a member of, and holder of office in, the university, which was a charitable foundation and consequently subject to the jurisdiction of a visitor. When the university purported to dismiss her she brought an action in the Chancery Division for a declaration that the decision to dismiss her was ultra vires and void by reason of non-compliance with the disciplinary rules and procedures contained in the university's charter and various statutes, ordinances and regulations incorporated into her contract. She also claimed damages for breach of contract or alternatively arrears of salary. The university originally applied for an order to stay the proceedings under h
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a RSC Ord 18, r 19 or the court's inherent jurisdiction on the ground that the plaintiff should first have petitioned the visitor. In the absence of any relevant provision as to the visitor's identity, such as is to be found in the statutes of London University, the visitor was the Crown as founder of the University of Bradford. In such cases the visitatorial powers are exercised on behalf of the Crown by the Lord Chancellor or such other person as he may advise Her Majesty to nominate. The university's application for a stay was refused at first instance, and that decision was affirmed by the Court of Appeal. In the **b** House of Lords the university was given leave to amend by claiming an order to strike out the statement of claim on the ground that the court had no jurisdiction to entertain the action. That was the effect of the decision of their Lordships. This is correctly summarised as follows in the headnote of the report ([1987] 2 WLR 677):

c '... that where the dispute related to the correct interpretation and fair administration of the domestic laws of the university, its statutes and its ordinances, it fell within the jurisdiction of the visitor and not the courts of law notwithstanding that its resolution would affect the plaintiff's contract of employment for she was not relying upon a contractual obligation apart from an obligation of the university to comply with its own domestic laws; that, accordingly, her claim fell within the exclusive jurisdiction of the visitor, subject to the supervisory jurisdiction of the **d** High Court, and therefore the court lacked jurisdiction in the first instance to intervene and the plaintiff's action should be struck out.'

The speeches of Lord Griffiths and Lord Ackner, with which the other members agreed, reviewed a long line of authorities dealing with the nature and scope of the jurisdiction of visitors. In that connection counsel for the applicant emphasised and relied on the **e** exclusivity and breadth of the jurisdiction in support of his main submission that a visitor was obliged to investigate disputes and grievances brought to his attention to the same extent and in the same depth as disputes which are litigated in the courts. I will deal with this later on, together with the consequential submissions founded on it. But it is convenient at this stage to refer to some of the main passages on which counsel for the applicant relied, before I come to those which deal directly with the issue going to **f** the jurisdiction of this court, exercising the power of judicial review over the decisions of visitors.

On the scope of the visitatorial jurisdiction the earliest of the cited cases was *Philips v Bury* (1694) Skin 447, [1558-1774] All ER Rep 53. Counsel for the applicant relied in particular on a passage in which Holt CJ pointed out that the jurisdiction conferred on visitors is 'an appointment of law' (see Skin 447 at 483, [1558-1774] All ER Rep 53 at **g** 58), and also on the following passage cited by Lord Griffiths in *Thomas v University of Bradford* [1987] 1 All ER 834 at 842, [1987] 2 WLR 677 at 686, where the judgment of Holt CJ (as reported in 1 Ld Raym 5 at 8, 91 ER 900 at 903) was summarised as follows:

h '... the office of visitor by the common law is to judge according to the statutes of the college, to expel and deprive upon just occasions, and to hear appeals of course. And from him, and him only, the party grieved ought to have redress; and in him the founder hath reposed entire confidence that he will administer justice impartially, so that his determinations are final, and examinable in no other court whatsoever.'

j Next, if authority be needed for the proposition that a visitor must act judicially in the exercise of his powers, then this is to be found in the decision of *R v Bishop of Ely* 2 Term Rep 290 at 336, 100 ER 157 at 181. Counsel for the applicant also relied on a passage from the argument of Sir Samuel Romilly in *Ex p Kirkby Ravensworth Hospital* (1808) 15 Ves 305 at 311-312, 33 ER 770 at 772, which Lord Griffiths in *Thomas v University of Bradford* [1987] 1 All ER 834 at 842, [1987] 2 WLR 677 at 686 described as 'long accepted as authoritative'. The complete passage reads as follows:

'A visitor is the Legislator and the Judge: a Judge, not for the single purpose of interpreting laws, but also for the application of laws, that are perfectly clear: requiring no interpretation; and, farther, for the interpretations of questions of fact; involving no interpretations of laws. It is within his province, as a judge of fact as well as law, to ascertain the fact . . .'

The last of the cases prior to *Thomas v University of Bradford* on which counsel for the applicant relied was *Thomson v University of London* (1864) 33 LJ Ch 625, from which Lord Griffiths also cited a passage in the judgment of Kindersley V-C (see *Thomas v University of Bradford* [1987] 1 All ER 834 at 846, [1987] 2 WLR 677 at 681). This included the following (33 LJ Ch 625 at 634):

' . . . whatever relates to the internal arrangements and dealings with regard to the government and management of the house, or the domus, of the institution, is properly within the jurisdiction of the Visitor, and only under the jurisdiction of the Visitor, and this Court will not interfere in those matters . . .'

Then counsel for the applicant relied on the following important passage from the speech of Lord Griffiths itself ([1987] 1 All ER 834 at 843, [1987] 2 WLR 677 at 694):

'I can see no reason why the visitor as judge of the laws of the foundation should not have the power to right a wrong done to a member or office holder in the foundation by the misapplication of those laws. The visitor would be a poor sort of judge if he did not possess such powers. Suppose, first, a case in which on appeal the visitor concluded that there had been no "good cause" for the dismissal of a member of the academic staff and ordered the reinstatement of the member; I cannot entertain a doubt that the visitor would have power to order payment of arrears of salary between the date of dismissal and reinstatement. Suppose, second, a case in which the visitor concluded there had been no "good cause" for the dismissal but relations between the dismissed member and the other members of the academic staff had so deteriorated that it would be inimical to the general health of the university to order reinstatement. Why in these circumstances should the visitor not proceed to right the wrong done to the member by ordering that a monetary recompense should be paid by the university in lieu of reinstatement. No doubt in calculating the sum he would be guided by those principles that the courts have worked out in cases of wrongful dismissal in which the courts refuse to enforce a contract of service wrongfully terminated but give monetary recompense instead, which the law labels as damages. To deny a visitor such a power is to deny him one of the fundamental functions of a judge which is to right a wrong, in so far as money can.'

Lord Ackner dealt with the same issue as follows ([1987] 1 All ER 834 at 851, [1987] 2 WLR 677 at 697):

'In order to consider the scope of the visitorial jurisdiction the historic basis and justification for the jurisdiction must first be considered. An eleemosynary corporation is a corporation founded for the purpose of distributing the founder's bounty. The purpose of the visitor's jurisdiction is the supervision of the internal rules of the foundation so that it is governed in accordance with those private laws which the founder has laid down to regulate the objects of his benefaction. Clearly, this supervision cannot be restricted merely to interpreting the statutes. For the supervision to be effective it must involve ensuring that the statutes, properly interpreted, are also being properly applied and observed.'

At the end of his speech Lord Ackner said ([1987] 1 All ER 834 at 852, [1987] 2 WLR 677 at 698):

- a 'As regards the visitor's jurisdiction to award "damages" I see no practical problem. The visitor in the course of his supervisory jurisdiction must be entitled, in order to ensure that the domestic law is properly applied, to redress any grievance that has resulted from the misapplication of that domestic law.'

My reason for adding this passage to the other citations is that counsel for the applicant questioned the use of the word 'supervisory' in characterising the visitor's jurisdiction, and I will return to this point later on.

- b I then turn to the important passages in *Thomas v University of Bradford* which deal with the supervisory jurisdiction exercisable by the courts by way of judicial review over the decisions of visitors. In that context Lord Griffiths said ([1987] 1 All ER 834 at 849–850, [1987] 2 WLR 677 at 695):

- c 'Finally, there is the protection afforded by the supervisory, as opposed to appellate, jurisdiction of the High Court over the visitor. It has long been held that the writs of mandamus and prohibition will go either to compel the visitor to act if he refused to deal with a matter within his jurisdiction or to prohibit him from dealing with a matter that lies without his jurisdiction. On mandamus see *R v Bishop of Ely* (1794) 5 Term Rep 475, 101 ER 267 and *R v Dunsheath, ex p Meredith* [1950] 2 All ER 741, [1951] 1 KB 127 and on prohibition see *R v Bishop of Chester* (1747) 1 Wm Bl 22, 96 ER 12 and *Bishop of Chichester v Harward and Webber* (1787) 1 Term Rep 650, 99 ER 1300. Although doubts have been expressed in the past as to the availability of certiorari, I have myself no doubt that in the light of the modern development of administrative law, the High Court would have power, on an application for judicial review, to quash a decision of the visitor which amounted to an abuse of his powers.'

- e Apart from the authority which this passage carries in any event, it is clear from the following paragraph at the conclusion of Lord Griffiths's speech that it formed part of the ratio of his decision. He continued as follows ([1987] 1 All ER 834 at 850, [1987] 2 WLR 677 at 696):

- f 'These considerations lead me to the conclusion that the visitatorial jurisdiction subject to which all our modern universities have been founded is not an ancient anachronism which should now be severely curtailed, if not discarded. If confined to its proper limits, namely the laws of the foundation and matters deriving therefrom, it provides a practical and expeditious means of resolving disputes which it is in the interests of the universities and their members to preserve.'

- g Finally in this connection, in concluding that the plaintiff's action must be struck out, Lord Ackner said ([1987] 1 All ER 834 at 852, [1987] 2 WLR 677 at 698):

'Accordingly, in my judgment, her claim falls within the exclusive jurisdiction of the visitor, subject always to judicial review.'

- h While these passages obviously leave no doubt as regards the jurisdiction of this court to entertain the present proceedings in principle, I should briefly deal with two other matters to which counsel for the visitor referred for the sake of completeness, since they relate to our jurisdiction.

The identity of the visitor in this case

- i Counsel for the visitor made it clear that in his submission no question of immunity from suit was involved in this case on the ground that the visitor was Her Majesty in Council. There was no question concerning the immunity of Her Majesty in her personal capacity, nor the possible immunity of the Queen in Council in the course of the exercise of legislative or prerogative powers by the sovereign. Counsel for the visitor submitted that the visitatorial jurisdiction exercised in the present case by virtue of the statutes

scheduled to the University of London Act 1978 was analogous to subordinate legislative powers exercisable by Order in Council, which were susceptible to review by the courts on the ground of being ultra vires (see eg *R v HM Treasury, ex p Smedley* [1985] 1 All ER 589 at 593, [1985] QB 657 at 667 per Sir John Donaldson MR). Counsel for the visitor also pointed out that in a large number of cases, where the statutes or other provisions governing foundations did not designate any visitor, the visitatorial powers were vested in the Crown, but were nevertheless clearly subject to judicial review.

I accept the effect of all these submissions.

The jurisdiction to issue certiorari

Since Lord Griffiths referred, in *Thomas v University of Bradford* [1987] 1 All ER 834 at 850, [1987] 2 WLR 677 at 695, to past doubts on this question, counsel for the visitor also dealt with it briefly. He pointed out that in *Picarda The Law and Practice Relating to Charities* (1977) p 431 it is stated that, while the courts had limited judicial control over visitors' decisions by granting prohibition or mandamus in certain circumstances—

'a visitor is not subject to *certiorari*: in this respect a visitor may be compared to an ecclesiastical court against which prohibition may issue but which is not subject to *certiorari*.'

However, the reason given for this statement is that 'the system of law administered by the visitor differs from that administered by the courts', clearly a reference to ecclesiastical law. In that connection counsel for the visitor drew our attention to *R v Chancellor of St Edmundsbury and Ipswich Diocese, ex p White* [1947] 2 All ER 170, [1948] 1 KB 195, where Wrottesley and Evershed LJ stated that *certiorari* will not issue from the Court of King's Bench (as it then was) to an ecclesiastical court. But the grounds of that decision do not apply to modern visitatorial powers, at any rate in situations like the present. Thus Wrottesley LJ referred to the laws administered by ecclesiastical courts as 'exotic' (see [1947] 2 All ER 170 at 171, [1948] 1 KB 195 at 204), and Evershed LJ said ([1947] 2 All ER 170 at 180, [1948] 1 KB 195 at 220):

'... I am disposed to think that the true ground of the absence of jurisdiction is to be found in the fact that the ecclesiastical courts administered a system of law foreign to and having, in the words of LORD ELLENBOROUGH, C.J., no "privity with" the courts of the common law, the civil law which they administered being concerned primarily with rights and duties of spiritual import.'

Counsel for the visitor also pointed out that the modern system of judicial review introduced by RSC Ord 53, and now to be found in s 31 of the Supreme Court Act 1981, was designed precisely to obliterate the need for distinguishing between the various alternative forms of prerogative relief and other powers. This was also clearly in the mind of Lord Griffiths in the passage which I have cited. In these circumstances I am equally left in no doubt but that *certiorari* will lie in this case.

I then turn to the substantive issues, firstly in general, and secondly on the facts.

The issue as to the visitor's duty

As I have already briefly mentioned, counsel for the applicant sought to derive a submission from the exclusivity and breadth of the visitatorial jurisdiction that it had to be exercised in the same manner as the jurisdiction of the courts in determining disputes between litigants. This may be summarised as follows. Since the visitor is the direct and only judge of all grievances within his jurisdiction, without any appeal from his decisions, it is incumbent on him to investigate all contested issues to the full, so that his decision can be seen to be his own evaluation of the merits, or his own assessment of the truth of the matters in dispute, depending on the circumstances. In particular, there was no room for the exercise by the visitor of a merely supervisory jurisdiction by the application, for instance, of the principles stated by Lord Greene MR in *Associated Provincial Picture Houses*

Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223. Thus, in the present case it was incumbent on the committee to investigate the applicant's complaints and the university's answer in sufficient depth to satisfy the committee personally that the appointment of Professors Gahan and Holt as examiners was reasonable, or at any rate not unreasonable, given the subject matter and nature of the applicant's thesis on the one hand, and the qualifications of these examiners on the other.

Counsel for the applicant put these submissions in different ways, attractively as always, and I hope that I am doing justice to them even if I do not repeat their various permutations. But I regret that I cannot for one moment accept any such mandatory prescription governing the mode of the exercise of visitatorial powers. These fall to be exercised in an almost infinite variety of situations, and the mode of their exercise must necessarily be left to the discretion of the visitor, provided of course that he acts judicially. Thus, far from concluding that the exercise of a merely supervisory jurisdiction is wrong in all cases, as counsel for the applicant appears to submit, it seems to me that in some cases it may well be the only proper exercise of visitatorial powers. In many situations, for example, it might be an abuse of power, and a justifiable source of grievance on the part of the foundation, if the visitor entered on matters which, by the statutes of the foundation, were expressly left in the discretion of specially designated officers or members. Thus, counsel for the applicant himself accepted that the question whether or not the thesis and viva voce examination of the applicant satisfied the standard required for a PhD was solely a matter for her examiners. He accepted this, because that was clearly the effect of the relevant statutes and regulations. However, as explained below, these equally prescribe the procedures for the appointment of the examiners themselves. They lay down no requirements as to their qualifications. The effect of the regulations is to leave these in the discretion of those members of the academic staff in whom the power and duty to appoint the examiners is vested, obviously having regard to the knowledge and experience which is to be expected from holders of their posts in the academic hierarchy. Accordingly, if the visitor declines to interfere with their decisions on matters which depend on academic or scientific or other technical judgment, then it seems to me quite impossible to say that he has committed any error of law, unless the decisions in question are so plainly irrational or fraught with bias or some other obvious irregularity that they clearly cannot stand. Prima facie, by enrolling as a candidate for a PhD at a particular university, the candidate accepts that his or her fitness for that degree will be judged by examiners appointed in accordance with the rules and academic practices of the chosen university. The powers of review possessed by the visitor of the university do not form part of the structure of academic judgment on which the candidate's enrolment is based. It is merely an instance of last resort in exceptional circumstances, and not, as the submissions of counsel for the applicant implied, an integral part of something in the nature of an appellate structure.

For these reasons I cannot for one moment accept that the committee in the present case was bound to investigate the applicant's grievances to the extent of satisfying itself directly that the appointment of these particular examiners was not unreasonable in the circumstances, let alone that they were suitable to be appointed.

The issue as to the scope of judicial review

While supporting the approach to the visitor's discretion as to the mode of exercising his powers which I have indicated above, counsel for the visitor nevertheless sought to rely on the exclusivity of the visitor's jurisdiction for another purpose. He used it as a ground for submitting that the court's powers of judicial review over visitors are more restricted than in relation to other tribunals or authorities. He submitted that the visitor was solely and exclusively responsible for the interpretation and administration of the internal laws of the foundation in relation to which he exercised visitatorial powers. For instance, as counsel for the visitor submitted, it was not open to the court to review a visitor's interpretation of a statute or regulation governing the foundation by deciding,

if necessary, that the visitor had erred in applying its proper legal meaning to it. In that connection he relied on a dictum of Brightman J in *Herring v Templeman* [1973] 2 All ER 581 at 591 (affirmed on different grounds [1973] 3 All ER 569, CA) when he said that, subject to certain statutory provisions vesting a discretion in the Secretary of State— a

‘The construction of the regulations of the college and the carrying into effect of those regulations in relation to persons who subject themselves to those regulations are, in my view, matters which the decided authorities have committed to the exclusive jurisdiction of the visitor.’ b

The present case raises no issue as to the committee’s construction of any of the relevant statutes or regulations. It is therefore unnecessary to decide whether counsel for the visitor is correct in the width of his submission. My present view, however, is that I can see no reason for concluding that the general principles of the court’s powers of judicial review are any different in relation to the acts and decisions of visitors from other cases. c What may well be different, however, is the appropriate way, as a matter of the court’s discretion, of exercising those powers in relation to visitors and the circumstances in which visitatorial powers fall to be exercised. An approach of self-denial may well be appropriate in such cases, depending on the circumstances. But no question as to the desirable scope of the exercise of the court’s powers of intervention arises in the present case, and I therefore say no more about it. d

I then turn to the factual issues in so far as they are relevant to this application.

The issues relevant to the first petition

The applicant’s main complaint throughout was that Professors Holt and Gahan were not properly qualified to judge her thesis because they were not zoologists. Thus, she said in her affidavit in support of this application: e

‘The thesis involved the usage of standard histochemical and other methods of analysing the behaviour, role and morphology of “free cells” of the above-mentioned species. The thesis, concerning as it did the structure of animal cells, falls entirely within the discipline of zoology. Both Professor Holt and Professor Gahan are essentially histochemists. Professor Holt is Professor at the Courtauld Institute of Biochemistry and is on the Board of Studies in Biochemistry. He was awarded a Doctorate in Chemistry in 1948 and his thesis was entitled: Contributions to the Chemistry of Quinololine and Quinoline. He is a biochemist. Professor P. B. Gahan is a Professor of Botany at Queen Elizabeth College, a College of the University of London. He was awarded a Doctorate in 1964 in histochemistry and his thesis was entitled: Histochemical Studies in Proliferating Cells with Special Reference to Lipids and Deoxyribonucleic Acid.’ f

And in her letter of 20 December 1979 to the Vice-Chancellor of the university she said: g

‘As a result of this bias towards histochemistry, the examiners tended to concentrate on that aspect of my work, to the detriment of the other, more important contributions I have made. And yet I only applied standard histochemical methods, to further elucidate the morphological findings, e.g. by devising a new histochemical staining method.’ h

The fact that the nature of the applicant’s complaint was fully understood by the committee is shown by the following passage from their decision: i

‘The Committee will deal first with the petitioner’s complaint that Professors Gahan and Holt were not zoologists specialising in the field of zoology to which the petitioner’s thesis related. She submitted that both examiners were primarily histochemists and therefore would tend to concentrate on the histochemistry aspect of her work, to the detriment of the important contributions which she was seeking

a to make to the field of comparative zoology. The petitioner says that she only applied histochemical methods in order to elucidate her morphological findings, and did not seek to make any contributions to the field of histochemistry. Thus her thesis was misjudged.'

b I then come to the university's answer to the first petition which dealt with these complaints. It pointed out that Professors Gahan and Holt had been appointed as the applicant's examiners on 13 July 1979 by the chairman of the higher degree sub-committee of the board of studies in zoology, Professor Bullough. As regards the way in which these examiners came to be chosen and the appropriateness of their choice in the light of their qualifications, the university's answer proceeded as follows:

c 'Professors Gahan and Holt were put forward as possible Examiners of the Petitioner to the Secretary of the Board of Studies in Zoology following the Secretary's request for nominations made to Professor Dales as the Petitioner's supervisor. Professor Dales put forward their names after discussion with Dr. Thorndyke, the Senior Lecturer in Zoology at Bedford College. Their qualifications were: *Professor Gahan*. Professor of Botany at Queen Elizabeth College. He obtained his Ph.D in 1964 in, according to the University's Records, Zoology-Histochemistry. He is (and was) a member of the Board of Studies in Zoology. Histochemistry is a d subdiscipline of the three main biological subjects of anatomy, botany and zoology. *Professor Holt*. Professor of Experimental Biochemistry at the Courtauld Institute of Biochemistry. He obtained his Ph.D in 1948 in Organic Chemistry. He holds a degree of D.Sc. in Cytochemistry. The further grounds on which it was considered that they were suitable to examine the Petitioner was as follows. The thesis was a e cytochemical and ultrastructural study of the phagocytes in several species of polychaete annelids. Although the thesis was entirely within the purview of the Board of Studies in Zoology, the appropriate examiners were those with particular knowledge of cell structure, cytochemical techniques, electron microscopy and identification of lysosomal enzyme activity by histochemical means, using both light microscopy and electron microscopy. The two examiners appointed fulfilled f completely these requirements. Professor Holt had worked for many years on the histochemistry of lysosomal enzymes, and especially on ultrastructural and cytochemical studies employing electron microscope methods for enzyme localization and the application of these methods to problems in cell biology. Professor Gahan was and is one of the leading cell biologists in the University and has worked particularly with lysosomes and cytochemistry of lysosomal enzymes. It is g accordingly submitted that these Examiners were appointed in accordance with the Statutes and Regulations of the University, that their qualifications for appointment were properly considered; that their appointments were made upon reasonable grounds; and that they were appointed in good faith. They were proper and competent Examiners to examine the Petitioner.'

h That was the essential material which was before the committee in relation to this issue on the first petition. Their decision in relation to it appears from the following passage which follows immediately on that which I have quoted above:

j 'While appreciating the nature of the petitioner's complaint, the Committee desire to emphasise, as has been observed in other cases, that it is no part of their duty to interfere in matters of scientific or technical judgment. It would not be proper for the Committee to express a view of their own as to the choice of examiners, or to criticise the decision on such matters of the University authorities, save in a case, which is far from the instant case, where it is apparent from the facts that the examiners appointed by the University were plainly not qualified to perform their task. The Committee are of the opinion that the petitioner is not entitled to any relief by reason of this complaint.'

It will be apparent from what I have said earlier that I cannot accept the submission of counsel for the applicant that the supervisory approach adopted by the committee in this passage discloses any error of law or other ground for intervention by this court. However, in deference to his sustained arguments I should refer to a number of other related matters. a

Firstly, none of the counsel who appeared on this appeal were able to throw any light on what was intended to be referred to by the remark 'as has been observed in other cases'. If I may respectfully say so, if there were any precedents or guidelines which the committee was following in the approach which it adopted, then it would have been preferable to make this material available to counsel for the applicant at the hearing. However, this is clearly not a point which can by itself provide a basis for challenging this passage and the contrary was not suggested. b

Secondly, and mainly, counsel for the applicant submitted that in this passage the members of the committee were misdirecting themselves in law by saying that it was 'no part of their duty' to interfere in matters of scientific or technical judgment. Even if, as he maintained, the committee were not bound to satisfy themselves generally about the reasonableness of the appointment of these examiners, or at any rate about the absence of unreasonableness in their choice, he submitted that this passage showed that the committee felt themselves bound to adopt a *Wednesbury* approach and did not regard a direct investigation into the merits as open to them. But in my view this criticism is untenable. The second sentence must be read together with the first, and might well have been separated from it by a colon instead of a full stop. Read together, it is clear that the committee were expressing their view as to what they felt to be the appropriate course to adopt; not what they believed they were bound to do as a matter of law. c

Thirdly, in criticising the approach adopted in this passage, counsel for the applicant contrasted it with the approach adopted in another case by another committee which had also been concerned with a refusal of a PhD by allegedly unqualified examiners. This arose from a petition presented on behalf of an external candidate in 1969, a Dr Hansford-Miller. Counsel for the applicant pointed out that in that case the report of the committee analysed the nature of the candidate's thesis and the comments of his examiners in their reports, which were evidently before the committee. The bold submission of counsel for the applicant was that the committee had either erred in the latter case or in the present case, and that it must follow from the difference in approach that there had been an error of law in one of these cases, ie the present. In support of this submission he pointed to the requirements for a PhD thesis which included the following under the relevant regulations: d

'23.1 . . . (b) It must form a distinct contribution to the knowledge of the subjects and afford evidence of originality, shown either by the discovery of new facts or by the exercise of an independent critical power . . . e

23.7 The degree will not be conferred upon a candidate unless the examiners certify that a thesis is worthy of publication as a "Thesis approved for the degree of Doctor of Philosophy in the University of London".' f

Having regard to these requirements counsel for the applicant submitted that, in adjudicating on a petition based on the alleged lack of the necessary qualifications on the part of the examiners, the committee had to satisfy themselves that the selected examiners were in fact competent to apply these standards, or at any rate not incompetent. That task, counsel for the applicant submitted, had indeed been performed by the committee in relation to the Hansford-Miller petition, but not in the present case. Again, I cannot accept this submission for the reasons already stated. Admittedly, the decision in the Hansford-Miller case reveals a different approach from the present case. That may have been, as the university submits, because the circumstances were different, since that was a case of an external candidate in relation to whom more material may have been placed g

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- before the committee. Or it may be because the nature of the controversy in that case was such that, basing itself on the material before it, the committee was able and willing to found its decision more directly on the actual merits of the dispute. But these must be matters for the visitor's discretion according to the circumstances. Thus, in the present case it would no doubt have been open to the committee, if they had thought fit, to call for the examiners' reports. But, contrary to counsel for the applicant's submission, they were clearly not obliged to do so. Having regard to the nature of this dispute and in the light of the material before them I cannot see the beginning of any error of law or other complaint on which judicial review of their decision could be founded.

The issues relevant to the second petition

- This resulted in part from the applicant's dissatisfaction with the outcome of her first petition and in part, or mainly, from errors which she found, or believed to have found, in the facts referred to in the university's answer to her first petition. Since the facts stated in the answer had of course formed part of the material placed before the committee and had indeed been referred to it in their decision to some extent, the applicant evidently felt that she had no choice but to pursue the matter. However, as often happens in the course of litigious activity which may originally have stemmed from some justifiable grievance, the applicant began to lose sight of the wood for the trees at this stage, if she will forgive my saying so. Thus, it seems to me, with all due respect to the obvious strength of her feelings, that she has never given adequate weight to the facts that (i) the appointment of her examiners was made by Professor Bullough, the chairman of the higher degree sub-committee of the board of studies in zoology, (ii) Professor Gahan was himself a member of this board of studies and (iii) no criticism has ever been made of the qualifications of the three additional examiners appointed for her re-examination, consisting of Professor Mitcheson, the chairman of the board of studies in zoology, and two outside examiners. Unfortunately, instead of bearing these matters in mind and accepting the decision of the committee in the circumstances, she launched on a second petition for a rehearing on three new grounds which can only be described as marginal.

- Firstly, she pointed out that the university had been wrong in its answer to the first petition in referring to Dr Thorndyke as the 'Senior Lecturer in Zoology at Bedford College' with whom Professor Dales had discussed the names of Professors Gahan and Holt as possible examiners, and that this description of Dr Thorndyke had been repeated by the committee in their decision. So far as it went, this criticism was justified. Dr Thorndyke was in fact merely a lecturer in zoology, not the senior lecturer. The applicant also claimed that he was of no greater seniority and possessed no greater knowledge than she herself. Before the hearing of the second petition the university readily agreed that there had unfortunately been a mistake in referring to Dr Thorndyke as 'senior' lecturer. Obviously, however, this was not a point of any great moment in relation to the reasonableness or otherwise of the appointment by Professor Bullough of Professors Gahan and Holt as her examiners.

- Secondly, the applicant unfortunately spent a great deal of time and effort in challenging the reference in the university's answer to Professor Gahan's PhD having been obtained in 1964 'in, according to the University's Records, Zoology-Histochemistry'. She contended that the reference to zoology was inaccurate. This unfortunately started what can only be described as a paper chase. The applicant referred to the catalogue of doctoral theses in the university library which included Professor Gahan's work under the heading 'Biochemistry' and not under 'Zoology'. But in answer to this it was pointed out that the catalogue merely contained a librarian's classification, whereas the official minute of the senate of the university dated 29 January 1964 referred to 'Zoology-Histochemistry' as part of the description of this particular thesis. However, undaunted, the applicant thereupon embarked on a process of analysing the contents of this thesis in order to seek to show that it had no possible connection with zoology.

Again, these matters speak for themselves and could hardly have been expected to lay any foundation for a rehearing.

The third new point was that the applicant complained that the appointment of the examiners had been made by Professor Bullough in person, as chairman of the higher degree sub-committee of the board of studies in zoology, and not by the sub-committee itself. On behalf of Professor Bullough it was explained that he had made the appointments during the long vacation with the best intentions, in order to avoid delay in the consideration of the applicant's thesis until after the next (combined) meeting of the board of studies and of the higher degree sub-committee which was only due to take place on 29 October 1979. As shown by the minutes of that meeting, Professor Bullough then reported this appointment among many others, all of which were noted by the sub-committee without disapproval. But these matters were brushed aside by the applicant. Her complaint in this regard in her second petition was that the circumstances did not justify what in the practice of the university's organisational hierarchy, as in the case of many committees generally, is referred to as 'chairman's action'. She said that this was only appropriate in cases of emergencies and not in circumstances such as hers. Again, this is clearly not a point of any weight on the merits. On the appeal before us counsel for the applicant then sought to take this point one stage further when he indicated that there was in fact no provision for 'chairman's action' anywhere in the university's statutes, regulations or instructions. Although this quasi-jurisdictional point had not been raised before the committee, he submitted that it had been available in the material before them and that it would in any event be appropriate for consideration by the committee if the whole matter were now remitted to them, as he submitted it should be. On the other hand, so far as concerns the merits of this point, he did not seek to challenge the statement made by counsel on behalf of the university that 'chairman's action' was, as one might expect, a recognised practice at all committee levels in the university's hierarchy. For present purposes, in the context of appointing examiners for PhD candidates, the chain of delegation led from the senate via the academic council and the board of studies in zoology to the higher degree sub-committee of that board whose chairman at the time had been Professor Bullough. No criticism of his qualifications has ever been advanced, and he clearly acted with the best intentions. All this again speaks for itself.

I am bound to say that in my view no weight is to be attached to any of these points. The committee clearly thought so too. If they had simply expressed a view to the same effect in dismissing the second petition for a rehearing of the first petition, then the applicant's position on this aspect of her present application would have been entirely unarguable. However, counsel for the applicant still had one further submission. He referred to a short note of the hearing of the second petition made by the registrar of the Privy Council, Mr D H O Owen, and a longer note made by someone on behalf of the university which was exhibited to an affidavit before us. These notes showed, as he submitted, that in dealing seriatim with the applicant's points, although this aspect was not mentioned in the committee's formal dismissal of the second petition, Lord Brightman appears to have regarded the committee as bound to apply the decision of the Court of Appeal in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489 to the new points sought to be raised by the applicant. In particular Lord Brightman appears to have insisted on the application of the rule that fresh evidence could only be received if it could not have been procured with reasonable diligence at the time of the prior hearing.

I agree with that submission to the extent that the notes in question are capable of bearing this interpretation. Thus, according to Mr Owen's note, Lord Brightman said, after the committee had called on counsel for the university on one point, that 'their jurisdiction was restricted and they could not order a rehearing except in very limited circumstances'. And, according to the note taken on behalf of the university, there was a similar reference to the committee's 'jurisdiction' being 'very limited indeed' to direct a further hearing. But in my view this criticism rests merely on semantics. Thus, in an

- earlier passage in the same note, Lord Brightman pointed out to the applicant that the committee were concerned 'as to whether there was a case for further hearing'. The notes show that Lord Brightman was throughout seeking to explain to the applicant the rules which would be applied by the courts to the new points on which she sought to rely. But it does not follow at all that Lord Brightman had formed the view that the committee was bound to refuse a rehearing on these grounds as a matter of law, even if they had otherwise wished to have the petition reheard. All that he was doing was to point out what would be the corresponding situation in court proceedings and to indicate that the committee approached the application for a rehearing on the same basis, as they were plainly entitled to do. The reality, as it seems to me, is that in the circumstances the application for a rehearing could never have had any prospect of success, and that in their conduct of it the committee were only concerned to show sympathy for the applicant, who appeared in person. There is no ground for remitting the applicant's petition to the committee, either in law or as a matter of discretion.

In all the circumstances I can find no basis for the grant of any relief by way of judicial review, and I would accordingly dismiss this application.

- SIMON BROWN J.** I agree with Kerr LJ's judgment, and for the reasons which he gives I too would dismiss this application. Only in recognition of the clear general importance of the question which arises on the nature and scope of the visitor's jurisdiction and in deference to counsel's careful arguments do I add a short judgment of my own.

- The rival contentions I understand to be essentially as follows. Counsel for the applicant submits that the proper exercise of visitatorial jurisdiction is certainly not limited to a *Wednesbury* type review (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223.) Rather he describes the visitor's role as intimate and interventionist, extending to the resolution of questions of fact as well as to ensuring that the relevant domestic rules have been both substantively and procedurally followed. But counsel for the applicant accepts, indeed asserts, that there can be no single a priori characterisation of the proper approach to the exercise of this jurisdiction. Rather he recognises that this must always depend on two considerations: first, the particular law, rule or custom which the visitor is being required to enforce; and, second, the character of the breach alleged. There is, he suggests, a wide spectrum ('continuum' was his word) of possible grievances on which the visitor may be called to adjudicate. The nature of the particular grievance will dictate where in that spectrum the dispute falls and on that will in turn depend whether the visitor's role is essentially supervisory in nature or whether instead it is to a greater or lesser extent an independent fact-finding and judgment-forming role, akin more to an appellate than a review jurisdiction. Unlike Kerr LJ, I did not understand counsel for the applicant to submit that the exercise of a merely supervisory jurisdiction would necessarily and invariably be wrong; rather that it should not generally be regarded as the correct approach.

- Counsel for the visitor contends for an altogether more restricted visitatorial role. In particular he submits that the visitor's function is essentially to construe and carry into effect the regulations of the foundation; it is not to usurp the role of members of the foundation to whom those internal regulations accord specific executive functions of their own. The visitor is, he points out, in a fundamentally different position to that of the particular university organ charged with the decision on the merits. The analogy, he suggests, is with the review jurisdiction of this court; indeed, he submits the analogy is exact. Just as this court's supervisory role is limited to ensuring that a particular regime (he instanced immigration control) created and entrusted by the legislation to some public law body is being lawfully operated in accordance with Parliament's declared will, so the visitor must ensure that the university regime is being operated according to the will of the founder as the instigator of that particular charitable regime. In the instant case, indeed, the analogy is contended to be yet more precise, since the founder's will is

itself now enshrined in statute. Nor, the argument runs, is this an artificial or inappropriate limitation of role to ascribe to the visitor, any more than the limited character of the court's review jurisdiction is itself properly to be regarded as in the nature of a self-denying ordinance. Rather in both cases Parliament has legislated for decisions to be taken by bodies apart from the visitor or the court (as the case may be) and it would be wrong for either of those tribunals to usurp such expressly conferred decision-making functions. a

The argument is ostensibly confined to cases where the internal law commits the decision on the merits to an organ of the university. Counsel for the visitor accepts that other disputes may well fall to be decided by the visitor himself on the merits. b

Seductively though this argument was presented, I find great difficulty in accepting it. In the first place it seems to me that the internal laws will generally commit the relevant decision, that is the decision creating the grievance before the visitor, to some specific body within the foundation. Take, for instance, the facts in *Thomas v University of Bradford* [1987] 1 All ER 834, [1987] 2 WLR 677. Miss Thomas was removed from office under a 'good cause' condition which provided for a person's removal from office in given circumstances (broadly, criminal conviction, incapacity or misconduct) which the university 'Court or the Council (as the case may be) considers to be such as to render the person concerned unfit for the execution of the duties of his office' or 'such as to constitute failure or inability of the person concerned to perform the duties of his office or to comply with the conditions of tenure of his office' (see [1987] 1 All ER 834 at 836-837, [1987] 2 WLR 677 at 679-680). On its face that internal law clearly commits the merits of the decision whether or not good cause exists to specified university organs. Yet Lord Griffiths plainly regarded the visitor as empowered to determine for himself that self-same question on the merits; he expressly envisaged 'a case in which on appeal the visitor concluded that there has been no "good cause" for the dismissal of a member of the academic staff' (see [1987] 1 All ER 834 at 849, [1987] 2 WLR 677 at 694; my emphasis). Were it indeed otherwise, people like Miss Thomas dismissed by the university would be gravely disadvantaged compared to those in other employment, who, in an action for wrongful dismissal, would clearly be entitled to the court's own independent decision on the substantive merits of the dispute. c
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Nor am I persuaded of the exactness of the suggested analogy between the visitor's role and that of this court when exercising its review jurisdiction. Rather it appears to me fallacious. Judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law. There is, of course, no question of this court entertaining an appeal from a decision entrusted by Parliament or the prerogative to another public body; rights of appeal, indeed, are by definition always statutory. But the visitor's jurisdiction is in my judgment *sui generis*. It is unconstrained by those considerations which operate to confine this court's powers. The statutes of the university provide only for the visitor's identity. Nothing whatever is laid down as to the precise role which he should play in the resolution of whatever domestic disputes may be referred to him. In my judgment the decision in *Thomas*, determining as it does the exclusivity of visitorial jurisdiction where it arises, underlines also the need for such jurisdiction to assume whatever breadth and character will best enable the visitor to discharge his ultimate function. That function was described by Lord Griffiths as being the 'judge of the laws of the foundation [who] should . . . have the power to right a wrong done to a member or office holder in the foundation by the misapplication of those laws' (see [1987] 1 All ER 834 at 849, [1987] 2 WLR 677 at 694). Lord Ackner put it that the visitor 'must be entitled, in order to ensure that the domestic law is properly applied, to redress any grievance that has resulted from the misapplication of that domestic law' (see [1987] 1 All ER 834 at 852, [1987] 2 WLR 677 at 698). f
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I conclude therefore that the visitor enjoys untrammelled jurisdiction to investigate and correct wrongs done in the administration of the internal law of the foundation to which he is appointed: a general power to right wrongs and redress grievances. And if

a that on occasion requires the visitor to act akin rather to an appeal court than to a review court, so be it. Indeed there may well be occasions when he could not properly act other than as an essentially appellate tribunal.

b The difference between visitatorial and this court's supervisory jurisdiction may be illustrated thus. It will often be inappropriate for this court in the exercise of its review jurisdiction to investigate the facts underlying the legal dispute before it. Equally, this court must from time to time leave undisturbed a decision on the merits which it believes to be wrong because it recognises that there is properly room for two views on the point. But in my judgment there are no such limitations on the visitor's jurisdiction: he may, indeed should, investigate the basic facts to whatever depth he feels appropriate and he may interfere with any decision which he concludes to be wrong, even though he feels unable to categorise it as *Wednesbury* unreasonable.

c Generally speaking, therefore, I prefer the approach urged on us by counsel for the applicant. But it nevertheless remains important to recognise that many decisions giving rise to dispute will be subject to considerations which quite properly inhibit the visitor from embarking on any independent fact-finding role. I agree with Kerr LJ that this is as plainly true of the appointment of examiners as of the decision of such examiners on the standard attained by a candidate. But in both cases this seems to me less because the university statutes expressly entrust those decisions to the discretion of particular d members of the university than that these members are peculiarly fitted by their eminence, experience and expertise to arrive at proper decisions. This, indeed, was the essential burden of the submissions of counsel on behalf of the university. And it must be remembered that even courts exercising an unlimited appellate jurisdiction on occasions recognise that the tribunal appealed from may have an expertise which e particularly qualifies it to decide a given question and will accordingly decline to intervene, save only if satisfied that such tribunal was clearly wrong (see for instance the Court of Appeal decision in *Race Relations Board v Associated Newspapers Group Ltd* [1978] 3 All ER 419, [1978] 1 WLR 905).

f My final conclusion, therefore, is that the visitor's role cannot properly be characterised either as supervisory or appellate. It has no exact analogy with that of the ordinary courts. It cannot usefully be defined beyond saying that the visitor has untrammelled power to investigate and right wrongs arising from the application of the domestic laws of a charitable foundation; untrammelled, that is, save only and always that the visitor must recognise the full width of his jurisdiction and yet approach its exercise in any given case reasonably (in the public law sense). I wholly share Kerr LJ's conclusions on the instant application that, in regard to each petition, the committee did indeed both recognise the g full width of their visitatorial jurisdiction and approach its exercise entirely properly.

Application dismissed.

Solicitors: *Wray Smith & Co*, agents for *Davis Walker*, Chalfont St Peter (for the applicant);
Treasury Solicitor; *Clifford Chance* (for the university).

Dilys Tausz Barrister.

Bulk Transport Group Shipping Co Ltd v Seacrystal Shipping Ltd The Kyzikos

COURT OF APPEAL, CIVIL DIVISION

LLOYD, GLIDEWELL LJ AND SIR JOHN MEGAW

29, 30 APRIL, 1, 15 MAY 1987

Shipping – Commencement of lay days – Arrived ship under berth charterparty – Notice of readiness – Charterparty providing that notice of readiness could be given ‘whether in berth or not’ – Vessel arriving at port but unable to berth because of fog although berth available – Notice of readiness given on arrival – Whether ‘whether in berth or not’ clause converting berth charter into port charter – Whether notice of readiness could be given on arrival if berth available but unable to be reached because of weather.

A berth charterparty included standard provisions that laytime was to commence at the discharging port after notice of readiness was given, that time lost waiting for a berth was to count as discharging time and that the master had the right to tender notice of readiness ‘whether in berth or not’. When the vessel arrived at the discharging port a berth was available for her but she could not proceed to the berth because of fog. Nevertheless, immediately on arrival the master gave the charterer notice of readiness to discharge. On the owner’s claim for demurrage, the arbitrator held that the ‘whether in berth or not’ clause converted the berth charter into a port charter, so that as soon as the ship arrived within the port the master was entitled to give notice of readiness, and therefore the owner was entitled to the demurrage claimed. On appeal by the charterer, the judge set aside the award on the grounds (i) that the charter remained a berth charter despite the ‘whether in berth or not’ clause, which merely had the limited effect of enabling notice of readiness to be given on arrival in port if a berth was not available, and (ii) that in any event the notice of readiness was invalid, since the vessel was not at the charterer’s immediate and effective disposal when it was given, because of the fog. The owners appealed.

Held – The appeal would be allowed for the following reasons—

(1) The effect of including a ‘whether in berth or not’ clause in a berth charterparty was to convert the charter into a port charter for the purpose of calculating laytime, so that a valid notice of readiness could be given to start laytime running as soon as the vessel arrived in the discharging port even though the only reason the vessel could not reach a berth which was available was bad weather. It followed that, provided the other conditions for a valid notice of readiness had been fulfilled, the master had been entitled to give notice of readiness on arrival at the port although a berth was available but could not be reached because of fog (see p 225 f to j, p 226 j, p 229 e and p 230 a b e f, post); dicta of Buckley and Roskill LJ in *The Johanna Oldendorff* [1972] 3 All ER at 433, 445, of Lord Diplock in *Federal Commerce and Navigation Co Ltd v Tradax Export SA, The Maratha Envoy* [1977] 2 All ER at 857 and *Surrey Shipping Co Ltd v Cie Continentale (France) SA, The Shackleford* [1978] 1 WLR 1080 considered.

(2) The precondition to giving a valid notice of readiness, namely that the vessel had arrived at the place in the port where she was at the charterer’s immediate and effective disposal, was fulfilled when the vessel arrived at the place in the port where ships waiting for a berth usually lay and it was not necessary to show that the circumstances prevailing at the time of arrival at the usual waiting place, e.g. the weather, were such as to enable the vessel to proceed directly to a berth if one was available. It followed that the vessel had been at the charterer’s immediate and effective disposal when the notice of readiness had been given even though fog prevented the vessel from proceeding from her waiting

a place to her berth. Accordingly, the notice of readiness was valid and had the effect that laytime began to run (see p 228 g to j, p 229 e and p 230 f to h, post); *The Johanna Oldendorff* [1973] 3 All ER 148 applied.

Notes

b For arrival of a ship at the discharging port, see 43 Halsbury's Laws (4th edn) paras 644–654, and for cases on the subject, see 43 Digest (Reissue) 379–383, 9290–9328:
For readiness to discharge, see 43 Halsbury's Laws (4th edn) para 655.

Cases referred to in judgments

Federal Commerce and Navigation Co Ltd v Tradax Export SA, The Maratha Envoy [1977] 2 All ER 849, [1978] AC 1, HL.
c *Johanna Oldendorff, The, E L Oldendorff & Co GmbH v Tradax Export SA* [1973] 3 All ER 148, [1974] AC 479, [1973] 3 WLR 382, HL; *rvsg* [1972] 3 All ER 420, [1974] AC 479, [1972] 3 WLR 623, CA.
Kell v Anderson (1842) 10 M & W 498, 152 ER 567.
Sociedad Financiera de Bienes Raices SA v Agrimpex Hungarian Trading Co for Agricultural Products, The Aello [1960] 2 All ER 578, [1961] AC 135, [1960] 3 WLR 145, HL; *affg* [1958] 2 All ER 695, [1958] 2 QB 385, [1958] 3 WLR 152, CA.
d *Surrey Shipping Co Ltd v Cie Continentale (France) SA, The Shackelford* [1978] 1 WLR 1080, CA.

Case also cited

Cia de Naviera Nidelka SA v Tradax Internacional SA, The Tres Flores [1973] 3 All ER 967, [1974] 1 QB 264, CA.

Appeal

f Seacrysal Shipping Ltd (the owners) appealed against the judgment of Webster J given on 31 July 1987 setting aside the award of the arbitrator, Mr Bruce Harris, dated 26 November 1985, in the arbitration of a dispute between the owners and the charterers, Bulk Transport Group Shipping Co Ltd (the charterers), arising out of the charter in the Gencon Box form of the vessel Kyzikos, in which he decided that the owners' claim for demurrage succeeded in full. The judge set aside the award on the grounds (i) that the inclusion in the charterparty of a 'whether in berth or not' clause in relation to the commencement of laytime at the loading and discharging ports did not convert the berth charter into a port charter and only enabled notice of readiness to be given on arrival in the discharging port if a berth was not available, not if a berth was available but could not be reached because of bad weather, and (ii) that the notice of readiness given by the owners immediately on arrival at the port was invalid because the vessel was not then at the charterers' immediate and effective disposal because of bad weather. By a respondent's notice the charterers contended that the judgment should be confirmed on the additional grounds that the 'whether in berth or not' clause did not apply to the discharging clause
g of the charterparty and therefore a valid notice of readiness could not be given, and
h laytime could not commence, before the vessel berthed. The facts are set out in the judgment of Lloyd LJ.

Martin Moore-Bick QC and C N B Priday for the owners.
Bernard Eder for the charterers.

Cur adv vult

15 May. The following judgments were delivered.

LLOYD LJ. The amount at stake in this appeal is relatively small. But the case raises two questions on which there is said to be no direct authority and on which arbitrators in the City of London are said to have differed. Both questions are of some importance

in calculating laytime under charterparties which allow owners the right to give notice of readiness 'whether in berth or not'.

The first question is whether owners can give a valid notice of readiness when a berth is vacant but the vessel is prevented from reaching her berth by reason of bad weather, in this case fog. Counsel for the charterers submits, and the judge has held, that 'whether in berth or not' applies only when the berths are congested or otherwise unavailable.

The second question is whether, if that be wrong, and if the effect of 'whether in berth or not' is, as is often said, to convert what would otherwise be a berth charter into a port charter, the vessel can be said to be at the 'immediate and effective disposition of charterers' even though she is unable, at the moment of giving her notice of readiness, to proceed to her berth by reason of fog. Counsel for the charterers submits, and the judge has held, that the vessel would not be an 'arrived ship' in such circumstances under a port charter, and therefore could not give a valid notice of readiness in reliance on the 'whether in berth or not' provision.

The facts are that the *Kyzikos* was chartered on the Gencon Box layout form to load a cargo of steel and/or steel products in Italy for discharge in US Gulf. She arrived at Houston on 17 December 1984 at 0645 hrs. A berth was available for her, but she could not proceed to her berth by reason of fog. She gave notice of readiness as soon as she arrived on 17 December. The precise time does not matter. The owners say that time began to run at 1400 hrs the same day. If they are right, they are entitled to \$30,435 by way of demurrage. The vessel was not able to berth, by reason of the fog, until 1450 hrs on 20 December. The charterers say that the owners were not entitled to give notice of readiness until the vessel berthed, or perhaps until she left her anchorage on her way to the berth. If they are right, there is nothing due by way of demurrage.

The charter provided that the vessel was to proceed to her discharging port or place, namely: '1/2 safe always afloat, always accessible berth(s) each port—1/2 safe port(s) U.S. Gulf': see box 11. Clauses 5 and 6 provide as follows:

'5. Loading

Time to commence at 2 p.m. if notice of readiness to load is given BEFORE NOON AND at 8 a.m. next working day if notice given during office hours after noon . . . Time lost in waiting for berth to count as loading time. Time to count as per Clause 5 Wipon/Wibon/Wifpon/Wcon and Master to have the right to tender Notice of Readiness by cable, both in the loading and discharging port(s).

6. Discharging

Cargo to be received by Merchants at their risk and expense alongside the vessel not beyond the reach of her tackle and to be discharged in the number of running working days stated in Box 17. Time to commence at 2 p.m. if notice of readiness to discharge is given before noon and at 8 a.m. next working day if notice given during office hours after noon. Time lost in waiting for berth to count as discharging time.

The last sentence of cl 5 was introduced by an insert, typed vertically in the central space between the two columns of printed clauses. It is connected to cl 5, which is in the ordinary horizontal position in the left hand column, by means of an asterisk and a black line.

It was common ground that, by virtue of box 11, the contractual destination was the discharging berth. In other words this was a berth charter rather than a port charter. Counsel for the charterers advanced a preliminary argument that 'whether in berth or not' applied only to loading (cl 5) and not to discharging (cl 6). This argument did not occur to the experienced arbitrator, Mr Bruce Harris, who made his award on documents without any oral hearing. The argument was rejected by the judge. He seems to have been in doubt whether the argument was even open. I agree with the judge, and say no more about it.

The arbitrator held on what he regarded as 'well established authority' that the effect of 'whether in berth or not' was to make what would otherwise have been a berth charter into a port charter. He went on to hold that time started to run at 1400 hrs on 17

a December 1984, in accordance with the owners' time sheet. He does not seem to have considered that the notice of readiness might be invalid on the ground that the vessel was not then at the immediate and effective disposition of the charterers by reason of fog.

b The judge took a different view on both points. As to the first point he held that the primary obligation of the shipowners was to reach the contractual destination, namely the berth. 'Whether in berth or not' did not override that obligation. The charter remained a berth charter. 'Whether in berth or not' had only a limited effect. It meant that notice of readiness could be given, and time start to run, when the vessel was within the named port, *waiting for a berth to become available*. Here the vessel was not waiting for a berth to become available. She was waiting for the fog to clear. The point is put by the judge with admirable clarity and precision as follows:

c 'It is one thing to say that a vessel can give notice of readiness when it is ready to unload and cannot come alongside because no berth is available; it is another thing to say that a vessel is to be treated as having arrived at the berth when it has arrived at the port, even though a berth is available.'

d Counsel for the charterers supports the judge's reasoning by a number of powerful arguments. He accepts that the risk of a berth being unavailable is normally for charterers' account. But the navigational risk of getting to berth is normally for owners' account. There has never been a case, he says, in which 'whether in berth or not' has been applied where a berth has been available but the vessel has been prevented from reaching her berth by bad weather. On principle the provision should not be applied in such a case. He relies on the dictum of Lord Diplock in *Federal Commerce and Navigation Co Ltd v Tradax Export SA, The Maratha Envoy* [1977] 2 All ER 849 at 857, [1978] AC 1 at 14:

e 'The effect of this well-known phrase in berth charters has been settled for more than half a century. Under it time starts to run when the vessel is waiting within the named port of destination for a berth there to become vacant.'

f I feel the force of these arguments. But I cannot accept them. I do not doubt that the reason why the provision was originally included in berth charters was to cater for the case where the port is congested and a berth unavailable. But there is nothing in the wording of the provision which limits its operation to such a case. The wording is quite general. Notice of readiness may be given whether in berth or not. Ex hypothesi, therefore, notice of readiness may be given before the vessel has reached its contractual destination. Some limit must, of course, be placed on the provision. Nobody suggests that notice of readiness can be given while the vessel is still at sea (I say nothing as to the effect of 'whether in port or not', which was also included in this charterparty, but as to which we heard no argument).

g If then a limit is to be placed on the clause, it is to my mind better that the limit should be by reference to the *place* at which notice of readiness may be given rather than the *reason* why the vessel is unable to proceed to her berth. Certainty, as has been said so often, is of great importance in these matters. The traditional view of 'whether in berth or not' has always been that it becomes operative so as to enable a valid notice of readiness to be given as soon as the vessel has arrived in port, provided the other conditions of a valid notice of readiness are satisfied. The traditional view is preferable as a matter of construction and affords a greater degree of certainty in practice. I would hold that 'whether in berth or not' enables a valid notice of readiness to be given once the vessel has arrived in port, even though the reason why she is prevented from proceeding further is not the unavailability of a berth but bad weather.

j The arbitrator held, as I have mentioned, that the effect of 'whether in berth or not' when included in a berth charter is to convert the berth charter into a port charter. No doubt he had in mind Roskill LJ's dictum in *The Johanna Oldendorff, E L Oldendorff & Co GmbH v Tradax Export SA* [1972] 3 All ER 420 at 445, [1974] AC 479 at 515, where he said:

'The phrase "whether in berth or not" was designed to convert a berth charterparty into a port charterparty and to ensure that under a berth charterparty notice of

readiness could be given as soon as the ship had arrived within the commercial area of the port concerned so that laytime would start to run on its expiry.' a

To the same effect is a sentence of Lord Diplock in *Federal Commerce and Navigation Co Ltd v Tradax Export SA, The Maratha Envoy*: 'In effect it makes the Reid test applicable to a berth charter.' Lord Diplock went on to express approval of the judgments of Buckley and Roskill LJ in *The Johanna Oldendorff*:

'Buckley and Roskill LJ were in my view only repeating there what had already become a matter of legal certainty in English law as to the meaning and effect of the phrase "whether in berth or not", save that they were at that time bound by *The Allo* [1960] 2 All ER 578, [1961] AC 135...' b

(See [1977] 2 All ER 849 at 857, [1978] AC 1 at 14-15.)

It is sometimes said, and was said by the judge in the present case, that there is a difference of view between Buckley and Roskill LJ. Roskill LJ said that the phrase converted a berth charter into a port charter tout simple (see [1972] 3 All ER 420 at 445, [1974] AC 479 at 515), whereas Buckley LJ preferred the view that the phrase merely advanced the time at which laydays start to run, even though the ship may not have become an arrived ship in the technical sense (see [1972] 3 All ER 420 at 433, [1974] AC 479 at 501). c

As to this alleged difference of view I would make three comments. Firstly, Lord Diplock in the passage I have cited did not perceive any difference of view. Secondly, it makes no practical difference which view is correct. The only significance of a vessel becoming an arrived ship is to start the clock ticking. Provided the clock starts to tick it is immaterial whether the ship is an arrived ship or not, or whether she has reached her contractual destination. To ask whether she is still theoretically engaged on the carrying stage of the adventure or whether she has embarked on the discharging stage is to ask a barren question without practical import. The only question that matters is whether she is entitled to give notice of readiness, so as to start laytime running. Thirdly, I should mention the decision of this court in *Surrey Shipping Co Ltd v Cie Continentale (France) SA, The Shackleford* [1978] 1 WLR 1080, to which the judge was not referred. One of the questions in that case was whether, in a berth charter with a 'whether in berth or not' provision, time spent shifting between berths was for owners' or charterers' account. Sir David Cairns, in giving the leading judgment, referred to the judgments of Buckley and Roskill LJ in *The Johanna Oldendorff* and said that he preferred the view of Roskill LJ ([1978] 1 WLR 1080 at 1091). Buckley LJ said (at 1092): d

'With deference to Sir David Cairns, it does not seem to me that Roskill L.J. and I were differing in our views expressed in *The Johanna Oldendorff*, as he suggests. Roskill L.J. was, I think, speaking of a straightforward berth charterparty into which the words "whether in berth or not" were written, as I also was. I did not suggest that such a charterparty would have any different effect from a port charterparty. Any difference between Roskill L.J. and myself related, it seems to me, only to the way in which it was more satisfactory to rationalise or express this result.' e

Bridge LJ said (at 1093): f

'I agree with the judgment of Sir David Cairns, subject only to the gloss put upon its reasoning in relation to the shifting point by Buckley L.J., with whose judgment I also agree.' g

There is thus a majority of this court for the view that there is no difference in the result between Buckley and Roskill LJ; the only difference is as to the way the result should be rationalised or expressed. I would wholeheartedly support that view. In practical terms the effect of 'whether in berth or not' is to turn a berth charter into a port charter so that, in the words of Lord Diplock, the Reid test (to which I shall return later) applies to the commencement of laytime. The consequence of the judge's judgment in the present case is to resuscitate a distinction between Buckley and Roskill LJ and to give h

it practical effect. I would regard that consequence as undesirable, even if it were open to us. In the light of *The Shackleford*, I do not think it is.

Finally, on the first point, I should return to the dictum of Lord Diplock in *The Maratha Envoy* [1977] 2 All ER 849 at 857, [1978] AC 1 at 14 that where 'whether in berth or not' is incorporated in a berth charter, time starts to run 'when the vessel is waiting within the named port of destination for a berth there to become vacant'. Although this dictum is accurate as it stands for the very great majority of cases, where the reason why a vessel cannot proceed immediately to her berth is because of congestion, it would be accurate for the present case as well if for the last seven words there were substituted 'to proceed to her berth'.

I should also mention the definition of 'whether in berth or not' contained in the Charterparty Laytime Definitions 1980 issued jointly by BIMCO, CMI, FONASBA and GCSB as follows:

"'WHETHER IN BERTH OR NOT' . . . means that if the location named for loading/discharging is a berth and if the berth is not immediately accessible to the ship a notice of readiness can be given when the ship has arrived at the port in which the berth is situated.'

It will be noticed that the above definition is not limited to cases where the berth is unavailable. 'Immediately accessible' is wider than 'immediately available' and would appear to cover a case where the berth is inaccessible through bad weather as well as cases where it is inaccessible through congestion. The definition is therefore consistent with the view which I have formed.

I now turn to the second question. Was the vessel at the immediate and effective disposition of the charterers when she gave her notice of readiness? If not, then the notice would be invalid and time would not begin to run. This question seems to have occupied less time in the court below than it did before us. In some ways, however, it is the more important of the two questions. Counsel for the charterers argues that the vessel could not, as a matter of common sense, be said to be at the immediate and effective disposition of the charterers if she was unable to proceed by reason of fog. The arbitrator has found that the pilot station had closed down. Without a pilot the vessel was as much disabled as if her steering gear had broken down or her master and crew were on strike. Even in a port charter, navigational delays are at the risk of the owners. So even if, in a port charter, the vessel would otherwise have arrived, nevertheless if at the moment of arrival she is unable to proceed to her berth by reason of bad weather she is not entitled to give notice of readiness. In support of his argument counsel for the charterers relied on *Kell v Anderson* (1842) 10 M & W 498, 152 ER 567, which, although an old authority, is, he submits, the only authority directly in point.

I cannot accept the argument of counsel for the charterers. The conditions which must be fulfilled before a vessel is entitled to give notice of readiness in a port charter are now well established. Firstly, she must have arrived at the place within the port where she is at the immediate and effective disposition of the charterers. Secondly, she must be ready, so far as she is concerned, to load or discharge her cargo. She need not be absolutely ready, for example, by having all her cargo gear fixed up and in position. But she must be capable of being made ready, in ordinary course, by the time her cargo gear is needed. If therefore her steering gear were broken down, so that she was unable to get to her berth, or if her cargo gear were broken down, so that she was incapable of loading or discharging, the second condition would not be fulfilled, and a purported notice of readiness would be invalid. However, it is not suggested in the present case that the second condition was not fulfilled or that the vessel was not ready in herself. The suggestion is that the first condition was not fulfilled.

The decision of the majority of the House of Lords in *Sociedad Financiera de Bienes Raices SA v Agrimpex Hungarian Trading Co for Agricultural Products, The Aello* [1960] 2 All ER 578, [1961] AC 135 approved the so-called Parker test for an arrived ship in a port charter, namely that the vessel must have reached that part of the port where a ship can be loaded when a berth is available, known as the commercial area, albeit she cannot be

loaded until a berth is available. It was held that the usual waiting place at Buenos Aires, some 22 miles downstream, was not within the commercial area.

In *The Johanna Oldendorff* [1973] 3 All ER 148, [1974] AC 479 the House of Lords overruled *The Aello*. There was substituted for the Parker test what has become known as the Reid test ([1973] 3 All ER 148 at 157, [1974] AC 479 at 535):

'On the whole matter I think that it ought to be made clear that the essential factor is that before a ship can be treated as an arrived ship she must be within the port and at the immediate and effective disposition of the charterer and that her geographical position is of secondary importance. But for practical purposes it is so much easier to establish that, if the ship is at a usual waiting place within the port, it can generally be presumed that she is there fully at the charterer's disposal. I would therefore state what I would hope to be the true legal position in this way. Before a ship can be said to have arrived at a port she must, if she cannot proceed immediately to a berth, have reached a position within the port where she is at the immediate and effective disposition of the charterer. If she is at a place where waiting ships usually lie, she will be in such a position unless in some extraordinary circumstances proof of which would lie in the charterer.'

The facts in *The Johanna Oldendorff* were that the vessel was anchored in the usual waiting place at the Mersey Bar, some 17 miles from her discharging spot. If the House of Lords had applied the Parker test, it is clear that the vessel would not have arrived. She was not in that part of the port where she could be loaded or discharged when a berth became available. But applying the Reid test she had arrived, since she was at the immediate and effective disposition of the charterers. The effect of substituting the Reid test for the Parker test was to extend the distance from the actual loading or discharging spot at which she could be said to have arrived, though she must still be within the legal limits of the port: see *The Maratha Envoy*.

In the days when the Parker test prevailed, it was never, so far as I know, suggested that the weather was a relevant factor. Once a ship was anchored in the commercial area and ready in herself she was entitled to give notice of readiness even if she was unable to proceed to her berth by reason of bad weather. So if the present case had been decided before *The Aello* had been overruled I do not doubt that owners would have succeeded. Counsel for the charterers, however, submits that the Reid test, in addition to extending the distance from the actual loading or discharging spot at which the vessel might be said to have arrived, introduced a wholly new factor. If his submission is correct, it is now necessary to consider not just the place where the vessel is anchored, waiting to get into berth, but also the circumstances prevailing at the moment of her arrival. If the weather is good when she arrives at the ordinary place of waiting, so that she could proceed direct to her berth if a berth were available, she can give a valid notice of readiness. But if the weather is bad, and the pilot station has closed down, she cannot give a valid notice of readiness until the weather improves even though she is anchored in precisely the same place.

I do not believe that the Reid test was intended to introduce a new factor into the equation. It is true that Lord Reid speaks of a vessel's geographical position being of secondary importance. But it is still a *position* which he has in mind. If she is in the place where waiting ships usually lie, then she will normally be in the required position. In exceptional or extraordinary cases, the proof of which would lie on the charterers, she may be required to be at some other place. But nothing in Lord Reid's speech suggests that if she is where waiting ships usually lie she may nevertheless not be at the immediate and effective disposition of the charterers because of the weather. It was conceded by counsel for the charterers that a vessel could be at the immediate and effective disposition of the charterers despite a temporary obstruction in the fairway preventing her getting to her berth when vacant. I can see no difference in principle between a temporary obstruction of the fairway and the temporary closing down of the pilot station by reason of fog or by reason of a strike or for any other reason.

Nor does Lord Diplock's speech in *The Johanna Oldendorff* [1973] 3 All ER 148 at 178–179, [1974] AC 479 at 560–561 suggest that he had anything in mind other than arrival at a place as determining whether a vessel has 'arrived' or not. The Reid test is, as Lord Diplock says, a convenient and practical test for ascertaining where that place is. It would be much less convenient and practical if, in addition to ascertaining where that place is, one had also to inquire as to the circumstances prevailing at the moment when the vessel arrived at that place. At present there are only two questions to be answered: where does the vessel have to be? and is she ready in herself? The Reid test provides the answer to the first of those questions. I see nothing in favour of having to ask a third question, to which the answer would vary according to the circumstances.

So I would reject the submissions of counsel for the charterers on both the main points in the case. That is sufficient to decide this appeal in favour of the owners. It makes it unnecessary to consider an alternative argument advanced by counsel for the owners that the charterers were in breach of their obligation under box 11 to nominate a berth which was 'always accessible' on arrival. I am glad to be able to take that course because it is doubtful, to say the least, whether the point is now open to the owners having regard to the course which the case took before the arbitrator.

The questions of law certified by the judge do not correspond precisely with the questions as I have dealt with them. But I do not think this matters. I am satisfied that the questions which I have dealt with are sufficiently comprehended within the question originally certified. So it is unnecessary to decide whether the judge had power to certify a second question. I would only add, for what it may be worth, that I was unconvinced by the argument of counsel for the charterers that he had no such power.

For the reasons I have given I would allow this appeal.

GLIDEWELL LJ. I have had the advantage of reading in draft the judgment of Lloyd LJ. I agree with him that the appeal should be allowed. I add some short comments of my own only because we are differing from the conclusion of the judge.

Between cl 5 of the charterparty, headed 'Loading', and cl 6, headed 'Discharging', there were inserted the words on which the issue in the present case turns. So far as material they were:

'Time to count as per Clause 5 . . . Wibon . . . and Master to have the right to tender Notice of Readiness by cable . . . in the . . . discharging port(s).'

I am not sure whether this sentence is to be treated as part of cl 5 or as a separate though unnumbered additional clause. It is clear to me, however, that the clause applies at the discharging port. If the argument to the contrary is open to the charterers at this stage I, together with Webster J and Lloyd LJ, would reject it.

In *The Johanna Oldendorff*, *E L Oldendorff & Co GmbH v Tradax Export SA* [1972] 3 All ER 420 at 433, [1974] AC 479 at 501 Buckley LJ said:

'In the case of a berth charter the ship does not reach her destination until she is berthed. In the case of such a charter the insertion of the words "whether in berth or not" makes lay days run from a time when the ship has not yet berthed. Whether it is right to say that the effect of the insertion in such a case is to make the operation of the charter the same as a port charter, so that the ship should be treated as "arrived" although she has not berthed, or whether the insertion merely advances the time from which lay days run notwithstanding that the ship may not technically have arrived, perhaps does not much matter. The latter seems to me to be probably the more correct view.'

It is clear from this passage that Buckley LJ was saying that, whichever description of the effect of a 'whether in berth or not' clause is correct, the effect is the same. Thus Buckley LJ was not disagreeing in substance with the view of Roskill LJ in the passage from his judgment (quoted by Lloyd LJ [1972] 3 All ER 420 at 445, [1974] AC 479 at 515). Indeed, as Lloyd LJ points out, Buckley LJ himself later said that the only difference

related to 'the way in which it was more satisfactory to rationalise or express this result' (*The Shackelford* [1978] 1 WLR 1080 at 1092). Thus I agree with Lloyd LJ that the effect of the 'whether in berth or not' clause in this charterparty was to turn the charter in effect into a port charter for the purpose of calculating lay days and thus to make applicable the test enunciated by Lord Reid in *The Johanna Oldendorff* [1973] 3 All ER 148 at 157, [1974] AC 479 at 535, which Lloyd LJ has set out.

The judge's conclusion was that the effect of the 'whether in berth or not' clause was that 'under it, time starts to run when the vessel is waiting within the named port for a berth there to become available, ready so far as she is concerned to unload' (my emphasis). I regard this interpretation of the clause as too restricted. The only basis for it is the sentence from the speech of Lord Diplock in *The Maratha Envoy* [1977] 2 All ER 849 at 857, [1978] AC 1 at 14: '... time starts to run when the vessel is waiting within the named port of destination for a berth there to become vacant.' However, it must be remembered that *The Maratha Envoy* was a case in which the vessel could not proceed to berth because none was available. Lord Diplock's words were wholly appropriate to such a case. I do not believe that they have the effect of limiting the operation of a 'whether in berth or not' clause to a case where there is no suitable berth available. So to hold would be to read into the words a restricted meaning which, of themselves, they do not bear. Moreover, cl 6 of the charterparty in the present case concludes with the words: 'Time lost in waiting for berth to count as discharging time.' If the 'whether in berth or not' clause had the restricted interpretation put on it by the judge, its effect was a mere duplication of the words already included in cl 6.

Thus I agree with Lloyd LJ that the effect of the 'whether in berth or not' clause was to provide that time started to run when the vessel was waiting in the named port of destination to proceed to her berth. She was in a fit state to proceed to berth and discharge. Thus the owners were entitled to give notice of readiness provided that she was, in Lord Reid's words, 'at the immediate and effective disposition of the charterer'. Whether a ship which is in port and cannot proceed to berth because of fog satisfies that test is the second main issue in the case.

On this issue I am in complete agreement with the views expressed by Lloyd LJ in his judgment. If I said more, I would only be making the same point less effectively.

I also would therefore allow the appeal and restore the award of the arbitrator.

SIR JOHN MEGAW. I agree with both the judgments. As to the suggested difference between the views expressed by Buckley and Roskill LJ in *The Johanna Oldendorff*, *E L Oldendorff & Co GmbH v Tradax Export SA* [1972] 3 All ER 420, [1974] AC 479 when it was before this court, I would be content simply to say that no practical difference exists between them.

The issue of substance, as it appears to me, on this appeal is whether, in the now accepted formula, 'the position within the port where she is at the immediate and effective disposal of the charterers', the last nine words are simply part of the definition of the place where the vessel must be. The answer to that question in my opinion is Yes.

Appeal allowed, arbitrator's award restored. Leave to appeal to the House of Lords refused. No order on respondents' notice of appeal.

Solicitors: Middleton Potts & Co (for the owners); Holman Fenwick & Willan (for the charterers).

Wendy Shockett Barrister.

a

R v Robertson

R v Golder

COURT OF APPEAL, CRIMINAL DIVISION

LORD LANE CJ, BOREHAM AND McCOWAN JJ

b

18, 19 MAY, 11 JUNE 1987

Criminal evidence – Conviction as evidence of commission of offence – Conviction of another as evidence of commission of offence by accused – Commission of offence by another relevant issue at trial of accused – Whether ‘issue’ limited to essential element of offence charged – Whether ‘issue’ having wider meaning – Whether plea of guilty amounting to ‘conviction’ – Police and Criminal Evidence Act 1984, ss 74(1), 78(1).

c

In two separate appeals questions arose regarding the circumstances in which a co-defendant's conviction was admissible and whether a guilty plea was admissible as evidence under s 74(1)^a of the Police and Criminal Evidence Act 1984, which provided that the fact that ‘a person other than the accused has been convicted of an offence . . . shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that that person committed that offence . . .’

d

In the first appeal, R and two co-defendants were charged with conspiracy to commit burglary. The co-defendants pleaded not guilty to the charge of conspiracy but guilty to some 16 burglaries for which they were sentenced to imprisonment. At R's trial, which took place after his co-defendants had been sentenced, the Crown sought to prove the conspiracy by adducing evidence under s 74(1) of the co-defendants' convictions. The evidence was admitted and R was convicted. He appealed, contending (i) that there was no ‘issue’ whether the burglaries had in fact occurred, (ii) that s 74 only applied where the accused had played no part in the offences for which the third party was convicted, and (iii) that the evidence should have been excluded under s 78(1)^b as being unfair because by relying on s 74 to prove the co-defendants' crimes the prosecution had deprived R of an opportunity to cross-examine them.

e

f

In the second appeal, G was tried on a count of robbery from a garage. Two men were charged with the same offence and also with having robbed another garage on the previous day. The two men pleaded guilty, but neither had yet been sentenced. The Crown sought to adduce the guilty pleas as evidence under s 74(1) in order to show that the contents of alleged confessions made by G were in accordance with the facts as they were known and thus more likely to be true. The judge admitted the evidence and G was convicted. He appealed, contending, inter alia, that the evidence had been wrongly admitted because the guilty pleas would not amount to ‘convictions’ for the purpose of s 74(1) until sentence was passed.

g

j

Held – (1) For the purpose of s 74(1) of the 1984 Act an ‘issue’, in relation to a trial, covered not only an issue which was an essential ingredient in the offence charged (eg in a handling case, the fact that the goods were stolen) but also less fundamental issues such as evidential issues arising during the course of the proceedings, and accordingly, s 74(1) did not apply only to proof of conviction of offences in which the defendant had played no part. In the first appeal there was clearly an ‘issue’, namely whether there had been a conspiracy between R's co-defendants (their convictions supplying clear evidence to that effect) and it was that conspiracy to which the Crown sought to prove that the appellant was a party. Furthermore, that evidence did not have to be excluded under s 78(1) as being unfair to R, since his name did not appear on any of the 16 burglary counts so that even if the two men had given evidence in accordance with their pleas, R's counsel would have been unlikely to cross-examine them, or to have done so without gravely prejudicing

a Section 74(1), so far as material, is set out at p 234 h, post

b Section 78(1) is set out at p 235 c, post

R. It followed that the judge had been right to admit the evidence, and R's appeal would be dismissed (see p 236 *h* to p 237 *e g* and p 238 *f*, post).

(2) Since the purpose of s 74(1) of the 1984 Act was to enable proof of the commission of an offence by a person to be proved by the record without the necessity of calling him to admit the truth of what appeared on the record, what was required for the purposes of s 74(1) was either that a jury had found the offence proved or that that person himself had before a court formally admitted that he had committed the offence. Provided the plea had not been withdrawn, nor the jury's verdict, if any, quashed on appeal, the conviction subsisted and whether the accused had been sentenced or not was irrelevant. Since 'conviction' in s 74(1) thus meant a finding of guilt or a formal plea of guilty, in the second appeal the judge had been right to admit the evidence, and G's appeal would be dismissed (see p 239 *j* to p 240 *b f*, post); dictum of Lord Reid in *S (an infant) v Manchester City Recorder* [1969] 3 All ER at 1232 applied.

Per curiam. Section 74(1) of the 1984 Act should be sparingly used. There will be occasions where technically admissible evidence is likely to be of such a slight effect that it will be better not to adduce it, particularly when there is a danger of contravening s 78(1) of the Act. Where, however, such evidence is admitted, the judge should carefully explain to the jury the effect of the evidence and its limitations (see p 237 *h j*, post).

Notes

For the Police and Criminal Evidence Act 1984, ss 74, 78, see 17 Halsbury's Statutes (4th edn) 212, 215.

Cases referred to in judgments

Hollington v F Hewthorn & Co Ltd [1943] 2 All ER 35, [1943] KB 587, CA.

R v Drew [1985] 2 All ER 1061, [1985] 1 WLR 914, CA.

R v O'Connor [1987] Crim LR 260, CA.

R v Plummer [1902] 2 KB 339, [1900-3] All ER Rep 613, CCR.

R v Turner (1832) 1 Mood CC 347, 168 ER 1298.

S (an infant) v Manchester City Recorder [1969] 3 All ER 1230, [1971] AC 481, [1970] 2 WLR 21, HL.

Cases also cited

R v Cole [1965] 2 All ER 29, [1965] 2 QB 388, CCA.

R v Gallagher [1974] 3 All ER 118, [1974] 1 WLR 1204, CA.

Appeals

R v Robertson

Malcolm Robertson appealed against his conviction on 17 February 1986 in the Crown Court at Snaresbrook before his Honour Judge Owen Stable QC and a jury on a charge of conspiracy with Barry Poole and Albert William Long to commit burglary for which he was sentenced to three years' imprisonment. The facts are set out in the judgment of the court.

R v Golder

Martin Golder appealed against his conviction on 14 October 1986 in the Crown Court at St Albans before his Honour Judge Hickman and a jury on count 5 of an indictment charging him with robbery for which he was sentenced on 17 October to four years' imprisonment. The facts are set out in the judgment of the court.

The two appeals were heard consecutively as raising the same point.

R B Tansey (assigned by the Registrar of Criminal Appeals) for the appellant Robertson.

Philip Turl (assigned by the Registrar of Criminal Appeals) for the appellant *Golder*.
a *Stewart Patterson* for the Crown.

At the conclusion of argument the court announced that the appeal would be dismissed, for reasons to be given later.

11 June. The following judgment of the court was delivered.

b **LORD LANE LJ.** These two cases raise similar points on the construction of certain sections of the Police and Criminal Evidence Act 1984, and we propose therefore as a matter of convenience to deal with them together.

R v Robertson

c On 17 February 1986 in the Crown Court at Snaresbrook before his Honour Judge Stable QC and a jury, the appellant, Malcolm Robertson, was convicted of conspiracy to commit burglary. He was sentenced to three years' imprisonment. Now by leave of the single judge he appeals against that conviction.

The original indictment had contained five counts. Counts 1 and 2 charged the appellant together with Barry James Poole and Albert William Long with conspiring together and with others unknown to commit burglary at premises belonging to Comet plc. The remaining counts concerned Poole and Long only.

d Before arraignment, and by consent, the indictment was amended by adding counts 6 to 20, each count charging burglary at premises belonging to Comet plc in various parts of London and South East England. Eight of these counts charged Poole alone, two charged Long alone and five charged Poole and Long jointly. Poole pleaded not guilty to conspiracy but guilty to all 14 counts of burglary. Long pleaded not guilty to conspiracy but guilty to all nine counts of burglary, six of the counts being joint charges with Poole: e a total therefore of 17 burglaries, 16 of them at Comet premises. These pleas were accepted and on 8 January Poole was sentenced to two and a half years' imprisonment, Long to two years' imprisonment.

f The trial of the appellant on the two conspiracy counts commenced on 6 January, but, for reasons which do not concern us, the jury were discharged.

Prior to his retrial on 11 February, three further counts were added to the indictment charging the appellant with burglary (count 21) and handling a stolen video (counts 22 and 23). During the course of the retrial, and by consent, the indictment was further amended by consolidating the two conspiracy counts to allege one conspiracy with Poole, Long and others between 1 January 1984 and 20 June 1985.

g The Crown's case was that between January 1984 and 20 June 1985 82 burglaries were committed at premises belonging to Comet in London and South East England. Goods to the value of £245,000 were stolen. This was not in dispute. The pleas of Poole and Long related to 16 of these burglaries and to goods to the value of £44,000. Their last offence was committed at Stevenage on 20 June 1985, when six video recorders to the value of £2,700 were stolen. They were observed by nearby residents, their car number h was taken, and they were arrested with the stolen goods within a very short time.

The appellant was arrested at his home on 25 June. The Crown's case against the appellant was: (1) that there was a conspiracy between Poole and Long in the terms of the indictment, namely, 'on divers days between the 1st day of January, 1984 and 20th day of June, 1985 . . . to enter showrooms and warehouses belonging to Comet plc, as j trespassers, and to steal therein video cassette recorders and television sets.' The admissibility of the evidence adduced by the Crown on this aspect of their case is disputed; (2) that the appellant was, for at least part of the time, a member of that conspiracy.

The Crown relied on (a) admissions alleged to have been made on three occasions by the appellant: first at his home when arrested, secondly at the police station and thirdly at a formal interview when contemporaneous notes were made of the questions and

answers. The appellant was given the opportunity to check and sign the notes. He said he would think about it. He never signed them. In evidence the appellant denied making any admissions. His versions of the first two conversations contained nothing in the nature of an admission. As to the formal interview, he agreed that a note had been made, but not from anything he had said. It was an entire fabrication. Pc Bricklow not only asked the questions, he also supplied all the answers. Pc Simpson recorded them at his colleague's dictation; (b) evidence of the appellant's association with stolen property and with Poole and Long. On 2 May 1984 Pc Smith found a damaged video recorder on the ground beneath a broken window of the appellant's first floor flat. It had been stolen on 30 April 1984 from a Comet warehouse at Chingford. Three officers visited the flat, where they found the appellant and Poole and where they said they saw a video lead hanging from socket in the television set. The appellant denied that there was such a lead and asserted that the video recorder had no connection with him or his flat. The video recorder was the subject of counts 22 and 23. a
b
c

The Crown also relied on an incident on 13 May 1985 when a car driven by Poole stopped when approached by the appellant and Long. According to Pc Bricklow, Poole passed to the appellant a paper on which the word 'Comet' was printed. The appellant and Long then entered the car which was driven away by the appellant. The appellant did not deny the incident, but disputed any reference to Comet. His case was that his association with Poole and Long was entirely innocent. d

After a five-day trial the appellant was convicted of the conspiracy. The jury were discharged from returning verdicts on counts 21 to 23. The appellant was sentenced to three years' imprisonment. His application for leave to appeal against that sentence was refused by the single judge, and has not been renewed.

Counsel for the appellant submits that the verdict was unsafe and unsatisfactory by reason of what he submits was a serious irregularity in the course of the trial, and two more in the course of the summing up. e

The irregularity in the trial relates to the admissibility of evidence. The Crown sought to prove the existence of the conspiracy between Poole and Long by proving, *inter alia*, that within the relevant period Poole and Long had committed a number of burglaries at different Comet premises and had stolen television sets and video recorders. The inference was that they must have conspired together. To do this they sought the leave of the judge to adduce evidence of the conviction of Poole and Long of 16 relevant counts of burglary. Their case was that they were entitled to adduce that evidence by virtue of the provisions of s 74(1) of the Police and Criminal Evidence Act 1984. The judge heard argument and ruled in favour of the Crown. f

Counsel for the appellant challenges that ruling on a number of grounds. To put his submissions into perspective, it is necessary to refer to s 74 and the related sections of the 1984 Act. Section 74 provides: g

'(1) In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom . . . shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that that person committed that offence, whether or not any other evidence of his having committed that offence is given. h

(2) In any proceedings in which by virtue of this section a person other than the accused is proved to have been convicted of an offence by or before any court in the United Kingdom . . . he shall be taken to have committed that offence unless the contrary is proved.' i

It is unnecessary to refer to sub-ss (3) and (4).

Section 75 provides:

'(1) Where evidence that a person has been convicted of an offence is admissible by virtue of section 74 above, then without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction

a was based—(a) the contents of any document which is admissible as evidence of the conviction; and (b) the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.

b (2) Where in any proceedings the contents of any document are admissible in evidence by virtue of subsection (1) above, a copy of that document, or of the material part of it, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document shall be admissible in evidence and shall be taken to be a true copy of that document or part unless the contrary is shown. . . .’

Subsections (3) and (4) are irrelevant for present purposes.

Finally, s 78 provides:

c ‘(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

d (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.’

Counsel for the appellant’s criticisms of the judge’s ruling may be summarised as follows. (1) Section 74 did not apply for the following reasons: (a) there was no issue that many burglaries had been committed at Comet premises within the relevant period, because that fact was conceded by the appellant; (b) the mischief against which the section was directed did not exist or apply here; (c) the section has a restricted application: e it only applies where the defendant on trial has played no part in the offences of which the third party has been convicted, for instance on a charge of handling stolen goods. The conviction of the thief of the same goods may properly be given in evidence. (2) Even if the Crown could bring themselves within the ambit of s 74, the evidence should have been excluded in accordance with s 78(1) because of its adverse effect on the fairness f of the proceedings.

In support of his submission that s 74 had no application, counsel for the appellant relies on para 218 of the Criminal Law Revision Committee’s 11th Report (Cmnd 4991) for the background of the law as it was. The relevant part reads:

g ‘There is no doubt that the principle of *Hollington v. F Hewthorn & Co Ltd* [1943] 2 All ER 35, [1943] KB 587 applies to criminal cases although there is very little authority. For example in *R. v. Turner* (1832) 1 Mood. C.C. 347 at 349 “many of [the judges] appeared to think” that in a case of receiving stolen property the conviction of the thief “would not have been any evidence of her guilt, which must have been proved by other means.” This is always taken to be the law. In our opinion it is clearly right that convictions of persons other than the accused should h be made admissible in criminal proceedings as evidence of the fact that the person convicted was guilty of the offence charged and that on proof of the conviction that person should be taken to have committed the offence unless the contrary is proved. Clause 24 provides accordingly. It seems quite wrong as well as being inconvenient that the prosecution should be required to prove again the guilt of the person concerned. The clause will be helpful to the prosecution in various cases where the guilt of the accused depends on another person’s having committed an offence. j Examples are handling stolen goods, harbouring offenders and the offences under sections 4 and 5 of the Criminal Law Act 1967 of assisting offenders and concealing offences.’

The terms of cl 24 of the committee’s draft bill are in all material respects identical to those of s 74.

The matter has already been considered by this court in the recent case of *R v O'Connor* [1987] Crim LR 260. O'Connor was charged with conspiring with a man named Beck to obtain property by deception. He pleaded not guilty and was tried. Beck pleaded guilty and evidence of that plea was admitted at O'Connor's trial. On appeal it was submitted (1) that s 74 did not permit evidence of Beck's plea to be put before the jury, alternatively (2) that even if the strict wording of s 74(1) did render the evidence admissible, then the judge ought, pursuant to s 78, to have excluded it on the ground that it would have such an adverse effect on the fairness of the proceedings. The court held that the disputed evidence ought to have been excluded, but applied the proviso to s 2(1) of the 1968 Act and dismissed the appeal. The following is an extract from the judgment in that case:

'The terms of s 74 clearly were designed, in the judgment of this court, to deal with the situation where it was necessary as a preliminary matter for it to be proved that a person other than the accused had been convicted of an offence. The object, it would seem, of the section is to avoid that matter having to be proved twice where the other person had already pleaded guilty to the offence it was necessary to prove. In effect therefore the object of the section, in our view, was to deal with cases where it was necessary to prove the conviction of another as a condition precedent to the conviction of the defendant of the charge laid against him. The most obvious example would be a case where it is necessary to prove against another that he was guilty of theft before the person before the court could be convicted of handling or harbouring.'

Counsel for the appellant's case is that this view of the restricted application of s 74(1) is in accordance with the views of the Criminal Law Revision Committee and entirely supports his submission that s 74 had no application to the instant case.

Counsel for the Crown contends that the judge's ruling was correct. His case is that the words of s 74(1) are clear and unambiguous, and should be given their natural meaning; that being so they are wide enough to cover the instant case. Had Parliament intended to restrict the application of the section, they could, and would, have done so in clear terms: for instance, by substituting for the words 'where to do so is relevant to any issue in those proceedings' some such expression as 'where it is necessary to prove the guilt of another'. Parliament has not chosen to do so.

The heart of the problem is the correct interpretation of the expression 'issue in the proceedings'. Only when that is determined can the court decide what in the particular circumstances is relevant and thus admissible. That is the very question left open in O'Connor's case. There, in the passage already cited, the court gave its view of the primary object of s 74. It expressly left open the limits or scope of the section in the following terms:

'We find this a difficult point, and, without deciding the full scope of s 74, for the purposes of this case it is sufficient to say that if it was appropriate within the section to admit the conviction of Beck in the proceedings, we take the view that it would have resulted in a very unfair state of affairs.'

Despite the assistance of counsel, the difficulty remains. We think the time has come to attempt to provide some guidance for courts who have the task of applying s 74. The word 'issue' in relation to a trial is apt to cover not only an issue which is an essential ingredient in the offence charged, for instance in a handling case the fact that the goods were stolen (that is the restricted meaning), but also less fundamental issues, for instance evidential issues arising during the course of the proceedings (that is the extended meaning). Section 74 by using the words 'any issue in those proceedings' does not seek to limit the word 'issue' to the restricted meaning indicated above. Although the Report of the Criminal Law Revision Committee is an indication that the committee may have been regarding the matter at least primarily in the restricted sense, it seems to us that we

are not entitled to use that possibility as showing that the words of the section mean other than what they plainly state.

On any view we find no support for counsel for the appellant's submission that the section applies only to proof of conviction of offences in which the defendant on trial played no part. It may well be that the section will be at its most useful in dealing with the type of situation exemplified by the Law Revision Committee, but it is not restricted to that kind of case. Provided that there is an issue before the jury to which the conviction is relevant, the conviction, subject to what we say hereafter, is admissible.

So far as the present case is concerned, there was certainly an issue. Indeed it was probably an issue in the restricted sense, namely the issue of whether there was a conspiracy between Poole and Long (of which their joint conviction of burglary was the clearest evidence). It was that conspiracy to which the prosecution sought to prove the appellant was a party. It is true that the appellant was prepared to accept that there had been a series of burglaries at Comet's premises during the material times, but that would not preclude the prosecution from relying on s 74 as the words of sub-s (1) of that section make clear.

The judge gave his ruling as follows:

'... in a conspiracy case where there is only one defendant being tried, but it is alleged that he conspired with two other named persons and others unknown, it is relevant that those named persons committed a number of burglaries which the Crown allege were acts done by those named persons in furtherance of the common design. If the fact of committing those burglaries is relevant, then s 74... facilitates the manner in which their participation in those events may be proved. I think that the evidence of their conviction is relevant to an issue in these proceedings, namely was there a conspiracy.'

That, in our judgment, was a correct approach.

It remains to consider the submissions based on s 78. The complaint here is that by relying on s 74 to prove the convictions of Poole and Long, the prosecution deprived the appellant of the opportunity to cross-examine them. Counsel for the appellant points out that this was a prominent feature in *O'Connor's* case already referred to. The circumstances there however were quite different. *O'Connor* and Beck were jointly indicted in one count with having conspired together and with no one else. It followed that Beck's admission of guilt of that very offence might well lead the jury to infer that *O'Connor* in his turn must have conspired with Beck. That situation did not exist here. The pleas and consequent convictions of Poole and Long did not on the face of them involve the appellant whose name did not appear in the relevant counts at all. Consequently, even if Poole and Long had given evidence in accordance with their pleas, counsel would have been unlikely to cross-examine them or, if he had, to have achieved anything except disaster for his client.

The judge was, in our view, correct to admit the evidence.

It only remains to add this. Section 74 is a provision which should be sparingly used. There will be occasions where, although the evidence may be technically admissible, its effect is likely to be so slight that it will be wiser not to adduce it. This is particularly so where there is any danger of a contravention of s 78. There is nothing to be gained by adducing evidence of doubtful value at the risk of having the conviction quashed because the admission of that evidence rendered the conviction unsafe or unsatisfactory. Secondly, where the evidence is admitted, the judge should be careful, as the judge was here, to explain to the jury the effect of the evidence and its limitations.

There are two further grounds of appeal. The first is that the judge commented unfairly on the appellant's failure to call Poole or Long as witnesses. Having referred to the appellant's evidence of a conversation that he had with Poole prior to the final interview with the police, the judge continued:

‘... you should consider why the police allowed Robertson to see Poole, and why Poole suggested that Robertson should put his hands up, but, members of the jury, you should bear this in mind: that no one knows better than Poole and Long if Robertson was one of their number concerning the Comet burglaries. Both had been dealt with, neither would have anything to lose by giving evidence for Robertson. There is no obligation, of course, on Robertson to call either of them, but had he wished you to hear their evidence they could have been compelled to go into the witness box, and you may think it is surprising neither was called on his behalf if the admissions of Robertson are wicked inventions on the part of corrupt policemen.’ a

That was a reference to the alleged fabrication of the last interview. Counsel for the appellant was unhappy about it and, after the jury had retired, invited the judge to retract it. The judge declined. b

It is submitted that the comment was so unfair as to prejudice the appellant's case, particularly as it was linked to the controversial issue of the final interview. It was particularly unfair, it is said, because neither Poole nor Long could assist as to the genuineness of the record of that interview. If, which is doubtful, the judge was entitled to comment, it should have been done with more circumspection. c

In our view the judge was entitled to comment. There is no doubt that the comment was strong. The judge is entitled to make a comment which in appropriate circumstances may be strong. These were appropriate circumstances. d

The appellant's final point is that the judge wrongly directed the jury that the appellant's case was that all the police officers had lied, whereas in fact the appellant was alleging that only those officers, four in number, who gave evidence related to the damaged video recorder and the video lead attached to the television set in the appellant's flat and the meeting at which the Comet paper was produced, were mistaken. e

It is unnecessary to go into detail. We have studied the transcripts of the cross-examination of those four officers. It is sufficient to say that the judge and the jury could be forgiven, as all those in this court may be forgiven, for concluding that the suggestion was made that the officers had invented the video lead and the Comet paper. There is nothing in this point. f

For these reasons we conclude that the verdict is neither unsafe nor unsatisfactory. This appeal is dismissed. g

R v Golder

On 17 October 1986 in the Crown Court at St Albans before his Honour Judge Hickman and a jury this appellant was convicted of robbery and sentenced to four years' imprisonment. On further counts he was sentenced to three years' imprisonment to run consecutively, thus making a total of seven years' imprisonment. g

We have refused his application for leave to appeal against sentence. We now give reasons for dismissing, as we have done on 18 May last, his appeal against conviction. h

On 20 November 1985 Mr Reece Wilson, an employee at Harper's Garage, St Albans, was robbed of £40. The prosecution case was that four men carried out the robbery, the appellant, McConnell who was also convicted by the jury, and two other men, Moran and Eley, both of whom pleaded guilty. The evidence was that two of the four men went into the garage armed with a gun and robbed Mr Wilson whilst the other two, including this appellant, were waiting in a car nearby to drive all four away. i

The evidence against the appellant consisted primarily of admissions which he was alleged to have made after his arrest which took place on 4 December 1985. At first he prevaricated. However on 5 December, at a further interview, the contents of which were contemporaneously noted, he made a series of admissions. He admitted that he had discussed the possibility of robbing a garage of St Albans with three other men when they were outside a public house in Hatfield. He said they were all broke and intended j

a to see if they could get some money out of a garage. He further said that some of the three were involved in another robbery at a garage called Grays shortly before the St Albans robbery.

b So far as the St Albans robbery was concerned, he said that he stayed in the car, although he was not the driver, and that he did not see the gun until it was brought back by the men who had committed the robbery. He said the gun was a double-barrelled sawn-off shotgun. He knew the men had the gun with them. He said that he was told that they had only got £18 or £20 from the robbery of which they gave him nothing. He said the offence was 'a spur of the moment thing' and that the reason for picking on a garage was possibly because of the events on the previous day at Grays Garage as a result of which the other men perhaps felt more confident.

c During the course of the trial the prosecution requested, and were given leave, to adduce the following evidence, namely, that Moran and Eley, inter alios, had pleaded guilty to three counts. One of those was relevant only to the case of a co-accused called Puddifoot and need not be considered further. The other two were as follows: the first charged them with having on 19 November 1985 at Hatfield robbed an attendant at Grays Garage of £284; the second with having on the next day, 20 November, robbed Reece Wilson of £40, that being the same offence as that on which the appellant was being tried. Their pleas of guilty had been duly recorded by the court, but neither man d had been sentenced.

The application to adduce the evidence was made under s 74 of the Police and Criminal Evidence Act 1984.

e The following grounds were advanced before us as to why the judge was wrong, it is said, to admit the evidence. First, because the men had not been 'convicted'. The argument is that a plea of guilty does not become a conviction within the meaning of s 74 until sentence is passed. Up to that point no conviction exists. Thereafter it subsists until quashed.

f The principal authority cited in support of that proposition was *R v Plummer* [1902] 2 KB 339, [1900-3] All ER Rep 613. It was there decided that where a prisoner had pleaded guilty to an indictment, the court had jurisdiction to allow him, before sentence, to withdraw his plea and plead not guilty. It is argued from that, that the mere plea does not amount to a conviction. If it had amounted to a conviction, the court would have had no jurisdiction to allow him to withdraw his plea.

However, as Lord Reid made clear in *S (an infant) v Manchester City Recorder* [1969] 3 All ER 1230 at 1232, [1971] AC 481 at 489, that is not conclusive. This passage appears in his speech:

g 'Several cases have held that magistrates have no power to allow a change of plea during the interval between their acceptance of a plea of guilty and final disposal of the case. They appear to me to have arisen out of a misconception of purely technical matters. Much of the difficulty has arisen from the fact that "conviction" is commonly used with two different meanings. It often is used to mean final disposal of a case and it is not uncommon for it to be used as meaning a finding of guilt. It is h proper to say that a plea cannot be changed after "conviction" in the former sense. But it does not at all follow that a plea cannot be changed after "conviction" in the latter sense. It is perfectly true that "conviction" is used in this latter sense in the Magistrates' Courts Act 1952, and a number of other statutes.'

j This dual meaning of the word 'conviction' is further illustrated by the judgment of this court in *R v Drew* [1985] 2 All ER 1061, [1985] 1 WLR 914, where many of the authorities are reviewed.

We respectfully agree with the reasoning of the trial judge on this aspect of the matter. The purpose which lies behind the enactment of s 74 was to enable proof of the commission of an offence by X to be proved by the record without the necessity of calling X to admit the truth of what appears on the record.

Therefore what is important is either that a jury has found X's offence proved, or that X himself has before a court formally admitted that he has committed the offence. Provided that his plea has not been withdrawn nor the verdict of the jury, where there has been one, has been quashed on appeal, the conviction subsists. Whether or not X has been sentenced is irrelevant on the issue of whether he has committed the offence. Therefore the meaning of 'conviction' in this section is the latter of the two referred to by Lord Reid in the passage cited, namely, a finding of guilt or a formal plea of guilty. a

The second ground of appeal is that the convictions of Moran and Eley were not (within the meaning of the section) relevant to any issue on the trial of this appellant on the charge of robbing Reece Wilson. As to the first charge to which the two men had pleaded guilty, namely the robbery of the garage attendant committed on 19 November 1985, there is no doubt that in general proof that other men committed another offence at another time is irrelevant. Likewise it would, generally speaking, be irrelevant that two men other than the defendant had committed the burglary of which the appellant was being tried. This was the subject of the further conviction of Moran and Eley sought to be adduced in evidence. b

The prosecution contended that in the particular circumstances of this case those convictions were relevant. The admissions which he had according to the police made to them were contested. It was suggested to the officers that they had fabricated their story and that no such admission had been made. The prosecution's desire to put the convictions of Moran and Eley in was in order to show that the contents of the alleged confessions by the appellant were in accordance with the facts as they were known and the confessions were therefore more likely to be true. c

Secondly, as pointed out during argument at trial, one of the matters which the prosecution had to prove was that there had in fact been a robbery at Harper's Garage on 20 November. It was therefore relevant to prove that two men had admitted committing such a robbery, although there was as it transpired no dispute that the robbery had been committed by someone. d

The arguments advanced on behalf of the prosecution and of the appellant are similar to those on behalf of Robertson, and we need not repeat them here. Nor need we repeat our reasons for concluding that the judge was correct in his ruling that the evidence was admissible. e

For those reasons we dismissed the appeal against conviction. f

Appeals dismissed.

Solicitors: Crown Prosecution Service.

N P Metcalfe Esq Barrister.

a Citibank Trust Ltd v Ayivor and another

CHANCERY DIVISION

MERVYN DAVIES J

6, 11 MARCH 1987

b *Mortgage – Order for possession of mortgaged property – Suspension of execution of order – Likelihood that mortgagor will be able to pay sums due within reasonable period – Counterclaim – Whether court entitled to consider mortgagor's counterclaim in exercising discretion to postpone order for possession – Administration of Justice Act 1970, s 36.*

The defendants applied to the plaintiff bank for a mortgage to enable them to purchase a house. A survey which the plaintiff arranged to be carried out revealed evidence of rising damp and dry rot. A copy of the report was not sent to the defendants although they were required to pay for the survey. The plaintiff then offered to lend the defendants £32,250 on mortgage subject to £750 being retained for repairs which the plaintiff required to be carried out, including the obtaining of a specialist report on the damp and dry rot and carrying out work recommended in the report. The defendants accepted the mortgage offer, purchased the house, executed a legal charge in favour of the plaintiff and then arranged for a specialist inspection of the damp and dry rot, as the result of which they discovered that the cost of remedial work would be over £9,000. The defendants took the view that the plaintiff ought to have shown them the surveyor's report before they entered into the purchase, and refused to pay the instalments due under the mortgage. The plaintiff applied for possession of the property. The master made a possession order but stayed execution provided, inter alia, the defendants issued a counterclaim against the plaintiff and prosecuted it with due diligence. The plaintiff appealed, contending that the existence of a counterclaim did not affect its right to possession. The defendants contended that their counterclaim was a matter to be taken into consideration since under s 36^a of the Administration of Justice Act 1970 the court had a discretion to postpone possession if the mortgagor was 'likely to be able within a reasonable period' to pay the arrears.

Held – Although s 36 of the 1970 Act modified the rule that a mortgagee was entitled to possession, by giving the court a discretion to postpone possession if, inter alia, it appeared that the mortgagor was likely to be able within a reasonable period to pay any sums due under the mortgage, the existence of the counterclaim did not mean that the defendants would be able to pay off their arrears within a reasonable period, since even if they had a reasonable prospect of success there was no reason for the court to conclude that they would pay over any damages they might recover. It followed therefore that the court could not exercise its discretion under s 36 and the appeal would accordingly be allowed (see p 244 d e, p 245 f g and p 246 g to j, post).

h Notes

For the court's powers to provide temporary relief for a mortgagor in an action for possession, see 32 Halsbury's Laws (4th edn) para 836.

For the Administration of Justice Act 1970, s 36, see 40 Halsbury's Statutes (3rd edn) 1060.

j Cases referred to in judgment

Barclays Bank plc v Tennet [1984] CA Transcript 242.

Keller (Samuel) (Holdings) Ltd v Martins Bank Ltd [1970] 3 All ER 950, [1971] 1 WLR 43, CA.

^a Section 36 is set out at p 244 g to p 245 a, post

Mobil Oil Co Ltd v Rawlinson (1981) 126 SJ 15.

Royal Trust Co of Canada v Markham [1975] 3 All ER 433, [1975] 1 WLR 1416, CA. a

Western Bank Ltd v Schindler [1976] 2 All ER 393, [1977] Ch 1, CA.

Appeal

The plaintiff, Citibank Trust Ltd (Citibank), by notice of appeal dated 16 February 1987, appealed against the order made by Master Gowers on 10 February 1987 requiring the defendants, Bliss Billow Kodzo Ayivor and Claudette Pamela Ayivor, to give up possession of a freehold dwelling house at 14 Fletcher Lane, London E10, of which Citibank was mortgagee, within 28 days, the order not to be enforced for six months while monthly payments due under the mortgage were paid as they fell due and a counterclaim was duly served and prosecuted by the defendants against Citibank for damages. Citibank sought payment of all moneys due under the mortgage and an order for possession of the dwelling house forthwith. The appeal was heard in chambers but judgment was given by Mervyn Davies J in open court. The facts are set out in the judgment. b
c

John L Davies for Citibank.

Richard King for the defendants.

Cur adv vult d

11 March. The following judgment was delivered.

MERVYN DAVIES J. This is an appeal against a master's possession order in a mortgage action. By a legal charge dated 30 April 1984 made between the defendants Bliss Billow Kodzo Ayivor and Claudette Pamela Ayivor (his wife), of the one part and Citibank Trust Ltd (Citibank) on the other part a freehold dwelling house, 14 Fletcher Lane, London E10 with registered title EGL 98474 was charged by way of legal mortgage by the defendants with repayment of a loan of £33,000 made by Citibank. Repayment was intended to be over the period of 24 years by instalments of £343.91 per month. The amount of the instalments is variable and is currently in the sum of £214.89 a month. The money lent is further secured, as I understand, by an endowment policy carrying a premium of £49.50 a month. e
f

The legal charge does not mention the endowment policy; but the mortgage offer which I mention later has as one of its conditions a requirement that life assurance, as there referred to, is to be effected.

The defendants are in arrears with the mortgage instalments. On 5 March 1986 Citibank issued an originating summons claiming payment of the money due under the legal charge (then totalling £35,270.13), all necessary accounts and inquiries, and, as well, possession. On 10 February 1987 Master Gowers made an order (i) for delivery of possession within 28 days; but the possession order was qualified in this way: g

'(ii) that the operation of paragraph (i) above is not to be enforced without the leave of the court while (a) The defendants shall pay to [Citibank] all sums hereafter to become payable by way of capital or interest or otherwise under the said mortgage when such sums shall become due or would had there been no default have become due. (b) The defendants do on or before 24th February 1987 issue and serve a counterclaim in this action in the form set out in exhibit BBKA 4 to the affidavit of the first defendant sworn on 6th February 1987. (c) The defendants do prosecute such counterclaim with diligence and (d) The next six months are in course.' h
i

I am not clear what is meant by (d) above but I assume that at any rate during the six months from 10 February 1987 the possession order is not to be enforceable despite the arrears existing at that date if the mortgage instalments are thereafter paid and if a

a counterclaim is duly prosecuted. By a notice of appeal dated 16 February 1987 Citibank seek in place of that order an order for payment of moneys due together with an order for possession forthwith.

b The evidence in support of Citibank's claim now consists of two affidavits sworn by Mrs Linda Carole Jones, a Citibank employee. The first affidavit was sworn on 19 November 1986. It exhibits a copy of the legal charge and states that the defendants are in breach of the terms of the charge in that the defendants have failed to pay the mortgage instalments provided for.

c The affidavit states the then state of account between the parties but that state is now brought up to date by Mrs Jones's second affidavit sworn 29 January 1987. Therein it is stated that (i) the loan is £33,000, (ii) the amount of any instalment or interest in arrear at the date thereof was £5,589·86, (iii) the amount of principal remaining due is £33,000 and (iv) total indebtedness at the date hereof is £38,589·86. The first affidavit states that the amount of an instalment is £214·89 and that interest is accruing at the daily rate of £7·16. The first affidavit states that the legal charge 'is an endowment mortgage whereby the principal owed remains at £33,000 throughout the term subject to any further advance of which there have been none. The instalments therefore consist of interest only'.

d The evidence on the defendants' side consists of two affidavits sworn by the first defendant, the one on 6 February 1987 and the other on 19 February 1987. In this evidence the defendants admit that they are in arrear with their payments under the legal charge. The first defendant, however, contends that Citibank is liable to him and to his wife for negligence or breach of warranty; and that the damages recoverable in respect thereof would extinguish the arrears claimed by Citibank.

e It is this contention that gives rise to the reference to a counterclaim in the master's order. The defendants' evidence is that on approaching Citibank for an advance they were informed that Citibank would not make a mortgage offer prior to a survey of the house. It was therefore supposed that Citibank would only make a mortgage offer if 14 Fletcher Lane was good security for the sum to be lent. The first defendant did not order any survey. Nevertheless, in due course Citibank made a mortgage offer. The offer was for an advance of £32,250, with £750 withheld or retained pending 'repairs'. Such repairs were then specified under four heads relating to (a) roof, (b) arranging for reports as to damp-proof courses and as to eradication of timber rotting fungi and complying with the recommendations in such reports, (c) front door glass and (d) overhauling rainwater and wastewater disposal systems. The mortgage offer was accepted and the defendants completed their purchase and executed the legal charge on 30 April 1984. The defendants then instructed Hillcrest Timber Preservation Ltd to report on (b) above. g The report was forthcoming on 5 September 1984. This lengthy report indicates that it is estimated that the sum of £8,280 is required for remedial treatment against dry rot together with other remedial works in the sums of £761·30 and £57·50, totalling in all £9,098·80.

h As the first defendant observes in his affidavit, it is clear from the reports that the house is seriously affected by both damp and timber decay, with the cost of the remedial works more than one-quarter of the money lent by Citibank.

j On receiving the report dated 5 September 1984 the first defendant telephoned Norwich Union Insurance Society, that society having issued the endowment policy issued in conjunction with the legal charge. The first defendant asked to see a copy of any survey report received in connection with his purchase of 14 Fletcher Lane. In response there was received a report. The report is dated 5 January 1984 and appears to have been made at the behest of Citibank dated 22 December 1983 in the matter of an application by the first defendant to Citibank relating to 14 Fletcher Lane. In para 15 of the report it is stated: 'During our inspection evidence of both rising damp and dry rot were seen, although some remedial measures to the latter had already taken place.' In his affidavit the first defendant complains that this disturbing feature of the report is not

mentioned in the mortgage offer that had been made to him and to his wife. It is in these circumstances that the first defendant contends that he should have been informed of what had been said about rising damp and dry rot and that the effect of the retention clause in the mortgage offer was to indicate that there was no evidence of either defect. He says that if Citibank had accurately set out the surveyor's findings in the mortgage offer he would not have proceeded with the purchase without first ascertaining that the problem identified by the survey was within his means to rectify. In the event, he says, he proceeded with the purchase only to discover subsequently that there were problems, and that Citibank had known of these problems prior to the making of the mortgage. It is to be noted that the first defendant was required to pay £55 to Citibank for the surveyor's report, albeit that the report was not put before him. In these circumstances the first defendant has had prepared a counterclaim in the proceedings and pursuant to the master's order has served a statement of counterclaim. In brief the defendants, in various alternative fashions, claim damages against Citibank in the sum of £9,041.30 in consequence of Citibank having misled the defendants into supposing that 14 Fletcher Lane was free of rising damp and timber rot. Of course, I express no views as to the counterclaim, save to say that one would have supposed that since the first defendant was paying for the survey dated 5 January 1984 one would have supposed that he would have been sent a copy thereof.

One starts with the general rule that a legal mortgagee has a right to possession of the mortgaged property: see e.g. *Western Bank Ltd v Schindler* [1976] 2 All ER 393, [1977] Ch 1. The next question that arises in this case is whether or not the existence of the counterclaim affects the right to possession. The cases show that the existence of the counterclaim does not affect that right. In *Barclays Bank plc v Tennet* [1984] CA Transcript 242 Slade LJ said:

'... and, in my opinion, the *Keller* case [*Samuel Keller (Holdings) Ltd v Martins Bank Ltd* [1970] 3 All ER 950, [1971] 1 WLR 43] makes it quite clear that the existence of the counterclaim cannot defeat the right to possession, which the bank enjoys as mortgagee. Indeed, only recently in *Mobil Oil Co Ltd v Rawlinson* (in a decision given on 31 July 1981 apparently reported only in Lexis reports), which was brought to our attention, Nourse J specifically held that the existence of a counterclaim will not defeat the legal mortgagee's right to possession where he establishes his indebtedness. The correctness of that decision does not appear to be in doubt as a matter of principle.'

The *Mobil* case there referred to is reported in the *Solicitors' Journal* (126 SJ 15).

Accordingly, since here we have a dwelling house, one goes on to consider s 36 of the Administration of Justice Act 1970 as read with s 8 of the Administration of Justice Act 1973. Section 36 of the 1970 Act read as follows:

'(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

(2) The court—(a) may adjourn the proceedings, or (b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may—(i) stay or suspend execution of the judgment or order, or (ii) postpone the date for delivery of possession, for such period or periods as the court thinks reasonable.

(3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment

by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit . . .'

Section 8 at the 1973 Act reads as follows:

'(1) Where by a mortgage of land which consists of or includes a dwelling-house, or by any agreement between the mortgagee under such a mortgage and the mortgagor, the mortgagor is entitled or is to be permitted to pay the principal sum secured by instalments or otherwise to defer payment of it in whole or in part, but provision is also made for earlier payment in the event of any default by the mortgagor or of a demand by the mortgagee or otherwise, then for purposes of section 36 of the Administration of Justice Act 1970 (under which a court has power to delay giving a mortgagee possession of the mortgaged property so as to allow the mortgagor a reasonable time to pay any sums due under the mortgage) a court may treat as due under the mortgage on account of the principal sum secured and of interest on it only such amounts as the mortgagor would have expected to be required to pay if there had been no such provision for earlier payment.

(2) A court shall not exercise by virtue of subsection (1) above the powers conferred by section 36 of the Administration of Justice Act 1970 unless it appears to the court not only that the mortgagor is likely to be able within a reasonable period to pay any amounts regarded (in accordance with subsection (1) above) as due on account of the principal sum secured, together with the interest on those amounts, but also that he is likely to be able by the end of that period to pay any further amounts that he would have expected to be required to pay by then on account of that sum and of interest on it if there had been no such provision as is referred to in subsection (1) above for earlier payment . . .'

Section 36 was considered in *Western Bank Ltd v Schindler* [1976] 2 All ER 393 at 399, [1977] Ch 1 at 13, where Buckley LJ said:

'Accordingly, in my judgment, on the true construction of the section, it applies to any case in which a mortgagee seeks possession, whether the mortgagor be in arrear or otherwise in default under the mortgage or not, but, where the mortgagor is in arrear or in default, the discretion is limited by the conditional clause.'

As I understand it s 36 modifies the rule that a mortgagee is entitled to possession by conferring a discretion on the court. The court is given certain powers which it may exercise. But, where the mortgagor is in arrear (see Buckley LJ in the passage cited above) it may exercise such powers only 'if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage. . .'

Section 8(1) of the 1973 Act means, in this case, that I may treat as due from the defendants only such instalments as are due to date, that is to say one is not obliged, when considering the s 36 discretion, to regard the entire principal sum and interest as now due; although by the terms of this mortgage (see cl 10.2) it is due by virtue of the defendants' default in keeping up the instalment payments.

Section 8(2) of the 1973 Act then requires the court in exercising the s 36 discretion to have in mind not only the unpaid instalments already due but also the instalments that will fall due during the 'reasonable period' that is contemplated in s 36(1). As to this last point under s 8(2) I feel able to accept that the defendants will be able to pay such instalments as they fall due. I say that because while there is no actual evidence of the defendants' means it is accepted that the first defendant is in employment and earns £766 a month (net). I should say here that it seems that payment of the instalments as they fall due has always been within the first defendant's ability; but he decided, as I understand, not to pay because he regarded himself as having a claim against Citibank by reason of the non-disclosure of the surveyor's inspection report that I have mentioned. While there is thus no difficulty about the keeping up of the current instalments one

nevertheless has to turn to the question of the arrears. According to Citibank's evidence instalments were in arrear in the sum of £5,589.86 as at 29 January 1987. I understand they remain at that figure since two recent instalment payments have been made. Counsel for the defendants proposed a total monthly payment of £300. That would mean, as I see it, that, for practical purposes, the arrears would be paid off at £35.61 a month, since the instalments are running at £214.89 and the endowment policy premium is £49.50 a month. a

Counsel for the defendants put forward figures more favourable to the defendants. He calculated that a monthly payment of £300 would mean that arrears were paid off at £55 a month. I am willing to accept counsel's figure. Even so that means that the arrears of £5,589 would thus not be cleared off for 100 months, or 8½ years. b

Counsel for the defendants submitted that in exercising the s 36 discretion the court is not in this case confined to such a calculation of time as I have set out. Counsel said account should be taken of the following considerations (among others): (a) that the second defendant is on a catering course and may from July onwards be able to add to the family income; (b) that a sale of the house before cure of the dry rot will result in a very depressed price; (c) that the principal sum owing is secured by the endowment policy; (d) that it would be right to allow time for a sale by the defendants particularly since Citibank is a bank (as opposed to an individual) and the security is not depreciating; and (e) that the defendants' counterclaim may result in a substantial sum being owed by Citibank to the defendants within, say, the next year. c

As to (a) above there was no evidence. I do not feel justified in supposing that this possibility offers the likelihood of any imminent substantial reduction in the arrears. Considerations (b) and (c) do not seem to me to be considerations that can properly be taken into account in the context of s 36. As to (d) Browne LJ said in *Royal Trust Co of Canada v Markham* [1975] 3 All ER 433 at 439, [1975] 1 WLR 1416 at 1423: d

'I also agree with [Sir John Pennycuik] that, for the reasons he has given, it is not possible to accept counsel's submission that in a proper case the court could not stay or suspend an order to enable a property to be sold. I suppose that in all probability this would only be done where there was clear evidence that a sale was going to take place in the near future and that the price would cover all the sums due to the mortgagee for capital and interest. But in such circumstances, and if the court thought it proper, in my view there would be jurisdiction to make such an order.' e

However, here there is no evidence or indeed any statement by counsel that there is in prospect any sale by the defendants. Consequently I do not see that I can give any effect to consideration (d). Consideration (e) may be an inadmissible consideration. To allow weight to (e) might nullify or circumvent the rule that the existence of a counterclaim does not prevent the mortgagee from obtaining possession. The wording of s 36 does not seem to impinge on that rule. But however that may be, in this particular case, I do not, on the evidence, find myself able to say that the existence of the counterclaim means that the defendants are likely 'to be able within a reasonable period' to pay off the arrears. Even if I assume that the defendants' prospects of success on the counterclaim are good that does not justify me in concluding that the defendants are likely soon to reduce the arrears by paying over any damages they may recover. f

Counsel for Citibank very fairly said that Citibank would expect to wait for some time, perhaps up to 18 months, for the arrears. I find myself confined by the wording of s 36. On the evidence I cannot see that the defendants are likely to be able within any reasonable period to pay off their arrears. It follows that the s 36 discretion may not be exercised in favour of the defendants, so that the appropriate order to make is an order for possession in 28 days. I make this order without any enthusiasm at all because it does appear to me that the defendants in this case were dismayed to have disclosed to them, after they had bought their house, the information about dry rot etc that is contained in the surveyor's inspection report of 5 January 1984. Citibank allowed the purchase to go g

h
j

a ahead and the mortgage to be executed without supplying the defendants with a copy of the inspection report, and that even though they were requiring the defendants to pay for that report. However that may be, I in no way prejudice the defendants' counterclaim since for all I know Citibank may have a good defence thereto.

Order accordingly.

b Solicitors: Charles Caplin & Co (for Citibank); William Stockler & Co (for the defendants).

Jacqueline Metcalfe Barrister.

c John Laing Construction Ltd v Dastur

COURT OF APPEAL, CIVIL DIVISION

PARKER AND BINGHAM LJJ

10, 19 DECEMBER 1986

d County court – Payment into court – Tender – Unliquidated claim – Cost of repairs in road accident case – Whether defence of tender available in claim for cost of repairs in road accident case – CCR Ord 1, r 10.

e Notwithstanding that CCR Ord 1, r 10^a provides that the cost of repairs in a road accident case is to be treated as a liquidated claim, that rule does not affect or amend the common law relating to the defence of tender before action and therefore the defence of tender is not available to the defendant where the plaintiff's claim is for the cost of repairs to a vehicle arising out of a road accident, together with interest and solicitor's costs, since such a claim is for unliquidated damages even if it is quantified (see p 250 *e* to *j* and p 251 *d*, post).

f Notes

For a county court claim for the cost of repairs in a road accident case, see 10 Halsbury's Laws (4th edn) para 159.

g Case referred to in judgments

Davys v Richardson (1888) 21 QBD 202, CA.

Cases also cited

Calderbank v Calderbank [1975] 3 All ER 333, [1976] Fam 93, CA.

Dearle v Barrett (1864) 2 Ad & E 82, 111 ER 32.

h *Edmunds v Lloyd Italico e L'Ancora Cia di Assicurazioni e Riassicurazioni SpA* [1986] 2 All ER 249, [1986] 1 WLR 492, CA.

Gibson's Settlement Trust, Re [1981] 1 All ER 233, [1981] Ch 179.

Griffiths v Ystradyfodwg School Board (1890) 24 QBD 307.

Knight v Abbott Page & Co (1883) 10 QBD 11.

Mona, The [1894] P 265.

j *Newland v Boardwell* [1983] 3 All ER 179, [1983] 1 WLR 1453, CA.

President of India v La Pintada Cia Navegacion SA [1984] 2 All ER 773, [1985] AC 104, HL.

Wilson v United Counties Bank Ltd [1920] AC 102, [1918–19] All ER Rep 1035, HL.

a Rule 10 is set out at p 250 *g* *h*, post

Appeal

The defendant, Mrs Z B Dastur, appealed against the decision of his Honour Judge Tumim sitting at the Willesden County Court on 28 February 1986 whereby he gave judgment for the plaintiffs, John Laing Construction Ltd, for £137·85 plus £12·42 interest and costs being the amount claimed by the plaintiffs for damage to, and loss of use of, their motor vehicle following a road accident on 1 May 1985 caused by the defendant's negligent driving. The facts are set out in the judgment of Parker LJ.

Richard Slowe for the defendant.

Timothy Higginson for the plaintiffs.

Cur adv vult

19 December. The following judgments were delivered.

PARKER LJ. The defendant appeals by leave of this court from a judgment of his Honour Judge Tumim in the Willesden County Court on 28 February 1986 whereby he ordered that judgment be entered for the plaintiffs for £137·85 plus £12·42 interest and costs.

Although a very small sum is involved the matter is of some importance since the decision on the appeal will or may affect many other cases. For that reason leave to appeal was given and the appeal was expedited.

The short facts are these. On 1 May 1985 the defendant drove her car into the back of the plaintiffs' car, which was stationary. Correspondence ensued between the plaintiffs' insurers' solicitors and the defendant, who was initially uncertain whether to deal with the matter herself or hand it to her insurers. By mid-August she had decided on the latter course. On 16 September 1985 the plaintiffs' solicitors wrote to the defendant's insurers a simple straightforward letter which, after asserting (correctly) that the defendant was wholly responsible, continued:

'Our client claims:

Repair Cost (less VAT)

Loss of use 1 day at £5 per day

£132·50

5·00

Total £137·85

Our client's insurers are the Provincial Insurance Plc., Provincial House, 32, High Street, Haverhill, Suffolk, under policy number 1263859/F, the cover being third party, fire and theft. Our client is registered for VAT. We are instructed to commence proceedings for the recovery of our client's above mentioned claim unless we receive your remittance within the next ten days. Settlement will be subject to payment of our costs which total the sum of £28·80. We reserve the right to claim interest pursuant to section 69 of the County Courts Act 1984 if proceedings are issued.

Yours faithfully,
Shoosmiths & Harrison.'

This was a plain offer to settle the claim for £137·85 and £28·80 costs, but with the clear warning that if the matter were not settled the plaintiffs would, or would probably, add a claim for interest. On 20 September the defendant's insurers replied enclosing a cheque for £137·85 and stating that the defendant would not be liable for costs under the County Court Rules. This was clearly a rejection of the offer.

The plaintiffs' solicitors did not cash the cheque but on 3 October commenced proceedings in the Willesden County Court. The particulars of claim, by para 4 and the prayer, put the claim thus:

'4. By reason of the matters aforesaid the Plaintiff has suffered damage and loss.

a

Repairs to vehicle

Particulars

Loss of use for one day at £5.00

£132.50

£5.00

£137.50

b

AND the Plaintiff claims:

1. The said sum of £137.50.

2. Interest pursuant to section 69 of the County Courts Act 1984 at the rate of 15 per centum per annum from 5th August 1985 to 3rd October 1985. The daily rate of interest being 6p. 59 days \times 6p = £3.54.

c

3. Interest pursuant to section 69 of the County Courts Act 1984 from 3 October 1985 at the rate of 15 per centum per annum until judgment or sooner payment. The daily rate is as aforesaid or alternatively interest to be assessed pursuant to section 69 of the County Courts Act 1984.'

The claim was thus in excess of that put forward in September in that it included interest. There is a small discrepancy in the figures but it is not suggested that this is

d

material. On 16 October the defendant put in a defence admitting liability for the damages but denying liability for interest and costs. The defence referred to the fact that a cheque for the damages had been sent on 20 September, but did not plead tender as a defence. It is, however, common ground that it was intended to be and should be treated as being a defence of tender.

e

Under CCR Ord 9, r 12 it is provided:

'Defence of tender

Where a defence of tender before action is pleaded, the defendant shall pay into court the amount alleged to have been tendered, and the tender shall not be available as a defence unless and until the payment into court has been made.'

f

The defendant's solicitors did pay into court a sum which was the total of the damages and interest. This was thus more than the amount alleged to have been tendered. The judge rejected the defence of tender. The agreed and approved note of his judgment, after rejecting the history, reads as follows:

g

'Under s 69 of the County Courts Act 1984 there is a power to award interest which may be included for all or any part of the period from the date of the cause of action. Once the action had started the plaintiffs limited their claim to interest to the period from the 5 August 1985. Under Ord 9, r 12 the payment into court must be in the amount alleged to have been tendered. Under Ord 11, r 1(8), for the purposes of this rule a plaintiff's cause of action in respect of a debt or damages shall be construed as a cause of action in respect also of such interest as might be included in the judgment whether under s 69 of the Act or otherwise if judgment were given at the date of payment into court. Of the two offers the offer before action excluded any interest at all. The defendant's insurers of course did not know what the position was and it was difficult to know if interest was due from the date of the cause of action, the date of repair or otherwise. The payment in does include interest which was as much as could be awarded by a judge in the proper exercise of his discretion. As there was a total omission of interest from the original tender it was therefore not a good tender and accordingly there must be judgment for the plaintiffs.'

h

j

Although the judge refers to the amount of the payment in being different from the amount tendered it appears to me to be clear that the basis of his decision was that the

tender did not include interest and that he considered that by reason of the provisions of Ord 11, r 1(8) it should have done so. a

If and in so far as the judge considered that Ord 9, r 12 required the payment in therein provided for to be of the amount of the tender and no more he in my view erred. The rule merely states that the amount alleged to have been tendered must be paid in. If a defendant pays into court more than that amount in order to guard against the possibility of the plaintiff recovering more than the amount tendered he has still paid in the amount tendered. He has paid in that amount plus something more. It would in my view be an absurdity to hold that in such circumstances the defence of tender, if otherwise good, was not available for non-compliance with Ord 9, r 12. b

The judge also in my view erred in holding that the tender was bad because it did not include interest. His decision on this point was clearly founded on Ord 11, r 1(8), but that provision begins with the words 'for the purposes of this rule'. That rule is concerned with payment in under that rule in an action. It has in my view no bearing on the question of tender before action. c

No doubt in cases where the plaintiff was suing for a debt bearing contractual interest or by statute bearing interest from the date when it was incurred a tender would have to include any interest accrued to date of tender for that would be part of the debt. Where, however, as here, interest would only be recoverable under s 69 of the 1984 Act, the position is quite different. Such interest is wholly in the discretion of the court in an action. No interest may be awarded or it may be awarded only in respect of part of the debt or damages. Both period and rate of interest are in the discretion of the court. Where therefore there is no contractual interest and no statutory interest attached as a matter of right to the debt there can be no interest due. An alleged tender cannot therefore in my view be bad for failure to include interest to which, at date of tender, the plaintiff is plainly not entitled and to which he may never be entitled. d

I am accordingly of the opinion that the judgment cannot be sustained on the ground or grounds relied on by the judge. The plaintiffs, however, seek to uphold the judgment on the simple ground that the claim is one for unliquidated damages and that in such cases the defence of tender is not available at all. The defendant accepts, subject to the contentions hereafter mentioned, both that the claim, albeit quantified, is a claim for unliquidated damages and that the defence of tender is not available for such a claim. It was so decided by the court in *Davys v Richardson* (1888) 21 QBD 202. e

The defendant contends, however, that in the present case the effect of Ord 1, r 10 is to make the defence available notwithstanding that it is in law a claim for unliquidated damages. Order 1, r 10 provides: f

'Cost of repairs to be treated as liquidated claim in road accident case' g

A claim in an action for the cost of repairs executed to a vehicle or to any property in, on or abutting a highway in consequence of damage which it is alleged to have sustained in an accident due to the defendant's negligence shall, unless the court otherwise orders, be treated as a liquidated demand for the purposes of these rules.'

It may be that in the present case this rule cannot in any event avail the defendant because, albeit that the bulk of the claim is for cost of repairs, the claim includes a small amount for loss of use. It is, however, unnecessary to decide this point. Even if the claim were solely for cost of repairs the rule would not in my view be of any avail. In the first place the rule ends with the words 'shall, unless the court otherwise orders, be treated as a liquidated demand for the purposes of these rules'. The defence of tender is a common law substantive defence to which the rules other than Ord 9, r 12 have nothing to do. They cannot in any event amend the substantive law. Moreover, the rule itself gives the court a discretion and a discretion to allow or disallow a substantive common law defence available to a defendant is not, even if *intra vires*, within the contemplation of the rule. If a tender is made which is bad at common law it cannot in my view thereafter be made h

a good by a provision which states merely that, for the purposes of the rules and unless the court otherwise orders, the claim shall be treated as a liquidated demand.

A further contention was advanced, albeit understandably with little fervour, that the form of summons used was only appropriate for a liquidated claim and that the plaintiffs could not now be heard to say that the claim was unliquidated. I find it unnecessary to say more about this than that it is in my judgment misconceived.

b So much for the main question of tender. The defendant, however, sought also to argue that where a defendant had offered the whole of the damages claimed he should not be entitled to costs. There can in my view be no such principle. Each case will depend on its own facts and the judge's discretion cannot be fettered.

c Since tender is not available, the plaintiff is clearly entitled to proceed to action and claim both interest and costs. In particular circumstances the judge may find good reason to deprive him of all or some part of the costs but there can be no general principle. It is possible to envisage circumstances where such action might be appropriate but I refrain from giving examples since were I to do so it might in future be argued that the Court of Appeal had ruled that in certain circumstances a plaintiff should be deprived.

I would dismiss the appeal.

d **BINGHAM LJ.** I have had the advantage of reading in draft the judgment of Parker LJ and I agree with it. There is nothing I can usefully add.

Appeal dismissed.

Solicitors: *R F Prestney-Archer* (for the defendant); *Shoosmiths & Harrison*, Reading (for the plaintiffs).

Azza Abdallah Barrister.

Smith v Springer

a

COURT OF APPEAL, CIVIL DIVISION

SIR JOHN DONALDSON MR AND CROOM-JOHNSON LJ

22 MAY, 10 JUNE 1987

County court – Costs – Unliquidated claim – Legal costs – Cost of repairs in road accident case – Offer of settlement to pay repairs – Refusal to pay costs – Whether plaintiff entitled to continue with claim in order to obtain costs.

b

Where a plaintiff claims the cost of repairs arising out of a road accident, together with solicitor's costs, and the defendant's insurers offer to pay the cost of repairs in full but refuse to pay the legal costs, the plaintiff is entitled to continue with his claim in the county court, since the claim will be unliquidated and until the damages are assessed it will be impossible to know the amount of damages the plaintiff will recover or the costs for which the defendant will be liable (see p 256 c d g, post).

c

Hobbs v Marlowe [1977] 2 All ER 241 and *John Laing Construction Ltd v Dastur* [1987] 3 All ER 247 considered.

d

Notes

For a county court claim for the cost of repairs in a road accident case, see 10 Halsbury's Laws (4th edn) para 159.

Cases referred to in judgments

Hobbs v Marlowe [1977] 2 All ER 241, [1978] AC 16, [1977] 2 WLR 777, CA and HL.

e

Laing (John) Construction Ltd v C J O'Shea & Co [1986] CA Transcript 1038.

Laing (John) Construction Ltd v Dastur [1987] 3 All ER 247, [1987] 1 WLR 686, CA.

Cases also cited

Bellador Silk Ltd, Re [1965] 1 All ER 667.

Chilton v Saga Holidays plc [1986] 1 All ER 841, CA.

f

Cromwell Property Investment Co Ltd v Hucks [1939] 3 All ER 257, CA.

Debtor (No 757 of 1954), Re a, ex p the debtor v F A Dumont Ltd (petitioning creditor) [1955] 2 All ER 65, [1955] Ch 600.

Wallersteiner v Moir [1974] 3 All ER 217, [1974] 1 WLR 991, CA.

Appeal

g

The plaintiff, Mark Smith, appealed from the judgment of his Honour Judge Wakley sitting in Brentford County Court on 12 November 1986 whereby he dismissed an appeal from the order of Mr Registrar Rees dated 15 October 1986 striking out the plaintiff's claim for damages against the defendant, John Patrick Springer, as an abuse of the process of the court. The facts are set out in the judgment of Sir John Donaldson MR.

h

Timothy Higginson for the plaintiff.

Ronald J Walker QC and *Geoffrey B Brown* for the defendant.

Cur adv vult

10 June. The following judgments were delivered.

j

SIR JOHN DONALDSON MR. On 15 May 1985 the defendant, Mr Springer, drove his Lada motor car into the back of a Ford, owned and driven by the plaintiff, Mr Smith, whilst it was stopped at a road junction. This is not a promising position from which to

- deny liability and the defendant has never done so. But on the other hand neither he nor
- a his insurers, Eagle Star Insurance Group, rushed to the plaintiff, cheque book in hand, and in due course Mr Smith consulted solicitors, Messrs Shoosmiths & Harrison. This appeal is solely concerned with the extent, if any, to which the plaintiff can recover the professional fees which he is liable to pay Shoosmiths & Harrison as part of his claim against the defendant. It is possible that the plaintiff may have legal expenses insurance, but nothing turns on this since those insurers, if any, would be entitled to succeed to and
- b enforce the plaintiff's rights.

The sequence of events, so far as is material, was as follows.

(a) On 14 November 1985 Shoosmiths & Harrison wrote to the defendant claiming unspecified uninsured losses and were referred to Eagle Star.

(b) On 23 December Shoosmiths & Harrison wrote to Eagle Star as follows:

- c 'The circumstances of the accident make it clear that your insured is wholly responsible for, inter alia, our client's claims for uninsured losses. Your insured's vehicle ran into the rear of our client's stationary vehicle. We are instructed to commence County Court proceedings forthwith for the recovery of our client's claim. However, our client will now accept settlement for the total amount set out below, providing we receive your company's cheque within the next 10 days. If we
- d do not, we will issue the required summons. We enclose copies of the appropriate documents supporting our client's claims which are as follows:

	£
Policy excess	25.00
Loss of use 4 days at £15.00 per day	60.00
Interest @ 15 percentum per annum on the above at	
e 3p per day to today's date	1.32
Costs	23.00
	<u>£109.32</u>
	TOTAL

- f Kindly note that this settlement is subject to payment of our costs. Please make your remittance in respect of this item of claim payable to us.'

(c) On 17 January 1986 Eagle Star replied with a printed slip which, when the 'ticks' were interpreted, read: 'We enclose our cheque for £86.32 in settlement of your claim. We will not pay for costs.'

(d) Shoosmiths & Harrison replied on 10 February:

- g 'Your counter-offer is not acceptable to our client and we are therefore returning your cheque. We are instructed to commence County Court proceedings for the recovery of our client's losses together with interest pursuant to Section 69 of the County Courts Act 1984. These will be served on your insured direct without further notice.'

- h (e) Eagle Star replied on 19 February:

'We have your communication of the 10th February 1986, and feel that the action you have taken is totally unreasonable and unjustified. If this matter were referred to a Small Claims County Court, costs would not be awarded because the limit of £500 had not been exceeded. Furthermore, you had not been instructed because of any unreasonable attitude by ourselves, and feel that our offer to you of £86.32 is a fair and reasonable one, and we are maintaining it. If you would like to give written acceptance to this offer we can despatch our cheque to you.'

- j (f) On 15 May Shoosmiths & Harrison issued proceedings in the Brentford County Court. The particulars of claim referred to the facts of the collision, alleged negligence on the part of Mr Springer and continued:

'4. By reason of the matters aforesaid the Plaintiff has suffered damage and loss.

Particulars of Special Damage

a

	£
Policy excess	25.00
Additional travelling expenses and out-of-pocket expenses	10.00
D.V.L.C. Search	2.00
Total	<u>37.00</u>

b

5. The Plaintiff agents required the use of his vehicle whilst it was being taken to the garage where repairs were completed and during the period of repairs. The Plaintiff suffered inconvenience and was deprived of the use and enjoyment of the vehicle until repaired for the period of 4 days.

AND the Plaintiff claims damages and interest pursuant to Section 69 of the County Court Act 1984 limited to '£500.00.'

c

(g) On 7 July Messrs Edward Lewis & Co, solicitors acting for the defendant or Eagle Star, signed a printed form of defence which they completed to read as follows:

'In the BRENTFORD County Court

d

CASE No. 8607798

SMITH V SPRINGER

DEFENCE

e

1. Do you dispute the plaintiff's claim or any part of it? YES
2. If so, how much do you dispute and what are your reasons?

The Defendant reserves the right to contend that the Plaintiff's claim is an abuse/misuse of the process of the Court, pursuant to order 13 Rule 5(i) (d) of the County Court Rules 1981.

The Defendant admits that the accident referred to in the Particulars of Claim was caused by his negligence.

The Defendant further admits that as a result of the accident, the Plaintiff has suffered loss and damage. The Defendant avers that by a solicitors letter dated 23rd December 1985, the Plaintiff quantified his loss in the sum of £86.32.

f

Particulars

g

Policy Excess	£25.00
Loss of use, 4 days @ £15.00 per day	£60.00
Interest @ 15% p.a. on above @ 3p per day to today's date	£1.32
	<u>£86.32</u>

h

The Defendant through his insurers forwarded a cheque in the sum of £86.32 in full and final settlement of the Plaintiff's claim to the Plaintiff's solicitors.

The Plaintiff's solicitors have rejected the sum of £86.32 on the grounds that costs of £23.00 were recoverable. The Defendant avers that the Plaintiff's solicitors were not entitled to costs at any stage, as the total of the Plaintiff's claim fell below the arbitration limit of £500.00.

The Defendant avers therefore that the Plaintiff's claim is an abuse of the process of the Court.'

j

(h) On the same day Edward Lewis & Co paid the sum of £86.32 into court 'in full and final satisfaction of your claim interest and costs in this case'.

(i) On the same day Edward Lewis & Co applied for an order that—

- a (1) All proceedings be stayed.
(2) That the Plaintiff's claim be struck out on the grounds that it is an abuse of the process of the Court, pursuant to order 13 Rule 5(i)(d) of the County Court Rules 1981.
(3) The Plaintiff do pay the costs of this action, to be taxed in any event.'

b (j) On 16 July Shoosmiths & Harrison delivered a reply claiming to be entitled to interlocutory judgment for damages to be assessed and contending that the alleged quantification of the plaintiff's claim contained in their letter of 23 December 1985 was nothing more than an offer of settlement.

On the defendant's application, the registrar struck out the plaintiff's claim, ordered him to pay the defendant's costs and further ordered that the money in court be paid out to the defendant's solicitors. This order was affirmed by his Honour Judge Wakley on appeal. The grounds of decision in each case were that the plaintiff's claim was clearly a liquidated claim for £86.32 and that, in the light of the tender of the cheque by Eagle Star before proceedings were begun, the proceedings were unnecessary and were started for an improper purpose, namely the recovery of what were described as 'improper costs'. Each referred to and relied on *Hobbs v Marlowe* [1977] 2 All ER 241, [1978] AC 16, in which the House of Lords held that it was a misuse of the process of the court to increase the amount of the claim by including insured costs if the sole object of the exercise was to increase the amount of legal costs recoverable and that, in such a case, the judge was justified in refusing to order costs appropriate to the increased sum claimed.

Although the sum in dispute is small, the appeal is said to be of some importance in that the scenario is a common one and, in total, considerable sums may be involved. Indeed we were referred to two previous occasions on which Shoosmiths & Harrison and Eagle Star have joined issue on this same point. In the first, *John Laing Construction Ltd v C J O'Shea & Co* [1986] CA Transcript 1038 his Honour Judge Russell Vick QC refused to strike out the claim and Nicholls LJ refused leave to appeal on the grounds that the claim could only be struck out if it could be shown that there was no genuine or reasonable claim for more than had already been offered by Eagle Star. In the second, *John Laing Construction Ltd v Dastur* [1987] 3 All ER 247, [1987] 1 WLR 686, this court held on a substantive appeal that claims of this nature were for unliquidated damages and that the defence of tender, which would have defeated the plaintiff's claim for costs and entitled the defendant to recover his costs from the plaintiff, was not therefore available.

The argument for the plaintiff is that his is an unliquidated claim liability for which is admitted and that accordingly he is entitled to interlocutory judgment for damages to be assessed. What costs he obtains will depend on the amount of the damages which he is awarded on that assessment, subject to the effect of the payment into court of £86.32 should he fail to obtain more than this sum. There is no question of any misuse of the court procedure, since his open offer to settle was at a figure of £109.32, and in so far as he explained his offer, this explanation did not limit the extent of his claim if the offer was rejected, as it was. He further points out that he has now included a general item of £10 for travelling and out-of-pocket expenses and £2 for a DVLC search, neither of which featured in the breakdown of the offer of settlement, and that the claim for inconvenience and loss of use of the car is not now limited in amount, although as part of the settlement he had put that claim at £60.

The argument for the defendant is essentially that the whole philosophy governing the determination of small claims in the county court is that plaintiffs should be their own lawyers and can expect to recover no more than the costs stated on the summons or which would have been so stated if the claim had been a liquidated claim (see *Hobbs v Marlowe* [1977] 2 All ER 241 at 256, [1978] AC 16 at 40 per Lord Diplock and CCR Ord 19, r 6). However, by starting proceedings and forcing the defendant to pay into court, the plaintiff has put himself in a position to take the money out of court and lodge a bill

for taxation on the basis of scale costs (see Ord 11, r 3(5)). It was also submitted that the plaintiff would have a right to scale costs under Ord 9, r 6 if he signed interlocutory judgment. I find the construction of that rule obscure as applied to the facts of this case and I am not convinced that this is right. However, for present purposes I will assume that it is. The part of the judgment relating to costs could still have been varied at a later date, if circumstances justified such a course (see Ord 37, r 4). In the submission of the defendant the action has been brought solely in order to increase the costs payable by the defendant and so to induce his insurers in other cases to pay the full claim and solicitors' charges in order to avoid litigation. This is an abuse of the process of the court and should be met with a striking out order under Ord 13, r 5(i)(d). a

I would accept that the court should not allow a plaintiff to use the process of the court for purposes other than the resolution of real disputes, but I do not consider that the remedy of striking out is appropriate unless this can be established beyond argument at the time when the application is made. As things stand, it is impossible to say whether the plaintiff will recover more than £86.32. If he does not do so, the defendant will be able to limit his liability in costs to those incurred by the plaintiff up to the time of payment in, which would be small. There is also a residual discretion as to the costs which can be exercised in an appropriate case, but first it is necessary to ascertain the facts and that has not yet been done. b

Accordingly, I would allow the appeal and enter interlocutory judgment for the plaintiff ordering damages to be assessed by the registrar. It is only when those damages have been assessed that the county court will be in a position to exercise a discretion as to the costs. c

I would only add that I have some sympathy with insurance companies who are prepared to settle in full, but who do not wish also to have to meet legal expenses as the price of avoiding litigation. I apprehend that CCR Ord 1, r 10, which provides that— d

‘A claim in an action for the cost of repairs executed to a vehicle or to any property in, on or abutting a highway in consequence of damage which it is alleged to have sustained in an accident due to the defendant’s negligence shall, unless the court otherwise orders, be treated as a liquidated demand for the purposes of these rules.’ e

was addressed to this problem and was intended to make the defence of tender available to motor insurers. The decision of this court in *John Laing Construction Ltd v Dastur* [1987] 3 All ER 247, [1987] 1 WLR 686 shows that it does not achieve this result, at least where the claim is wider than for the cost of repairs, and it may be that the county court rule committee would wish to look at this rule again with a view to its amendment. f

CROOM-JOHNSON LJ. I have read the judgment prepared by Sir John Donaldson MR. I agree and have nothing to add. g

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Shoosmiths & Harrison*, Reading (for the plaintiff); *Edward Lewis & Co* (for the defendant). h

Frances Rustin Barrister.

Williams v Williams

Tucker and others v Williams and another

COURT OF APPEAL, CIVIL DIVISION

SIR JOHN DONALDSON MR, PARKER LJ AND SIR GEORGE WALLER

b 1, 10 JULY 1987

Evidence – Bankers' books – Entries – Inspection – Civil proceedings – Paid cheques and paying-in slips retained by bank – Whether paid cheques and paying-in slips 'bankers' books' – Bankers' Books Evidence Act 1879, s 9.

c Paid cheques and paying-in slips retained by a bank after the conclusion of a banking transaction to which they relate are not 'bankers' books' within s 9(2)^a of the Bankers' Books Evidence Act 1879 and accordingly cannot be the subject of an order for inspection pursuant to s 7^b of the 1879 Act (see p 261 *c* and p 262 *a b*, post).

Notes

For inspection of entries in bankers' books, see 3 Halsbury's Laws (4th edn) paras 124–128, and for cases on the subject, see 3 Digest (Reissue) 737–739, 4415–4433.

d For the Bankers' Books Evidence Act 1879, ss 7, 9, see 17 Halsbury's Statutes (4th edn) 104, 105.

Cases referred to in judgments

Barker v Wilson [1980] 2 All ER 81, [1980] 1 WLR 884, DC.

R v Jones, R v Sullivan [1978] 2 All ER 718, [1978] 1 WLR 195, CA.

e Cases also cited

Bentel v Barclays Bank International Ltd [1985] CA Transcript 950.

R v Dadson (1983) 77 Cr App R 91, CA.

Waterhouse v Barker [1924] 2 KB 759, [1924] All ER Rep 777, CA.

Interlocutory appeal

f Pamela Ruth Williams (Mrs Williams) appealed with leave from the judgment of her Honour Judge Holt given on 23 March 1984 setting aside so much of the order of Mr Registrar Jeffreys made on 10 March 1987 as directed that Mrs Williams's solicitors be at liberty to inspect and take copies of all paid cheques, credit slips, paying-in slips and counterfoils in respect of payments made into or out of certain bank accounts administered by Barclays Bank plc (the bank). The registrar's order was made in the

g course of (1) an application by Mrs Williams for ancillary financial relief in separation proceedings between her and Sidney Richard Williams (Mr Williams) and (2) possession proceedings brought by Edward Henry Tucker, Jacqueline Louise Hamilton and Kathleen Palmer against Mr and Mrs Williams. The facts are set out in the judgment of Sir John Donaldson MR.

h Timothy Ryder for Mrs Williams.
John Jarvis for the bank.

Cur adv vult

10 July. The following judgments were delivered.

i **SIR JOHN DONALDSON MR.** This appeal raises a short, but important, point under the Bankers' Books Evidence Act 1879 as amended by the Banking Act 1979 (Sch 6, para 1(2)). The point is whether the Act extends to paying-in slips and paid cheques retained by banks after the conclusion of the transactions to which they relate.

^a Section 9(2) is set out at p 260 *d*, post

^b Section 7 is set out at p 259 *j*, post

Mrs Williams has sought disclosure by the bank of copies of those documents for use as evidence in two different proceedings. In the first, in which she petitions for judicial separation from her husband, she also seeks ancillary financial orders. This involves ascertaining the income and capital resources of her husband, who is loath to assist and has ignored all orders for discovery. Mrs Williams's case is that her husband has secret bank and building society accounts and, in addition, has used his position as chairman or director of an unincorporated and unregistered 'charitable' organisation to conceal the extent of his own wealth by mixing his own moneys with those of the 'charity' in its accounts with the Orpington branch of Barclays Bank. In the second, the trustees of the 'charity' are seeking an order against both Mr and Mrs Williams for possession of the matrimonial home at St Anne's-on-Sea, alleging that it is owned by the 'charity'. Mrs Williams's defence is that, although it was bought with money drawn from the account of that organisation, the money used was that of her husband and that he is the beneficial owner of the house.

Clearly if justice is to be done, Mrs Williams must be able to find out what payments have been made into and out of these charitable accounts and her husband's accounts and by and to whom such payments were made. The question is how this is to be achieved. As the bank concedes, she could obtain a subpoena duces tecum addressed to the appropriate officer of the bank requiring him to attend at the hearing with all documentation in the hands of the bank relating to the accounts of the 'charity' and of her husband. However, this would probably, if not inevitably, lead to adjournments in both proceedings in order that the documents could be studied and further inquiries made. If, on the other hand, Mrs Williams and her advisers could have this information in advance of the hearings, the financial and other costs of an adjournment would be avoided and indeed the chances of getting at the truth would be improved.

With these considerations in mind, on 24 February 1987 Mrs Williams applied *ex parte* in the Blackpool County Court and obtained an order from Mr Deputy Registrar Pickup requiring the bank to allow her and her solicitors 'to inspect and take copies of all entries in the books of Barclays Bank PLC Orpington, Kent relating to [Mr Williams's] account therewith and also the accounts of ["the charity"]'.

On 10 March 1987 on a further *ex parte* application Mrs Williams obtained an extended order by Mr Registrar Jeffreys in the following terms:

'I. further to the provisions of the order of Mr Deputy Registrar Pickup, the Solicitors for [Mrs Williams] be at liberty to inspect and take copies of all entries in all of the records used and kept in the ordinary course of their business by Barclays Bank PLC, Orpington concerning and relating to the banking account or accounts of [Mr Williams] and also of ["the charity"] between 1st January 1978 and the date hereof (whether such records be written, or as microfilm, magnetic tape or any other form of mechanical or electronic data retrieval system) and in particular that they be at liberty to inspect and take copies of:— 1) all paid cheques issued on any of the said accounts and all such other documentary or other records used by the said bank and identifying the recipient of any cheque paid on the said accounts 2) all documentary or other records of payment into the said accounts, including credit slips, paying in slips or counterfoils (3) all documents of transfer recording or authorising payments from one of the said accounts to another thereof (4) all standing orders or direct debit instructions as ordered in relation to the said accounts ...'

On being served with this later order, the bank appealed and her Honour Judge Holt varied it by substituting an order in the following terms:

'IT IS ORDERED that further to the provisions of the order of Mr Deputy Registrar Pickup dated the 24th day of February 1987 the Solicitors for [Mrs Williams] be at liberty to inspect and take copies of all entries in all of the records used and kept in

a the ordinary course of their business by Barclays Bank Plc, Orpington concerning and relating to the banking account or accounts of [Mr Williams] and also of ["the charity"] between 1st January 1978 and the date hereof (whether such records be written, or as microfilm, magnetic tape or any other form of mechanical or electronic data retrieval system) and in particular that they be at liberty to inspect and take copies of all documents of transfer recording or authorising payments from one of the said accounts to another thereof.'

b Mrs Williams appeals seeking the restoration of the registrar's order of 10 March 1987.

We are told that the parties will have no difficulty in agreeing on a schedule indicating the types of documents which fall to be disclosed under the registrar's or, as the case may be, the judge's orders and, for the purposes of the argument, it was assumed that the difference lay in the fact that under the registrar's order cheques drawn on and paid out of the accounts of the named charity and of Mr Williams together with paying-in slips relating to payments to the credit of those accounts would be disclosable, whereas under the judge's order they would not.

c The first Bankers' Books Evidence Act was enacted in 1876. Its purpose was set out in the preamble:

d 'WHEREAS serious inconvenience has been occasioned to bankers and also to the public by reason of the ledgers and other account books having been removed from the banks for the purpose of being produced in legal proceedings: And whereas it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books: Be it therefore enacted [etc].'

e The way this was achieved was by providing that entries in the bank's books should be admissible as prima facie evidence of the 'matters, transactions, and accounts recorded therein', subject to verification by the bank's officers and that copies of all such entries should be admissible in evidence without production of the originals.

The current Act, that of 1879, was described as, and was, an amending Act, but it took the form of repealing the 1876 Act and re-enacting it in a simpler and clearer form.

f Would that the legislature would adopt the same methods today.

The relevant provisions of the 1879 Act, as originally enacted, were as follows:

3. Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions, and accounts therein recorded.

g 4. A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits . . .

h 6. A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause.

j 7. On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs . . .

9 ... Expressions in this Act relating to "bankers' books" include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank.' a

The Act in this form clearly contemplated that the banks had a series of books of various kinds which, in the course of the ordinary business of the bank, were in everyday use in that clerks made entries, that is to say wrote, in them. The transfer of any of these books to the court, with a consequent inability to make such entries, and indeed to consult the books, would have been a very considerable inconvenience. Hence the power to provide certified copies, not of the books, but of the relevant entries in the books. However, there was no need for this power to extend, and it did not extend, to papers (including cheques and paying-in slips) which were retained in the bank's possession, but did not constitute an 'entry in a banker's book'. b

In 1979 Parliament recognised that banks had replaced 'books' with more sophisticated forms of 'entry' recording 'matters, transactions and accounts' and it amended s 9 of the 1879 Act by substituting a new definition of 'bankers' books' in the following terms: c

'(2) Expressions in this Act relating to "bankers' books" include ledgers, day books, cash books, account books and other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism.' d

However, and this is highly significant, Parliament did not amend ss 3, 4 and 5 of the 1879 Act, which continued to refer to 'a copy of an entry in a banker's book'. The parliamentary intention was, therefore, that s 3, incorporating the new definition, should read: e

'... a copy of any entry in a ledger, day book, cash book, account book or other record used in the ordinary business of the bank, whether that record is in written form or is kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.' f

Sections 4 and 5 fall to be construed similarly.

For the purposes of this appeal it is not, I think, necessary to refer in detail to the evidence of how Barclays' cheques are collected, presented and paid. Suffice it to say that it is done by interbank and interbranch credits and debits, which identify the cheques and the accounts on which they are drawn by their numbers, but do not identify the payee by name. That information is only obtainable by looking at the cheque itself. This is returned to the paying branch and, unless the customer asks for it to be returned to him, is retained by that branch. Furthermore, surprising though it may seem, if it is returned to the customer, no copy is made of the cheque. The only exception to this general statement of the position is that if an electronic reader-sorter is unable to read the magnetic numbers on a cheque, that cheque is rejected and is then microfilmed and dealt with manually. Barclays were minded to concede on the authority of *Barker v Wilson* [1980] 2 All ER 81, [1980] 1 WLR 884 that the reel or sheet of microfilm might be regarded as a 'banker's book' within the new definition and that each photograph of a cheque might be regarded as an 'entry'. Even if this is right, it would not help Mrs Williams because only 3.5% to 4% of cheques are rejected by the Barclays reader-sorter and are photographed. Furthermore, the selection of which cheques are dealt with in this way is entirely fortuitous, at least if the magnetic print has not been erased deliberately. g
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a Cheques and paying-in slips retained by branches are not stored in any way, all those received on a particular day being bundled up together in any order. A day's bundle can contain 2,000 to 2,500 individual items. They are only referred to if a query arises and in that event, assuming that the relevant day can be identified, someone has to sort through the whole of that day's bundle.

b In this situation counsel for Mrs Williams has to submit, and does submit, that the bundles of cheques and paying-in slips constitute bankers' books within the modern definition and that adding each cheque or paying-in slip to the bundle constitutes making an entry in those books. Whilst I would be prepared to accept that the cheques constitute part of the bank's records used in the ordinary business of the bank (see *R v Jones* [1978] 2 All ER 718, [1978] 1 WLR 195, a case concerned with a bill of lading put in evidence under the Criminal Evidence Act 1965), I am quite unable to accept that adding an individual cheque or paying-in slip can be regarded as making an 'entry' in those records.

c Putting the matter in another way, 'other records' in the new definition has, I think, to be construed ejusdem generis with 'ledgers, day books, cash books [and] account books' and unsorted bundles of cheques and paying-in slips are not 'other records' within the meaning of the Act.

d For these reasons, which are substantially the same as those of Judge Holt, I would hold that Mrs Williams is not entitled to the extended order which she sought. I do so with considerable regret, because in a proper case, of which this seems to be one, it should be possible to obtain disclosure of cheques and paying-in slips before the hearing. This is something which I hope can be looked at by the relevant rule committee.

e Barclays have resisted this appeal for two reasons. First they say that they must preserve the confidentiality of the banker-customer relationship, unless this is overridden by an order of the court and they were not satisfied that, on the true construction of the 1879 Act, the court had power to do so. These sentiments are unexceptionable. Their second reason is less attractive. They point out that identifying particular paid cheques and paying-in slips is a very time-consuming, and therefore expensive, process bearing in mind their system of retaining such documents in an unsorted state. Understandably they are reluctant to undertake it even if they are reimbursed the cost involved. They are not therefore averse to a situation in which the only means by which such documents

f can be the subject of a court order for production is by subpoena duces tecum, since their experience is that few litigants will go to this length. Of course they put it more attractively, saying that in practice discovery of records, such as statements of account, under the 1879 Act normally provides the litigant with all that he needs and that if the Act were to extend to cheques and paying-in slips courts would be liable to order their production automatically and without a proper regard for whether this was necessary in the interests of justice. All that may be correct, but I am not attracted by reliance on procedural difficulties as a means of restricting orders for discovery, regardless of whether such discovery is necessary in the interests of justice.

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h On the facts of this case, it is not clear to me why, if this has not already been done, the court should not make a specific order requiring Mr Williams to obtain the cheques and paying-in slips relating to his account or accounts with Barclays Bank and to disclose them to Mrs Williams and her solicitor. If, as seems likely, Mr Williams failed to comply with this order, he could be committed for disobedience of the court order and Barclays, as his agent holding these documents on his behalf, could then be required to disclose them. That does not, however, solve the problem of the cheques and paying-in slips relating to the 'charity' accounts. Mr Williams would deny that they were in his possession, power or control. However, I do not understand why the trustees of the 'charity' should not be ordered to give discovery of them in the possession action. If, however, they are only discoverable by means of a subpoena duces tecum calling on the appropriate officer of the bank to attend the hearing, I see no reason why the court should not order that the hearing should begin on a specified day and, so far as that day is

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concerned, be confined to receiving the documents, the remainder of the hearing standing adjourned to a date to be fixed. a

I would dismiss the appeal.

PARKER LJ. I agree.

SIR GEORGE WALLER. I also agree. b

Appeal dismissed.

Solicitors: Wren Hilton Apfel & Ascroft Whiteside, Lytham St Annes (for Mrs Williams); Durrant Piesse (for the bank).

Frances Rustin Barrister. c

Udall v Capri Lighting Ltd d

COURT OF APPEAL, CIVIL DIVISION

KERR, NEILL AND BALCOMBE LJ

9, 10, 11 FEBRUARY, 12 MARCH 1987

Solicitor – Undertaking – Undertaking to procure execution of charge by client – Client not executing charge – Performance of undertaking becoming impossible – Whether solicitor guilty of professional misconduct in failing to perform undertaking – Whether court should exercise supervisory jurisdiction if performance of undertaking impossible – Whether solicitor should be ordered to compensate persons suffering loss because undertaking not performed. e

In May 1983 the plaintiff issued writs against the defendant company claiming the amount of goods sold and delivered and he subsequently issued summonses for summary judgment under RSC Ord 14. Before the summonses were heard the defendant's solicitor gave an oral undertaking to the plaintiff's solicitor that he would procure the execution of charges in favour of the plaintiff by the defendant's directors over their homes or life assurance policies, in return for which the plaintiff's solicitor agreed to adjourn the summonses. The charges were not executed and in due course judgment was entered against the defendant. Subsequently, however, the defendant went into liquidation and the judgment could not be enforced. The plaintiff then applied for an order that the defendant's solicitor should procure the execution of charges by the directors pursuant to his undertaking. The judge, without considering whether performance of the undertaking was impossible, ordered that the undertaking be performed, on the assumption that in the exercise of the court's supervisory jurisdiction over solicitors the court could not, in the absence of dishonourable conduct, make an alternative order that the solicitor pay compensation for non-performance of his undertaking. The defendant's solicitor appealed, contending that it was impossible for him to perform the undertaking and therefore it ought not to be enforced. The plaintiff cross-appealed, contending that the judge's order should be varied to require the solicitor to pay damages in lieu of the undertaking or, alternatively, compensation to make good the loss caused by his breach of duty to perform the undertaking. f

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Held – Where a solicitor was unable to carry out or procure the performance of an undertaking given by him the court could exercise its inherent supervisory jurisdiction over the solicitor, because failure to implement an undertaking prima facie constituted

- a** professional misconduct or a serious dereliction of professional duty even though the solicitor may not have acted dishonourably or actual performance of the undertaking required action by a third party and was therefore beyond the solicitor's control. Although the court would usually order performance of the undertaking, where performance was impossible the court could order the solicitor to pay compensation to any person who had suffered loss because of the solicitor's failure to implement his undertaking, provided it was shown that the failure amounted to professional misconduct or serious dereliction of duty. It followed that the judge had been wrong not to take into account the fact that it was impossible for the solicitor to perform the undertaking or to consider the possibility of making a compensatory order against the solicitor. Both the appeal and the cross-appeal would therefore be allowed and the case remitted to the judge for further consideration see p 269 b to d f to h, p 270 a to e h, p 271 a, p 273 d h j, p 274 h and p 275 b to d, post).

- c** *United Mining and Finance Corp Ltd v Becher* [1908–10] All ER Rep 876, *Myers v Elman* [1939] 4 All ER 484, *R & T Thew Ltd v Reeves (No 2)* [1982] 3 All ER 1086 and *John Fox (a firm) v Bannister King & Rigbeys (a firm)* [1987] 1 All ER 737 applied.

- Per Kerr LJ. Except in straightforward cases, performance of a solicitor's undertaking should never be ordered without the court first considering the practical implications of such an order (see p 271 h j, post).

d Notes

For the liabilities of solicitors as officers of the Supreme Court generally, see 44 Halsbury's Laws (4th edn) para 252.

- For liability on an undertaking given as a solicitor, see *ibid* para 255, and for cases on the subject, see 44 Digest (Reissue) 410–420, 4470–4572.

e Cases referred to in judgments

Fox (John) (a firm) v Bannister King & Rigbeys (a firm) [1987] 1 All ER 737, CA.

Greaves, Re (1827) 1 Cr & J 374, 148 ER 1466.

Grey, Re [1892] 2 QB 440, CA.

- f** *Hughes, Ex p* (1822) 5 B & Ald 482, 106 ER 1267.

Marsh v Joseph [1897] 1 Ch 213, [1895–9] All ER Rep 977, CA.

Myers v Elman [1939] 4 All ER 484, [1940] AC 282, HL.

New Brunswick and Canada Rly and Land Co Ltd v Muggeridge (1859) 4 Drew 686, 62 ER 263.

Peart v Bushell (1827) 2 Sim 38, 57 ER 705.

- g** *Seawell v Webster* (1859) 29 LJ Ch 71.

Silver (Geoffrey) & Drake v Baines [1971] 1 All ER 473, [1971] 1 QB 396, [1971] 2 WLR 187, CA.

Solicitor, Re a [1966] 3 All ER 52, [1966] 1 WLR 1604.

Solicitors, Re (1916) 32 DLR 387.

Stephens v Hill (1842) 10 M & W 28, 152 ER 368.

- h** *Thew (R & T) Ltd v Reeves (No 2)* [1982] 3 All ER 1086, [1982] QB 1283, [1982] 3 WLR 869, CA.

Tito v Waddell (No 2) [1977] 3 All ER 129, [1977] Ch 106, [1977] 2 WLR 496.

United Mining and Finance Corp Ltd v Becher [1910] 2 KB 296, [1908–10] All ER Rep 876; on app [1911] 1 KB 840, [1908–10] All ER Rep at 885n, CA.

j Cases also cited

Bayley, Ex p (1829) 9 B & C 691, 109 ER 257.

Burnett v Proois, Re an attorney (1870) 22 LT 543.

Davey-Chiesman v Davy-Chiesman [1984] 1 All ER 321, [1984] Fam 48, CA.

Dixon v Wilkinson (1859) 4 De G & J 508, 45 ER 198.

Evans v Duncombe (1831) 1 Cr & J 372, 148 ER 1465.

Ferns v Carr (1885) 28 Ch D 409, [1881–5] All ER Rep 1033.

Hilliard, Re, ex p Smith (1845) 1 New Pract Cas 185.

Morris v James (1838) 6 Dowl 514.

Orchard v South Eastern Electricity Board [1987] 1 All ER 95, [1987] 1 WLR 102, CA.

Solicitor, Re a (1918) 53 ILT 51, 1r HC.

Appeal

The plaintiff, Robert Alan Udall, trading as Udall Sheet Metal & Co, brought two actions against the defendant, Capri Lighting Ltd, of which a Mr Roe and a Mr Gowing were directors, claiming money for goods supplied by the plaintiff to the defendant. By originating summonses issued in the actions the plaintiff applied for an order to enforce a personal undertaking alleged to have been given on 6 July 1983 by Mr R O Whiting, the defendant's solicitor, to procure Mr Roe and Mr Gowing to give second charges on their homes or life policies in favour of the plaintiff. The summonses were heard by Sir Neil Lawson, sitting as a judge of the High Court, who by a reserved judgment given on 11 December 1985 found that Mr Whiting had given such an undertaking, held that the undertaking was enforceable by the court in the exercise of its summary jurisdiction over solicitors, ordered that Mr Whiting perform the undertaking within 28 days and refused a stay of execution. Mr Whiting appealed, seeking variation of the order to require him only to use his best endeavours to procure the charges or alternatively that the order should provide that he should not be required to do anything that was not within his power. By a respondent's notice served on 19 August 1986 the plaintiff sought a variation of the order of 11 December 1985 to require, inter alia, Mr Whiting to pay damages in lieu of the undertaking or alternatively to pay such compensation as was required to make good all losses occasioned by his breach of duty in not performing the undertaking. The facts are set out in the judgment of Balcombe LJ.

James Munby for Mr Whiting.

J G Ross for the plaintiff.

Cur adv vult

12 March. The following judgments were delivered.

BALCOMBE LJ (giving the first judgment at the invitation of Kerr LJ). This appeal and cross-appeal from an order dated 11 December 1985 made by Sir Neil Lawson (sitting as a judge of the High Court) raise the question of the exercise by the court of its discretionary jurisdiction to control solicitors as its officers.

In May 1983 the plaintiff (trading as Udall Sheet Metal & Co) issued specially indorsed writs against the defendant, Capri Lighting Ltd, of which company a Mr Roe and a Mr Gowing were directors. Both writs were in respect of goods sold and delivered by the plaintiff to the defendant; the first writ claimed £20,215, the second £5,509, in each case together with interest. Messrs Rutter & Rutter, solicitors of Shaftesbury, Dorset, acknowledged service of these writs on behalf of the defendant. The plaintiff then took out summonses under RSC Ord 14 in both actions, the return date being 7 July 1983 in each case.

On 6 July 1983 a number of telephone conversations took place between Mr Timothy Grant Readman, the principal of Messrs Readman & Co, solicitors for the plaintiff, and Mr Richard Oxley Whiting, a partner in Rutter & Rutter. In the course of one of these conversations Mr Readman said that the plaintiff was only prepared to agree to an adjournment of the Ord 14 summonses on the following day if Mr Roe and Mr Gowing were prepared to give second charges on their private residences or on life assurance policies having a surrender value. In the course of a subsequent telephone conversation on the same day Mr Whiting told Mr Readman that both Mr Roe and Mr Gowing were prepared to give second charges on their properties, which were then identified. The

- a judge found that in the course of this conversation Mr Whiting gave his personal undertaking as a solicitor to procure these charges; the precise form of the undertaking as found being to—
- ‘procure second charges on the security of the residence of one Gowing, namely 54 Church Street, Tisbury in the county of Wiltshire and [on the residence of] one Rowe [sic] namely The Cottage, Dennis Lane, Ludwell, Shaftesbury in the County of Dorset . . .’
- b There has been no appeal against this finding by the judge.
- The hearing of the Ord 14 summonses was adjourned, but on 26 July Rutter & Rutter wrote to Readman & Co to say that the defendant would submit to judgment. This evinced a reply from Readman & Co on the following day expressing astonishment and asserting that in the telephone conversation of 6 July Mr Whiting had given Mr Readman
- c a specific personal undertaking that Mr Roe and Mr Gowing would give second charges on the security of their respective private residences. On 28 July 1983 Rutter & Rutter wrote saying that no undertaking had been given by Mr Whiting. Thus the scene was set for these proceedings.
- In due course judgments were entered in default of defence in both actions but these judgments remain unsatisfied. The defendant company has since gone into liquidation.
- d So the plaintiff decided to enforce Mr Whiting’s personal undertaking. It is common ground that the plaintiff has a right of action in contract against Mr Whiting on his undertaking, but it is also common ground that Mr Whiting could and would plead by way of defence that there is no note or memorandum of the undertaking so as to satisfy s 4 of the Statute of Frauds or s 40 of the Law of Property Act 1925. Whether or not such a defence would succeed is immaterial: the plaintiff realistically took the view that the
- e probability of this defence being raised was a good reason why he should not pursue an action at law and he decided instead to invoke the court’s inherent jurisdiction over solicitors.
- So the plaintiff issued summonses in the two actions asking for orders that Mr Whiting should procure the second charges pursuant to his undertaking. Since both summonses raised precisely the same issues, I shall treat them as one application, as they have been
- f treated throughout. After various procedural vicissitudes the matter came before his Honour Judge Dobry QC sitting as a judge of the High Court in chambers. Mr Whiting was then taking the point that this was not a proper case for the invocation of the summary procedure, since it was not a clear case: see *Geoffrey Silver & Drake v Baines* [1971] 1 All ER 473, [1971] 1 QB 396. However, Judge Dobry QC rejected that contention, although he gave directions for pleadings and discovery and for the deponents to the affidavits to attend for cross-examination. Against that order there was no appeal.
- g So it was that the plaintiff’s application came on before Sir Neil Lawson for hearing on 4 and 5 December 1985.
- Before the judge the principal issue was whether Mr Whiting gave his personal undertaking and the greater part of the two-day hearing and of the judgment was
- h directed to this issue. Counsel who appeared for the plaintiff below, as he did before us, opened the case on the basis that if the undertaking had been given then it should be enforced by the court, and, relying on *United Mining and Finance Corp Ltd v Becher* [1910] 2 KB 296, [1908–10] All ER Rep 876, he did not need, nor did he seek, then to allege dishonourable or discreditable conduct on the part of Mr Whiting. Although the practicability of enforcing the undertaking was canvassed in argument before the judge,
- j there was then no evidence that the enforcement of the undertaking, ie the procurement of the two second charges, was impossible.
- Having decided that the undertaking had been given, the judge went on to consider whether it was enforceable by the court in the exercise of its summary jurisdiction over solicitors. On this aspect of the case he considered three points. (1) Was it a clear case? He answered this question in the affirmative. (2) Could the court enforce a solicitor’s

undertaking to secure a third party to do an act or execute a document? This question also he answered in the affirmative, in reliance on *Ex p Hughes* (1822) 5 B & Ald 482, 106 ER 1267 and the Canadian case of *Re solicitors* (1916) 32 DLR 387. (3) Was the undertaking one which it was impossible to perform? On this the judge said: a

‘I find it difficult to conceive of a solicitor giving an undertaking which it is impossible to carry out. But there is a point to that effect in *Peart v Bushell* (1827) 2 Sim 38, 57 ER 705.’ b

After pointing out that Lord Sumner (as Hamilton J) had questioned the authority of the report and refused to follow *Peart v Bushell* in *United Mining and Finance Corp Ltd v Becher* the judge continued:

‘But let it be assumed that that authority is still good support for the proposition that if an undertaking is impossible of performance the court will not enforce it (and, of course, that is a commonsense point of view), I have absolutely no evidence at all that this undertaking, when it was given, was not possible to be performed. Nor have I any evidence before me at this stage that it is not possible to perform. It may be unlikely or difficult, but that is not the same thing as impossible. Here the case is to be distinguished from the scope within *Re a solicitor* [1966] 3 All ER 52, [1966] 1 WLR 1604, because there Pennycuik J refused to enforce an undertaking given by a solicitor to hand over a lease which not only had been lost but had also been forfeited. He questioned the evidence of the solicitor that the lease could not be found, so he obviously had evidence which satisfied him that it was, at the time when he was asked to make the order, impossible of performance. But there is no evidence to that effect here. Finally I come to consider what order to make in the exercise of the jurisdiction. I am quite satisfied that at this stage I have no jurisdiction to make any order other than an order that the undertaking be performed. If it is not performed, then the question will arise as to what should be done about it. *Re solicitors* (1916) 32 DLR 387, the Canadian case to which I have referred, seems to me good authority for the proposition that that is all the court can do in the enforcement of a summary jurisdiction. If one looks at the notes in *The Supreme Court Practice* 1985, vol 2, p 1026, there is no case in which it has been suggested that the court can, in the exercise of this jurisdiction, do anything other than to order the solicitor to do that which he undertook. Therefore that is the order I make.’ c
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The judgment was a reserved judgment, delivered some six days after the end of the hearing, and after it had been delivered counsel for Mr Whiting applied for an adjournment to enable him to adduce evidence that it was impossible to perform the undertaking. This the judge refused. Accordingly an order was drawn up requiring Mr Whiting within 28 days to procure second charges on the security of 54 Church Street, Tisbury and The Cottage, Dennis Lane, Ludwell, Shaftesbury, ordering him to pay the plaintiff's costs and refusing a stay of execution. g

From that order Mr Whiting has appealed. By his notice of appeal dated 7 January 1986 he asks that the order be set aside or alternatively be varied by requiring him only to use his best endeavours to procure the charges. The grounds of the appeal are (1) the impossibility of performing the undertaking and (2) the judge's refusal to allow evidence of impossibility to be adduced after judgment. h

The appeal first came before this court on 16 April 1986. At that stage there was still no evidence properly before the court as to the impossibility of performing the undertaking, so the appeal was stood over, Mr Whiting was given leave to file evidence and the plaintiff was given leave to file evidence in reply; he was also given leave to file a respondent's notice by way of cross-appeal. j

Pursuant to that leave, both Mr Whiting and Mr Readman have filed evidence. I do not propose to refer to that evidence in detail, as it is of inordinate volume, but I am

a satisfied that it is now, and was in December 1985, impossible for Mr Whiting to perform his undertaking. I can summarise the relevant facts quite shortly.

b No 54 Church Street, Tisbury. The legal estate to this property was vested in Mr Gowing and his wife. The property was subject to a first mortgage in favour of a building society and to a second charge (dated 10 September 1979) in favour of a bank. Mr Gowing was adjudicated bankrupt on 5 October 1984 and he is now in Australia. The property was sold in September 1984 for some £50,000, of which the greater part went to the building society and the bank (as first and second mortgagees), some £8,300 to the Official Receiver acting in Mr Gowing's bankruptcy and a similar sum to a bank in respect of Mrs Gowing's share in the property pursuant to a guarantee she had given. There was no surplus, and a considerable deficiency still remains in Mr Gowing's bankruptcy.

c The Cottage, Dennis Lane, Ludwell. The legal estate to this property was vested in Mr Roe alone, although it is possible that his wife had a beneficial interest. The property was subject to a first mortgage in favour of a building society and to a second charge (dated 29 September 1978) in favour of a bank. In December 1985 Mr Roe was in hospital suffering from a terminal illness; he died on 24 February 1986. After the hearing at first instance Mr Whiting asked Mr Roe to execute a charge on the property, but he died without having done so.

d The plaintiff also served a notice of cross-appeal asking that the order of 11 December 1985 be varied in a number of respects, of which the only one now material is (3):

'So as to require the Appellant [Mr Whiting] to pay damages in lieu of the said undertaking, alternatively such compensation as was/is required to make good all losses occasioned by his breach of duty to perform the said undertaking.'

e I can deal quite briefly with the appeal. There is a short answer to the second ground of appeal, ie the judge's refusal to allow evidence of impossibility to be adduced after judgment. It was for Mr Whiting to adduce evidence of impossibility if he wished to rely on impossibility as an answer to the claim for enforcement of his undertaking. He did not do so at the appropriate time, and it was clearly within the judge's discretion to refuse him leave to adduce such evidence after judgment. However, on the first ground

f of appeal, ie impossibility of performance, the appeal must succeed. I do not say that the judge was wrong in making the order he did, since at that time he had no evidence as to impossibility and in those circumstances he was justified in ordering performance: cf *Re a solicitor* [1966] 3 All ER 52, [1966] 1 WLR 1604. However, we did have evidence of impossibility and, as an appeal is by way of rehearing (see RSC Ord 59, r 3(1)), we must of course take account of that evidence. It is old and trite law that the 'court will not

g make any order in vain': see eg *New Brunswick and Canada Rly and Land Co Ltd v Muggeridge* (1859) 4 Drew 686 at 699, 62 ER 263 at 268 cited and applied by Megarry V-C in *Tito v Waddell (No 2)* [1977] 3 All ER 129 at 311, [1977] Ch 106 at 326. The proposition is so self-evident that it requires no elaboration. There is the further point that disobedience to the court's order is a contempt, and contempt is punishable with imprisonment. It is unthinkable that a court should put a man at risk of imprisonment

h by making an order which it knows, at the time of making the order, is impossible of performance. As Kindersley V-C said in *Seawell v Webster* (1859) 29 LJ Ch 71 at 73:

'Put the extreme case of a vendor burning a title deed: the Court could not make a decree that he should deliver it up, and be imprisoned if he does not.'

j Counsel for the plaintiff was constrained to accept that, in the light of the further evidence, he could not realistically expect successfully to resist the appeal and in the event the argument before us turned wholly on the cross-appeal. In opening his case, counsel for Mr Whiting submitted that there are two different jurisdictions which the court exercises in dealing summarily with solicitors. (1) The jurisdiction to enforce undertakings. This is exercisable whether or not there were any proceedings pending in court and whether or not the undertaking was given in the course of legal proceedings.

The jurisdiction is exercisable although the solicitor has not been guilty of dishonourable or discreditable conduct. (2) The jurisdiction to award compensation. This jurisdiction is exercisable only where the solicitor had the conduct or prosecution of some cause or matter before the court. The jurisdiction is dependent on proof of serious misconduct.

However, during the course of the hearing of the appeal we were provided with a transcript of the judgments of this court (Sir John Donaldson MR and Nicholls LJ) in *John Fox (a firm) v Bannister King & Rigbeys (a firm)* [1987] 1 All ER 737. In the light of those judgments counsel for Mr Whiting was constrained to concede that the compensatory jurisdiction was not limited to undertakings given in the course of proceedings; however, as the undertaking in the present case was given in the course of proceedings, this did not matter. However, he maintained his submission that the compensatory jurisdiction is only exercisable on proof of serious misconduct, and he relied on the fact that no allegation of moral turpitude was made against Mr Whiting in the plaintiff's points of claim, nor in the way in which the case was opened and presented before the judge. It was, he submitted, now too late for the plaintiff to allege misconduct on the part of Mr Whiting of a kind sufficient to enable him (the plaintiff) to claim compensation for breach of the undertaking.

In my judgment the true position is as follows. There are three ways in which a party who seeks to enforce a professional undertaking given by a solicitor can proceed: (1) by an action at law, if there is a cause of action; (2) by an application to the court to exercise its inherent supervisory jurisdiction; (3) by an application to the Law Society. In the Law Society's *The Professional Conduct of Solicitors* (1986) para 15.02 it is stated:

'A solicitor who fails to honour the terms of a professional undertaking is *prima facie* guilty of professional misconduct. Consequently the Council will require its implementation as a matter of conduct.'

However, in the commentary to that principle it is stated:

'1 Neither the Council nor the Tribunal have power to order payment of compensation or to procure the specific performance of an undertaking if the solicitor declines to implement it. The only step open to the Council is to take disciplinary action for failure to honour the undertaking . . .'

It is the second of these methods with which this case is concerned, and I turn now to consider this jurisdiction. I should say at once that I do not accept the submission of counsel for Mr Whiting that the enforcement of undertakings is in some way separate and distinct from the general question of professional misconduct. The true position is as follows.

(1) The nature of the summary jurisdiction is explained in the following passage from the speech of Lord Wright in *Myers v Elman* [1939] 4 All ER 484 at 508-509, [1940] AC 282 at 319:

'The underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally, as was said by LORD ABINGER, C.B., in *Stephens v. Hill* ((1842) 10 M & W 28, 152 ER 368). The matter complained of need not be criminal. It need not involve speculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. Thus, a solicitor may be held bound in certain events to satisfy himself that he has a retainer to act, or as to the accuracy of an affidavit which his client swears. It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term "professional misconduct" has often been used to describe the ground on which the court acts. It would perhaps be

a more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the court and to realise his duty to aid in promoting, in his own sphere, the cause of justice. This summary procedure may often be invoked to save the expense of an action. Thus, it may, in proper cases, take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ. The jurisdiction is not merely punitive, but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action.²

(2) Although the jurisdiction is compensatory and not punitive, it still retains a disciplinary slant. It is only available where the conduct of the solicitor is inexcusable and such as to merit reproof: *R & T Thew Ltd v Reeves (No 2)* [1982] 3 All ER 1086 at 1089, [1982] QB 1283 at 1286.

c (3) If the misconduct of the solicitor leads to a person suffering loss, then the court has power to order the solicitor to make good the loss occasioned by his breach of duty: see *Marsh v Joseph* [1897] 1 Ch 213 at 244–245, [1895–9] All ER Rep 977 at 981 per Lord Russell CJ.

d (4) Failure to implement a solicitor's undertaking is prima facie to be regarded as misconduct on his part, and this is so even though he has not been guilty of dishonourable conduct: see *United Mining and Finance Corp Ltd v Becher* [1910] 2 KB 296, [1908–10] All ER Rep 876 and in particular the argument of the successful applicants in that case ([1910] 2 KB 296 at 301), and *John Fox (a firm) v Bannister King & Rigbeys (a firm)* [1987] 1 All ER 737 at 742. However, exceptionally, the solicitor may be able to give an explanation for his failure to honour his undertaking which may enable the court to say that there has been no misconduct in the particular case: see *Fox's case* [1987] 1 All ER 737 at 742–743.

e (5) Neither the fact that the undertaking was that a third party should do an act nor the fact that the solicitor may have a defence to an action at law (eg the Statute of Frauds), preclude the court from exercising its supervisory jurisdiction: see *Ex p Hughes* (1822) 5 B & Ald 482, 106 ER 1267 and *Re Greaves* (1827) 1 C & J 374, 148 ER 1466. However, f these are factors which the court may take into account in deciding whether or not to exercise its discretion and, if so, in what manner.

(6) The summary jurisdiction involves a discretion as to the relief to be granted: see *Myers v Elman* [1939] 4 All ER 484 at 508, [1940] AC 282 at 318 per Lord Wright. In the case of an undertaking, where there is no evidence that it is impossible to perform, the order will usually be to require the solicitor to do that which he has undertaken to do: g see *Re a solicitor* [1966] 3 All ER 52, [1966] 1 WLR 1604.

(7) Where it is inappropriate for the court to make an order requiring the solicitor to perform his undertaking, eg on the grounds of impossibility, the court may exercise the power referred to in para (3) above and order the solicitor to compensate a person who has suffered loss in consequence of this failure to implement his undertaking: see *John Fox (a firm) v Bannister King & Rigbeys (a firm)* [1987] 1 All ER 737. It is stated in the text-books (see *Cordery on Solicitors* (7th edn, 1981) p 122 and 44 *Halsbury's Laws* (4th edn) para 225) that the court will not enforce an undertaking which is incapable of being performed ab initio. If this statement means no more than that the court will make no order in vain, then I would not quarrel with it. If, however, it is intended to suggest that the court will not order compensation for breach of an undertaking which is ab initio incapable of performance, then it is difficult to understand the principle on which it is based and I doubt whether it is an accurate statement of the law. It appears to depend on the authority of *Peart v Bushell* (1827) 2 Sim 38, 57 ER 705 and I agree with the criticism of that case made by Hamilton J in *United Mining and Finance Corp Ltd v Becher* [1910] 2 KB 296 at 306, [1908–10] All ER Rep 876 at 881. However, the point does not arise in the present case and I need not consider it further.

It follows that, in my judgment, the judge was wrong in thinking that he would have no jurisdiction to make any order other than an order that the undertaking be performed; the cross-appeal must be allowed and the matter remitted to the court below for consideration whether to make an order requiring Mr Whiting to pay compensation to the plaintiff. In deciding whether or not to exercise its discretion the court will have to take into account a number of factors, including those mentioned below (the list is not intended to be exhaustive): (a) whether Mr Whiting's action in giving his undertaking and then failing to implement it is conduct of such a nature as to justify the exercise of the jurisdiction. The principles to be applied in the exercise of his discretion are those set out above; (b) depending on the answer to (a) above, whether the plaintiff can show that he has suffered loss in consequence of his not having had the benefit of the second charges which he would have had if the undertaking had been performed according to its terms. This must depend on a number of factors, including the value of the properties at the relevant date (whatever that may be) and the extent of the security afforded by any charges taking priority to the 'second charges' in question. The evidence before us is insufficient to enable me to say whether the plaintiff can establish a *prima facie* case of loss and it may be that even the judge will find it necessary to order an inquiry, as was done in *John Fox (a firm) v Bannister King & Rigbays (a firm)*.

I would therefore allow both the appeal and the cross-appeal and remit the case to the court below, to be heard by Sir Neil Lawson (if available).

NEILL LJ. I agree that the appeal and the cross-appeal should be allowed for the reasons given by Kerr and Balcombe LJ.

KERR LJ. I agree that the appeal of Mr Whiting should be allowed for the reasons stated in the judgment of Balcombe LJ. I also agree that the plaintiff's cross-appeal be allowed on the grounds which I set out below, without implying any disagreement with anything stated in that judgment.

This case has a number of unusual features. The first is the nature of the undertaking which Mr Whiting has been held to have given to Mr Readman. Solicitors' undertakings are normally concerned with matters within the solicitors' own control, such as to deliver up or not to part with documents in their possession, to pay moneys in certain events, to discharge a mortgage after completion etc. In the present case, however, the undertaking was to procure for the plaintiff second charges on the residences of Mr Gowing and Mr Roe. That undertaking could not be honoured by Mr Whiting without their co-operation. Its performance did not lie within Mr Whiting's sole control, as in the case of the usual kinds of undertaking given by solicitors. In effect, the nature of the undertaking was that Mr Whiting guaranteed that these two persons would provide second charges on their homes in favour of the plaintiff. If they failed to do so, for whatever reason, then the undertaking was broken.

It is against that unusual background that I would like to add some comments to the judgment of Balcombe LJ.

As he has pointed out, the fact that a solicitor has undertaken that a third party will do or refrain from doing something does not in itself affect the nature of the undertaking. The court has the same powers in relation to a solicitor who is alleged to have given an undertaking of this nature as in the case of any other undertaking. But the manner in which the court will exercise its powers in such cases may well be different from the more straightforward type of case. To give an undertaking that a third party will do or refrain from doing something may obviously be risky and indeed unwise. When there is a conflict whether or not an oral undertaking of the kind was in fact given, then the court may well conclude that the case is insufficiently clear to justify the application of its inherent summary supervisory jurisdiction over solicitors and that the matter should be left to proceed by action. But his Honour Judge Dobry QC rejected that submission, albeit subject to the safeguard of ordering pleadings and discovery. There was no appeal

against his decision and the matter then proceeded like an action, with oral evidence and full cross-examination. In this connection it should also be mentioned that it was rightly not suggested on behalf of Mr Whiting that his inability to rely on the Statute of Frauds or on s 40 of the Law of Property Act 1925 was any reason against the use of the court's summary jurisdiction over solicitors. This is in line with the authorities which show that lawyers must accept responsibility for, and be able to rely on, any oral undertaking given in the course of their profession. But these do not appear to have been cases where there was any conflict of evidence about the undertaking having been given. In such cases a high degree of proof should be required, and most solicitors would no doubt agree that, as a matter of normal good practice, oral undertakings should be confirmed in writing forthwith by the recipient. Thus, one surprising feature of the present case was that there was no reference to the undertaking held to have been given on 6 July in any correspondence across the line until a letter from Mr Readman of 27 July. However, Sir Neil Lawson heard the evidence and will no doubt have made allowance for all these matters, and in any event there has equally been no appeal against his finding that the undertaking was in fact given. In the upshot, therefore, although this appears to me to be a very unusual case, there then remains nothing save to decide whether, and if so in what manner, the court's undoubted inherent jurisdiction over Mr Whiting should be exercised.

Before returning to this point I wish to add something about another unusual feature of this case. This is that by the time when it had been established to the satisfaction of the court that Mr Whiting had given the undertaking in question, it had in any event become impossible for him to carry it out. While this may be unusual, it is perhaps hardly surprising in the circumstances. As I have said, the undertaking was held to have been given on 6 July 1983, but the hearing before Sir Neil Lawson did not take place until September 1985, nearly 2½ years later. The possibility of changed circumstances concerning the two properties in question must have been obvious, and I find it astonishing that an order for what was effectively specific performance of the undertaking was made without any prior investigation of the practicalities.

However, there were two reasons for this course of events. First, there appears to have been a misunderstanding between counsel for Mr Whiting and the judge, though I think that counsel must accept responsibility for it. The bulk of the two days' hearing had been taken up with the acute conflict of evidence as to whether or not the undertaking had in fact been given. At the end of it counsel for Mr Whiting assumed that the judgment would be limited to this issue, and that there would then be argument about the nature of the order which should be made in the event of it being held, as it was, that the undertaking had been given. It was therefore only at that stage that counsel for Mr Whiting proposed to deploy the evidence showing that performance of the undertaking had become impossible. In my view this was not a satisfactory way of dealing with the matter. Having regard to the passage of time and the nature of this undertaking it seems to me that it should have been ensured by all concerned that no order for the enforcement of the undertaking was considered, let alone made, without a prior investigation of the practicalities. If that had happened, then it is clear that it would quickly have become apparent that enforcement was out of the question, and the earlier appeal to this court for the admission of this and other evidence would have been avoided. Indeed, putting the matter quite generally, it seems to me that except in straightforward cases, enforcement of an undertaking should never be ordered without some consideration of the practical implications which will ensue from the order.

But there was also another reason which appears to have affected the course of events below. Quite understandably on the authorities as they then stood, it seems clear that both counsel and Sir Neil Lawson were under the impression that in relation to unperformed undertakings, as opposed to other matters which could give rise to the court's supervisory jurisdiction over solicitors, the court's powers were restricted to ordering the solicitor to perform the undertaking, and that no order for compensation

for non-performance could be made unless the circumstances also showed that the solicitor had acted dishonourably. This was not suggested by counsel for the plaintiff in the present case, since we were told that he opened the case against Mr Whiting expressly on the basis that the nature of his conduct was irrelevant; what mattered was that the undertaking had been given but not performed. All this explains the passage from the judgment which Balcombe LJ has cited. Indeed, for the first day or so of the hearing of the appeal before us matters took a similar course. Counsel for Mr Whiting's citations of authorities and textbooks had virtually convinced me that if an undertaking has become impossible of performance, as in the present case, then there was either no jurisdiction, or at any rate it was not the practice of the court, to make any order for compensation. Admittedly, I found this proposition surprising, and it was assumed rather than stated expressly in counsel's citations. But it is now unnecessary to go over this ground again, since the decision of this court in *John Fox (a firm) v Bannister King & Rigbeys (a firm)* [1987] 1 All ER 737 then came to light. We had heard, more or less by chance, that there had been a recent decision on this question, the transcript of which had only reached the Supreme Court Library a day or two earlier.

The decision in *Fox's* case is of course binding on us and it changed the course of this appeal. Counsel for Mr Whiting was at one time inclined to submit that it had been decided per incuriam because the arguments and citation of authorities may have been more restricted than before us, but he rightly did not persist in this submission. It seems to me, with respect, that the decision is precisely in line with what I would expect the law to be. But it is clearly important to consider carefully what the case in fact decided.

The plaintiff's solicitor, Mr Fox, had for some time been acting for a Mr Geoffrey Watts and was owed substantial fees. The defendants' solicitor, Mr Bannister, had previously acted for Mr Watts. He knew about Mr Fox's concern about his fees and had received a written authority from Mr Watts to give an undertaking to account to Mr Fox for the balance of certain proceeds due to be received from the sale of a property. Having received these proceeds, Mr Bannister paid some of them to Mr Fox, but this left a balance of £18,000 in relation to which there appears to have been some disagreement between Mr Fox and Mr Watts. It was therefore agreed that Mr Bannister would retain this sum for the time being. On 30 September 1982 Mr Bannister accordingly wrote to Mr Fox and informed him that Mr Watts had asked him to retain this sum and then added that 'no doubt you and Geoff will sort out as to the £18,000·00 which is still in my account and which of course I shall retain until you have sorted everything out' (see [1987] 1 All ER 737 at 739). In the event, without going into the facts in further detail, Mr Watts did not resolve the problems between him and Mr Fox and asked Mr Bannister to remit the £18,000 to him, which Mr Bannister did without further reference to Mr Fox. The latter thereupon issued an originating summons against Bannisters for an order for payment of the sum of £18,000 wrongfully released or alternatively for breach of the undertaking. His Honour Judge Tibber, sitting as a judge of the High Court, held that the letter of 30 September 1982 contained an undertaking to Mr Fox which had been broken, and although the £18,000 had meanwhile been released to Mr Watts, he ordered Bannisters to put Mr Fox in the same position as if the undertaking had been honoured. He therefore ordered that the sum should be paid into court or into a joint account 'to the credit of Mr Watts' and granted a stay pending appeal (see [1987] 1 All ER 737 at 740).

The appeal was heard by Sir John Donaldson MR and Nicholls LJ, and the latter gave the leading judgment. In the passage which became crucial for the plaintiff's cross-appeal in the present case for compensation for breach of Mr Whiting's undertaking, Nicholls LJ said ([1987] 1 All ER 737 at 740):

'The basic principles applicable in the present case are not in doubt. The jurisdiction being invoked here is the inherent jurisdiction which the Supreme Court has over solicitors, who are its officers. It is a jurisdiction which is exercised,

- a not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the court's own officers: see *Re Grey* [1892] 2 QB 440 at 443 per Lord Esher MR. One of the areas in which this principle falls to be applied is the enforcement of undertakings given by solicitors in their capacity as solicitors. As officers of the court solicitors are expected to abide by undertakings given by them professionally, and if they do not do so they may be called on summarily to make good their defaults: see *United Mining and Finance Corp Ltd v Becher* [1910] 2 KB 296 at 305, [1908-10] All ER Rep 876 at 881 per Hamilton J.
- b Where a solicitor, directly or indirectly, still has it in his power to do the act which he undertook to do, the court may order him to do that act. Where the solicitor does not have it in his power, he may be ordered to make good the loss flowing from his failure to perform the undertaking, as loss flowing from a breach of duty committed by a solicitor as an officer of the court: see *Marsh v Joseph* [1897] 1 Ch 213 at 245, [1895-9] All ER Rep 977 at 981 per Lord Russell CJ.
- c

He then held that the letter of 30 September contained an undertaking given by Mr Bannister in his capacity as a solicitor to Mr Fox, that it was irrelevant whether Mr Bannister had Mr Watts's authority to give it although there was no evidence to the contrary but that, if Mr Bannister had had no such authority and Mr Fox had known this, then 'this might well have affected the attitude which the court would adopt to the undertaking in these proceedings' (see [1987] 1 All ER 737 at 741). This is important, because it shows that even in cases of unperformed undertakings the court retains a discretion. He then dealt with the decision of Pennycuik J in *Re a solicitor* [1966] 3 All ER 52, [1966] 1 WLR 1604 and held that the case was—

d

- e 'no authority for the proposition now being advanced, to the effect that if a solicitor undertakes not to part with a fund and then in breach of his undertaking does so, the court is powerless to take any steps to require the solicitor to make good his default, but must leave the party to whom the undertaking was given to his remedy, if any, at law'.

- f (See [1987] 1 All ER 737 at 742.) He then went on to note that the case was not straightforward, because the breach of the undertaking had occurred over four years earlier and the parties' positions had changed a great deal, in particular since Mr Watts had meanwhile gone bankrupt. Moreover, the judge's order that Bannisters should re-create and hold the fund of £18,000 to the credit of Mr Watts could not be upheld in any event, since it was clear that neither Mr Watts nor his trustee in bankruptcy could have any claim to the fund. But, on the other hand, Mr Fox had not necessarily lost £18,000
- g but only the opportunity of taking such steps as were then open to him to stop this sum from being paid over to Mr Watts and thereafter to have recourse to it to meet his bill. In these circumstances he proposed, and Sir John Donaldson MR agreed, that the court should order an inquiry as to what loss, if any, Mr Fox had suffered by reason of the breach of the undertaking (see [1987] 1 All ER 737 at 742-743).

- h That was the outcome of the appeal, and to that extent the case is clear authority for the proposition that where a solicitor's undertaking has become impossible of performance, or where an order for its specific enforcement would be impracticable, then the court has power in its inherent jurisdiction to make an order for compensation instead. But that leaves the question as to the circumstances in which the court will exercise its discretion to make such an order. I have already referred to one brief passage in which Nicholls LJ made it clear that the court's attitude in that regard may be flexible.
- i I then come to the main passages in the judgments where this point was discussed. It was dealt with in connection with the submission that the situation in that case had not been sufficiently clear to justify the application of this summary procedure in the first place. This was the issue decided by Judge Dobry in the present case, which has not been appealed. And, since in consequence of his order there were pleadings, discovery and full

oral evidence in the present case, so that the character of the procedure was in effect no more summary than if the matter had proceeded by action, I do not cite the passages from the judgments in *Fox's* case which deal with the importance of ensuring that solicitors are not prejudiced from defending themselves by the summary character of the supervisory procedure. The important passages for present purposes are those which refer to the standard of conduct of solicitors, in the context of unperformed undertakings, which will justify intervention by the court. In that regard Nicholls LJ said ([1987] 1 All ER 737 at 742-743):

'Counsel for Bannisters submitted that to succeed with an application such as this the applicant has to show he has a plain and obvious case, and that where serious or difficult questions are involved, the case is not one appropriate to be dealt with under the court's summary jurisdiction over its officers. I am unable to accept this submission expressed in such wide terms . . . Since the jurisdiction is disciplinary as well as compensatory, the court must be satisfied that there has been misconduct in that there has been a breach of an undertaking given by the solicitor acting professionally . . . The court, however, will always have in mind that a solicitor is not necessarily to be regarded as having misconducted himself by failing to honour an undertaking when, for example, the issue of whether the words amounted to an undertaking, or the further issue of whether there has been a breach, turns on the answer to a fine or subtle point of construction. Likewise where there was real scope for genuine misunderstanding on what was said or meant by a solicitor on a particular occasion. In that sense this supervisory jurisdiction will only be exercised in a clear case.'

And Sir John Donaldson MR said in the same connection ([1987] 1 All ER 737 at 743-744):

'The jurisdiction is indeed "extraordinary", being based on the right of the court to see that a high standard of conduct is maintained by its officers acting as such (see *Cordery on Solicitors* (7th edn, 1981) p 116). It is, in a sense, a domestic jurisdiction to which solicitors are only amenable because of their special relationship with the court and it is designed to impose higher standards than the law applies generally. Thus, for example, it is no answer to a complaint that a solicitor acted in breach of an undertaking given by him that there was no consideration for it (*United Mining and Finance Corp Ltd v Becher* [1910] 2 KB 296 at 303, [1908-10] All ER Rep 876 at 880). Its "summary" character lies not in the burden or standard of proof, although it is only exercisable where there has been a serious dereliction of duty, but in the procedure whereby it is invoked . . . In *Geoffrey Silver & Drake v Baines* [1971] 1 All ER 473, [1971] 1 QB 396 what I think that the judges were saying was that the court will only exercise this jurisdiction where in the end it is clearly established that there has been a serious dereliction of professional duty by a solicitor as such.'

What these passages show is that even in cases which are suitable for the application of this summary procedure, as opposed to holding that the matter must proceed by action, and even where it has been established that an undertaking has been given but not performed, the court still retains a residual discretion about the order which is appropriate in the circumstances. In cases where enforcement of an undertaking by an order for its performance is still possible and practicable, such an order will no doubt be made more or less as a matter of course. The reason is that the failure to perform an undertaking which is still capable of being performed will generally amount to professional misconduct or a serious dereliction of professional duty, to use the expressions mentioned in the judgments. But these passages also show, to use the language of Nicholls LJ, that 'a solicitor is not necessarily to be regarded as having misconducted himself by failing to honour an undertaking' (see [1987] 1 All ER 737 at 742). One of the examples which he gives is the situation 'where there was real scope for genuine misunderstanding on what

was said or meant by a solicitory on a particular occasion . . . ' (see [1987] 1 All ER 737 at 743).

- a** Although, as I have said, these passages were clearly directed to the question whether or not the application of the summary procedure was in any event appropriate, it seems to me that the test which they lay down for its application must also remain relevant to the order which the court will ultimately make in cases where the summary procedure has been invoked, and where it has been established that an undertaking had been given
- b** but not performed. Since the purpose of the procedure is disciplinary, being designed to ensure a high standard of conduct on the part of solicitors, an order for enforcement of the undertaking or for compensation for its non-performance will not necessarily follow as a matter of course. Before making such an order the court will have to be satisfied that by failing to perform the undertaking the solicitor had been guilty of professional misconduct or a serious dereliction of professional duty. If it is not satisfied about this,
- c** then it seems to me that it must still be open to the court to decline to make any order, and to hold that the matter must proceed by action, if at all, on the ground that the circumstances do not warrant an order of a disciplinary nature against an officer of the court.

- Where does that leave the present case? I agree with the order proposed by Balcombe LJ that the matter must be remitted for decision whether any, and if so what, order
- d** should be made against Mr Whiting in all the circumstances. We have not seen any of the evidence in this case and it would therefore be quite inappropriate to express any view about this. It is clear, of course, that specific enforcement of the undertaking is out of the question and that the issue must be whether or not it is appropriate to make a disciplinary order for compensation. But in deciding this issue, which may not necessarily be easy in the unusual circumstances of this case, one of the factors which it may be
- e** necessary to take into account, as pointed out by counsel for Mr Whiting, is the legal professional privilege of Mr Whiting's clients, and the general principles of confidentiality, which may hamper him in seeking to establish that he was not guilty of professional misconduct in this case. Thus, it is possible that these factors may prevent him from explaining fully what happened, and why the second charges were not provided.

- f** On these grounds I agree that the cross-appeal should be allowed, as well as the appeal; and I also agree with the terms of the order proposed by Balcombe LJ.

Appeal and cross-appeal allowed.

Solicitors: *Hancock & Willis* (for Mr Whiting); *Halls*, agents for *Readman & Co*, Lancing (for the plaintiff).

Wendy Shockett Barrister.

Attorney General v Newspaper Publishing plc and others a

CHANCERY DIVISION

SIR NICOLAS BROWNE-WILKINSON V-C

20, 21, 22 MAY, 2 JUNE 1987

COURT OF APPEAL, CIVIL DIVISION b

SIR JOHN DONALDSON MR, LLOYD AND BALCOMBE LJJ

22, 23, 24 JUNE, 13, 14, 15, 17 JULY 1987

Contempt of court – Criminal contempt – Intention to interfere with course of justice – Breach of injunction by person not party to action – Party to proceedings restrained by court from publishing confidential information – Defendants not parties to proceedings in which order made – Defendants publishing confidential information – Whether defendants' acts interfering with course of justice – Whether defendants committing criminal contempt of court – Contempt of Court Act 1981, ss 1, 6. c

W, a former member of the British security service who had had access to highly classified and sensitive information, proposed to publish his memoirs in Australia but in 1985 the Attorney General obtained an interim injunction in Australia restraining him from publishing. In June 1986 two national newspapers published material derived from W's memoirs. In July 1986 the Attorney General commenced proceedings seeking to restrain the two newspapers from publishing in England material relating to W's memoirs and was, in the mean time, granted interlocutory injunctions to restrain such publication pending trial of the action. In April 1987 the three defendant newspapers, who had not been parties to the 1986 proceedings, published further material derived or taken verbatim from W's memoirs. The Attorney General obtained leave to bring proceedings against the defendants for criminal contempt of court. The judge directed that a preliminary issue of law be tried, namely whether a publication which was made in the knowledge of an outstanding injunction against another party and which if made by that other party would be in breach thereof constituted a criminal contempt of court on the ground that it interfered with the process of justice in relation to that injunction. The judge held that the law of contempt did not apply where the only act complained of was not a breach of the express terms of the order and the alleged contemnor was neither party nor privy to any breach of the order by others. The Attorney General appealed to the Court of Appeal, contending, inter alia, that the defendants' publication could nevertheless amount to criminal contempt as being an act which interfered with the administration of justice. The Attorney General conceded that the strict liability rule defined in s 1^a of the Contempt of Court Act 1981 did not apply because the particular proceedings were not 'active' but contended that under s 6(c)^b of that Act, which provided that nothing in the Act restricted liability for contempt in respect of conduct 'intended to impede or prejudice the administration of justice', a general or basic intent, which could include recklessness, was sufficient to give rise to liability for contempt. d
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Held – The Attorney General's appeal would be allowed for the following reasons—

(1) It was well established that an act which interfered with the course of justice was capable of constituting a contempt of court. Furthermore, the court's power to commit for contempt where the conduct complained of was intended to impede or prejudice the administration of justice was saved by s 6(c) of the 1981 Act, and accordingly, where the court had made orders to preserve the subject matter of an action pending trial, a third j

^a Section 1, so far as material, is set out at p 303 f, post

^b Section 6, so far as material, is set out at p 304 a, post

a party who knew of those orders but who nevertheless destroyed or seriously damaged that subject matter would be guilty of criminal contempt if in doing so he intended to impede or prejudice the administration of justice (see p 299 b c, p 308 b c, p 311 c and p 313 h, post).

(2) Given the inherently perishable nature of confidential information and the irretrievable damage which publication would cause, the court had in July 1986, as was normal, decided that publication of the confidential information derived from W's memoirs ought to be restrained pending trial of the action and the defendants, although strangers to the action, had interfered with the administration of justice in publishing material taken or derived from W's memoirs when they knew that the court had made orders designed to protect the confidentiality of that material pending trial. Accordingly, the defendants' action in publishing could amount to a criminal contempt and the matter would therefore be remitted to the High Court to determine whether the defendants' conduct did in fact amount to contempt (see p 296 g to p 297 c, p 300 h to p 301 a, p 304 e to g j to p 305 a, p 307 a b, p 308 g h, p 310 d and p 313 f to j, post); *Lord Wellesley v Earl of Mornington* (1848) 11 Beav 180, 181, X CC v A [1985] 1 All ER 53 and dictum of Lord Bridge in *R v Moloney* [1985] 1 All ER at 1037 considered.

d Per curiam. The mens rea required to establish an intention to impede or prejudice the administration of justice is a specific intent and not mere recklessness as to whether the administration of justice would be impeded or prejudiced (see p 304 b to d, p 310 e f and p 313 j, post).

e Per Sir John Donaldson MR and Lloyd LJ. It would be better if contempt were not classified into civil and criminal contempt but into (a) conduct involving a breach, or assisting in the breach, of a court order and (b) any other conduct involving an interference with the due administration of justice. The first category is a special form of the latter, such interference being a characteristic common to all contempts, and what distinguishes the two categories is that, in general, conduct in the first category is treated as a matter for the parties to raise by complaint to the court, whereas other forms of contempt are generally considered to be a matter for the Attorney General to raise as the guardian of the public interest in the due administration of justice (see p 294 f to h and p 306 c d, post).

Notes

For contempt of court in relation to pending proceedings, see 9 Halsbury's Laws (4th edn) paras 8–9, and for cases on the subject, see 16 Digest (Reissue) 19–33, 193–342.

g For the Contempt of Court Act 1981, ss 1, 2, 6, see 11 Halsbury's Statutes (4th edn) 181, 182, 187.

Cases referred to in judgments

- A-G v Butterworth [1962] 3 All ER 326, [1963] 1 QB 696, [1962] 3 WLR 819, CA.
 A-G v Leveller Magazine Ltd [1979] 1 All ER 745, [1979] AC 440, [1979] 2 WLR 247, HL.
 A-G v News Group Newspapers Ltd [1986] 2 All ER 833, [1987] QB 1, [1986] 3 WLR 365, CA.
 h A-G v Observer Ltd (1986) 136 NLJ 799, CA.
 A-G v Times Newspapers Ltd [1973] 3 All ER 54, [1974] AC 273, [1973] 3 WLR 298, HL;
 on app sub nom *Sunday Times v UK* (1979) 2 EHRR 245, E Ct HR.
 Bassel's Lunch Ltd v Kick (No 1) [1936] OR 445, Ont CA.
 Bassel's Lunch Ltd v Kick (No 2) [1937] 1 DLR 235, Ont CA.
 j Bonnard v Perryman [1891] 2 Ch 269, [1891–4] All ER Rep 965, CA.
 Brydges v Brydges [1909] P 187, CA.
 Catkey Construction Ltd v Moran (1969) 8 DLR (3d) 413, Ont HC.
 Cretanor Maritime Co Ltd v Irish Marine Management Ltd [1978] 3 All ER 164, [1978] 1 WLR 966, CA.
 F (a minor) (publication of information), Re [1977] 1 All ER 114, [1977] Fam 58, [1976] 3 WLR 813, CA.

Galaxia Maritime SA v Mineralimportexport, The Eleftherios [1982] 1 All ER 796, [1982] 1 WLR 539, CA. a

Ismail v Polish Ocean Lines [1976] 1 All ER 902, [1976] QB 893, [1976] 2 WLR 477, CA.

Iveson v Harris (1802) 7 Ves 251, 32 ER 102, LC.

Johnson v Grant 1923 SC 789, Ct of Sess.

Killiney Foreshore Case (unreported), cited in *Smith-Barry v Dawson* (1891) 27 LR Ir 558 at 560.

Marengo v Daily Sketch and Sunday Graphic Ltd [1948] 1 All ER 406, HL. b

R v Chief Registrar of Friendly Societies, ex p New Cross Building Society [1984] 2 All ER 27, [1984] QB 227, [1984] 2 WLR 370, CA.

R v Moloney [1985] 1 All ER 1025, [1985] AC 905, [1985] 2 WLR 648, HL.

Ranson v Platt [1911] 2 KB 291, CA.

Scott v Scott [1913] AC 417, [1911-13] All ER Rep 1, HL.

Seaward v Paterson [1897] 1 Ch 545, [1895-9] All ER Rep 1127, CA. c

Smith-Barry v Dawson (1891) 27 LR Ir 558.

Tilco Plastics Ltd v Skurjat (1966) 57 DLR (2d) 596, Ont HC; *affd* 61 DLR (2d) 664n, Ont CA.

UK Nirex Ltd v Barton (1986) Times, 14 October.

Wellesley (Lord) v Earl of Mornington (No 1) (1848) 11 Beav 180, 50 ER 785.

Wellesley (Lord) v Earl of Mornington (No 2) (1848) 11 Beav 181, 50 ER 786. d

X CC v A [1985] 1 All ER 53, [1984] 1 WLR 1422.

Z Ltd v A [1982] 1 All ER 556, [1982] QB 558, [1982] 2 WLR 288, CA.

Cases also cited

Acrow (Automation) Ltd v Rex Chainbelt Inc [1971] 3 All ER 1175, [1971] 1 WLR 1676, CA. e

Balogh v Crown Court at St Albans [1974] 3 All ER 283, [1975] QB 73, CA.

Butler's Case (1696) 2 Salk 596, 91 ER 504.

DPP v Withers [1974] 3 All ER 984, [1975] AC 842, HL.

Elliot v Klinger [1967] 3 All ER 141, [1967] 1 WLR 1165.

Hyam v DPP [1974] 2 All ER 41, [1975] AC 55, HL.

Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell [1980] 1 All ER 480, [1981] QB 65. f

Littler v Thomson (1839) 2 Beav 129, 48 ER 1129.

Montague v Hill (1827) 4 Russ 128, 38 ER 753, LC.

Project Development Co Ltd v KMK Securities Ltd (Syndicate Bank intervening) [1983] 1 All ER 465, [1982] 1 WLR 1470.

R v Evening Standard Co Ltd, ex p A-G [1954] 1 All ER 1026, [1954] QB 578, DC. g

R v Hancock [1986] 1 All ER 641, [1986] AC 455, HL.

R v Ingrams, ex p Goldsmith [1977] Crim LR 40, DC.

R v Jones, ex p McVittie [1931] 1 KB 664, [1931] All ER Rep 615, DC.

R v Machin [1980] 3 All ER 151, [1980] 1 WLR 763, CA.

R v Nedrick [1986] 3 All ER 1, [1986] 1 WLR 1025, CA.

R v Odhams Press, ex p A-G [1956] 3 All ER 494, [1957] 1 QB 73, DC. h

R v Thomas, R v Ferguson [1979] 1 All ER 577, [1979] QB 326, CA.

R v Tibbits [1902] 1 KB 77, [1900-3] All ER Rep 896, CCR.

Siskina (cargo owners) v Distos Cia Naviera SA, The Siskina [1977] 3 All ER 803, [1979] AC 243, HL.

Thorne RDC v Bunting (No 2) [1972] 3 All ER 1084, CA. i

Motion

By a notice of motion dated 11 May 1987 the Attorney General sought an order that the defendants, Newspaper Publishing plc (the publishers of the Independent), Andreas Whittam Smith (the editor of the Independent), Evening Standard Co Ltd (the publishers of the London Evening Standard), John Leese (the editor of the London Evening Standard), the London Daily News Ltd (the publishers of the London Daily News) and

- a Magnus Linklater (the editor of the London Daily News), be found in contempt of court on the grounds that the conduct of the respondents in publishing various articles in their respective newspapers was intended or calculated to impede obstruct or prejudice the administration of justice in that they were severally intended or calculated and in any event likely to thwart orders of the Court of Appeal made on 25 July 1986 in the High Court in proceedings brought by the Attorney General against the Observer Ltd and others and by the applicant against Guardian Newspapers Ltd. By a consent order dated
- b 11 May 1987 a preliminary issue of law was directed to be tried, namely whether a publication made in the knowledge of an outstanding injunction against another party and which if made by that other party would be in breach thereof, constituted a criminal contempt of court on the footing that it assaulted or interfered with the process of justice in relation to that injunction. The facts are set out in the judgment.
- c *John Laws and Philip Havers* for the Attorney General.
Christopher S C S Clarke QC and Adrienne Page for the Independent and its editor.
John Mathew QC and Jonathan Caplan for the London Evening Standard and its editor.
Charles Gray QC and David Pannick for the London Daily News and its editor.

Cur adv vult

- d 2 June. The following judgment was delivered.

SIR NICOLAS BROWNE-WILKINSON V-C. This is a motion brought by the Attorney General alleging that the proprietors and editors of three newspapers, the Independent, the London Evening Standard and the London Daily News, have committed

e contempts of court. The alleged contempts lie in the publication on 27 April 1987 of certain articles referring to the memoirs of Peter Maurice Wright and to information contained in such memoirs. The actual point for decision, although difficult and important, is a narrow one. But I must first explain the background.

- f Mr Wright was for many years a member of the British security service, holding senior positions with access to highly classified and sensitive information. He retired in 1976 and went to live in Tasmania. He considered that the security services had been penetrated by foreign agents and called for an inquiry. When no inquiry was held, he decided to publish his memoirs, disclosing facts supporting not only the allegation of penetration of the security services by foreign agents but also making other allegations of unlawful conduct by members of the security services.

- g In 1985 it was proposed to publish Mr Wright's memoirs in Australia. On discovering the proposed publication the Attorney General took proceedings in the Supreme Court of New South Wales against Mr Wright and the publishers claiming an injunction restraining publication on the grounds that the publication would be a breach of the duty of confidentiality owed to the Crown as Mr Wright's former employers. The defendants in the Australian proceedings gave undertakings pending trial not to disclose information obtained by Mr Wright as an officer of the British security service.

- h On 22 and 23 June 1986 (before the trial of the Australian proceedings) the Observer and the Guardian newspapers published articles outlining a number of the allegations which were said to be contained in the Wright memoirs. The Attorney General then applied in the High Court in England for injunctions against the Observer and the Guardian restraining them from making any publication. His claim was again based on the principle that the information in the memoirs is confidential. Ex parte injunctions
- i were granted. The matter then came before Millett J inter partes. On 11 July 1986 Millett J granted interlocutory injunctions against the Guardian and the Observer until trial or further order (the 1986 injunctions). The proceedings before me relate to the 1986 injunctions, which, so far as relevant, read as follows:

'The defendants and each of them be restrained until trial or further order from doing whether by himself or itself or by his or its servants or agents or any of them

or otherwise howsoever the following acts or any of them that is to say: 1. Disclosing or publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service and which they know or have reasonable grounds to believe to have come or been obtained whether directly or indirectly from the said Peter Maurice Wright. 2. Attributing in any disclosure or publication made by them to any person any information concerning the British Security Service to the said Peter Maurice Wright whether by name or otherwise.'

There were two provisos: the first permitted quotation of attributions to Mr Wright contained in works or broadcasts previously published; the second provided that disclosure of any information to be disclosed in the Supreme Court of New South Wales would not be a breach of the order.

The Guardian and the Observer appealed to the Court of Appeal. Millett J's decision was upheld save that a further proviso permitting the reporting of proceedings in the United Kingdom Parliament and law courts was added (see *A-G Observer Ltd* (1986) 136 NLJ 799). The Court of Appeal refused leave to appeal to the House of Lords but leave was subsequently granted by the House of Lords. That appeal is due to be heard before the end of July of this year.

The reasons given by both Millett J and the Court of Appeal for their decision to grant the 1986 injunctions were broadly the same. Mr Wright as a member of the security services owed the highest duty of confidentiality to the Crown, which duty would be breached by his publication of any memoir based on his experience in the service. It is essential for the proper working of the security service that all its dealings are totally confidential and are seen to be such: if former members are free to publish memoirs of their experiences, the security service would not appear to be leakproof which would gravely harm its relations with the security services of other friendly powers. In addition, although the memoirs were based on matters now more than ten years old, the memoirs were said to contain information which was still extremely sensitive and might harm the operations of the British security service if disclosed. These facts, on which the decisions were based, were all derived from affidavits sworn by Sir Robert Armstrong which, as the Court of Appeal emphasised, were uncontroverted in the evidence before the court. The court held that on an interlocutory application the public interest in preserving the confidentiality of the security service outweighed the public interest relied on by the Guardian and the Observer, namely the general freedom of newspapers to publish news and the need to disclose the allegations of unlawful conduct by the security services. Both courts were influenced, amongst other things, by the fact that the unlawful conduct alleged took place so long ago and by the lack of evidence that there was any overwhelming need to publish the allegations immediately instead of waiting until after the hearing of the action. This is an inadequate précis of the very full judgments delivered; but it is sufficient for present purposes.

The Australian case was tried by Powell J at the end of 1986. It lasted for many weeks. Sir Robert Armstrong was cross-examined. Both that cross-examination and the whole of the proceedings received exceptionally detailed reporting in the media, not only in this country but worldwide. Powell J gave judgment on 13 March 1987 dismissing the Attorney General's claim in Australia for injunctions against the publication of Mr Wright's memoirs. The judgment runs to some 286 pages but it is unnecessary to refer to it save to mention that Powell J found the evidence given by Sir Robert Armstrong in some respects unsatisfactory and unreliable.

The Attorney General has appealed in the Australian courts against the decision of Powell J. That appeal is due to be heard in July of this year. The defendants in Australia have given undertakings pending the hearing of the appeal not to publish Mr Wright's memoirs.

This was the position which obtained when, on 27 April 1987, the Independent published the articles complained of. The articles took up the whole of the front page of the Independent. They stated that the newspaper had received a copy of the manuscript

a of Mr Wright's memoirs and then published the gist of a number of allegations contained in the book expressly ascribing them to Mr Wright. The articles contained passages purporting to be verbatim quotations from the memoirs. In addition they contained details of the facts alleged in the Wright memoirs in support of the allegations made by Mr Wright that the security services had been guilty of unlawful conduct. On the same day the London Evening Standard and the London Daily News quoted those stories from the Independent although in considerably less detail. Although not in terms admitted, it appears that the Independent and the other two newspapers had done exactly what the Guardian and the Observer were restrained from doing by the 1986 injunctions.

b The Attorney General's response was to make an immediate application to the Queen's Bench Divisional Court for leave to move against the three newspapers for contempt of court. Leave was granted on 29 April. Although the Attorney General was anxious to have the application determined speedily (as was the London Daily News) the Independent wished to conduct considerable research before putting in evidence in answer; no direction for speedy trial was made.

c On the same day that leave was granted to bring the contempt proceedings, 29 April, the Guardian and the Observer gave notice of motion in the Chancery Division to discharge or vary the 1986 injunctions. The motion came before me on 7 May 1987. There were two grounds for the application: the first relied on what had transpired in the Australian courts and in particular on the evidence given by Sir Robert Armstrong under cross-examination; the second relied on the publication of the articles in the three newspapers which had been followed by a large number of other reports (both here and abroad) revealing the allegations made and ascribing them to Mr Wright. This second ground gave rise to the formidable argument: how can it be right to continue an injunction which prevents only the Guardian and the Observer from publishing matters which the rest of the world are freely publishing?

e It seemed to me that the validity of the second ground on which the Guardian and the Observer were relying largely depended on whether or not the publications by other papers were contempts of court and could therefore be punished or restrained. Doubts had arisen whether the contempt proceedings were properly brought in the Queen's Bench Division since they relate to an order made in the Chancery Division. I therefore suggested (and I must take full responsibility for the suggestion if it is thought to be mistaken) that the contempt proceedings against the three newspapers should be brought before me by a fresh notice of motion so that I could first determine the preliminary point of law whether the publication could be a contempt of court, given that the three newspapers (as opposed to the Guardian and the Observer) were not subject to any order restraining them from publishing the material. This suggestion was adopted and I directed a preliminary point of law in these terms:

f 'Whether a publication made in the knowledge of an outstanding Injunction against another party and which if made by that other party would be in breach thereof, constitutes a criminal contempt of Court upon the footing that it assaults or interferes with the process of Justice in relation to the said Injunction.'

h This is my judgment on that preliminary point of law.

i In outline the parties submissions are as follows. Counsel for the Attorney General accepts that the publication by the three newspapers did not constitute a breach of the 1986 injunctions since the publication was not made by the only persons restrained by the 1986 order but independently by the three newspapers. However, says counsel, there are two types of contempt. The first is civil contempt which consists of a breach by a party to proceedings of an order made against him: that is not the present case. The second type is a criminal contempt which consists of conduct which frustrates or impedes the due administration of justice: that, says counsel, is the present case. The conduct of the three newspapers in publishing the very material publication of which, to the knowledge of the newspapers, Millett J and the Court of Appeal have held to be contrary to the public interest constitutes a criminal contempt in that it thwarts and frustrates the

1986 injunctions. They were made for the purpose of preserving the right of the Crown to preserve the confidentiality of the matters contained in Mr Wright's memoirs. If those memoirs or excerpts therefrom are published by others, that very confidentiality has gone, robbing the 1986 injunctions of their utility and indeed destroying the very subject matter of the action, ie the confidentiality of the information. What is more, in frustrating an interlocutory order by publication, the three newspapers have deprived or impaired the Crown's right to a trial on the merits of the main hearing of the action against the Guardian and the Observer: the sole, or main, purpose of such hearing would be to obtain a permanent injunction so as to preserve the secrecy of the information relating to security services which, in the public interest, must remain confidential. So runs the argument for the Crown.

On the other side, the three newspapers contend that the Attorney General is seeking to widen the law of criminal contempt and that any extension of the criminal law is nowadays a matter for Parliament, not the judges. To hold that a third party who is not subject to the order is bound to give effect to its purpose would run contrary to the whole basis of English law: the court decides the issues between the parties before it and makes orders which bind the parties only. The court acts in personam not in rem. To hold the three newspapers guilty of contempt by breaking the spirit, but not the letter, of the 1986 injunctions would offend all the basic principles of natural justice: they would be held guilty of a crime in treating as not applicable to them an order not directed to them, made by a court which had not given them an opportunity to be heard and which made its order in ignorance of the facts and circumstances applicable to the three newspapers. Moreover, once the Crown accepts that there is no breach of the 1986 injunctions, what constitutes contempt by acting contrary to the purpose or spirit of that order becomes wholly uncertain.

Before dealing with these arguments, there are two fundamental factors which have to be borne in mind. First, this case arises out of facts affecting national security and state secrets which have attracted massive attention from the media. But that background must not obscure the fact that the only right asserted by the Crown before Millett J and the Court of Appeal and the only right protected by the 1986 injunctions is a private right of action under the civil law, viz the right of an employer to restrain a former employee from disclosing confidential information. Of necessity, the public interest in preserving national security was a major factor in assessing the degree of confidentiality required of a member of the security service and in considering the balance of convenience. But the basic right protected by the 1986 injunctions is exactly the same as the right of a manufacturer to stop an employee disclosing trade secrets or of one spouse to restrain the other from revealing 'pillow-talk'. The court in granting the 1986 injunctions was not enforcing any public right referable to the preservation of official secrets or the public welfare.

The second factor flows from the first. Since the 1986 injunctions are protecting a private, not a public, right of the Crown, the question I have to determine will affect many other types of case involving private litigants in which the Crown is not a party. In such cases no question of national interest or national security will apply. It is therefore important not to allow the decision in this case to be overborne by the desire to preserve state secrets. If the Attorney General is right in the principle he asserts in this case it will be applicable in many other cases as between private individuals where no question of security arises. It is important not to distort the general law of contempt so as to make it applicable in such cases in a manner which would be capricious, unfair or unworkable.

As I have said, the three newspapers allege that the Attorney General is extending the law of contempt. Counsel for the Attorney General, whilst denying that he is seeking any extension of the law, accepts that I am being asked to 'elucidate' the application of a general principle to a new state of facts. Either way, I must first consider how the law presently stands.

The basic principles of criminal contempt are not in dispute. It has often been said that contempt of court is an unhappy phrase, suggesting as it does that a judge is

a concerned to protect his personal or judicial dignity. That is far from the case. One of the foundations of a free society is that there should be courts to which all can have access, in which the justice dispensed is impartial and whose orders are obeyed. The law of contempt is the means by which these vital requirements are preserved. Thus to seek to prevent or dissuade a litigant or witness from coming to court is a criminal contempt. So is any interference with the impartiality of the judge or jury. So is any interference with the course of the trial. Disobedience to a court order by a party to the proceedings against whom the order has been made is a civil contempt. I accept fully that the public interest in ensuring fair and effective justice is very great. However I am not prepared to go as far as counsel for the Attorney General submitted in holding that a judge should prefer that public interest to any other public interest with which it may come in conflict: there are many cases where such preference has not been given, for example, in allowing the public interest in preserving the confidentiality of certain documents to outweigh the requirements of justice that they should be available as evidence in a trial.

b The English authorities demonstrate that hitherto actions by a third party which interfere with a court order have only been held to constitute a criminal contempt of court if both (a) the action by the third party complained of constituted a breach of the express terms of the order and (b) the third party has aided and abetted or been privy or party to a breach of the order by the person enjoined by the order. In this judgment I will refer to the plaintiff in the proceedings as 'A', the defendant in the proceedings who is enjoined from doing the act complained of as 'B' and the third party who is not a defendant and is not enjoined by the express terms of the order from doing the act as 'C'.

d The authorities establish that if B breaches the order he is guilty of a civil contempt which the court will punish in proceedings brought by A: see *Seaward v Paterson* [1897] 1 Ch 545, [1895-9] All ER Rep 1127. If C aids and abets B to do the act which B is enjoined from doing, he does not commit a breach of the order. In *Lord Wellesley v Earl of Mornington (No 1)* (1848) 11 Beav 180, 50 ER 785 the agent of Lord Mornington, who cut down the trees which Lord Mornington was forbidden to fell, was held not guilty of the civil contempt of disobedience of the order against Lord Mornington. However, one month later the agent was held liable in criminal contempt in knowingly aiding and abetting a breach of the order (see *Lord Wellesley v Earl of Mornington (No 2)* 11 Beav 181, 50 ER 786). Lord Langdale MR said that the agent 'in the position in which he was, and knowing the duty of the Earl of Mornington, ought to have taken care not to do any acts, in violation of the order of the Court' (see 11 Beav 181 at 183, 50 ER 786 at 787).

f The same conclusion was reached in *Seaward v Paterson*. The rationale behind holding C liable for criminal contempt was set out by Lindley LJ in *Seaward v Paterson* [1897] 1 Ch 545 at 554, [1895-9] All ER 1127 at 1130:

g 'Now, let us consider what jurisdiction the Court has to make an order against [C]. There is no injunction against him—he is no more bound by the injunction granted against [B] than any other member of the public. He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this—not that he has technically infringed the injunction, which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the Court at defiance, and deliberately treating the order of the Court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt as distinguished from a breach of the injunction, which has a technical meaning . . . It has always been familiar doctrine . . . that the orders of the Court ought to be obeyed, and could not be set at naught and violated by any member of the public, either by interfering with the officers of the Court, or by assisting those who were bound by its orders.'

i Counsel for the Attorney General submits that, although the actual decision does not cover the present case, the rationale extends to a case such as the present where C has not aided and abetted B and there has been no breach of the express terms of the order. It is

to be noted that in those two cases (and indeed in all the other cases cited to me) although C is said to be in criminal contempt, the proceedings to punish such criminal contempt have been brought by A (the plaintiff in the main proceedings) and not by the Attorney General. a

Counsel for the Attorney General also relied on the decision of the Court of Appeal in *Z Ltd v A* [1982] 1 All ER 556, [1982] QB 558. In that case the Court of Appeal considered the impact of a Mareva injunction on banks holding the assets of the defendant against whom the order was made. In particular, it considered the position where the bank, but not the defendant who was enjoined, had been served with the order. It was argued that in such a case the bank could not be guilty of contempt of court by disposing of the defendant's assets under its control since the defendant could not himself be in contempt: the bank could not be aiding and abetting someone who was not himself in contempt. The Court of Appeal rejected this argument. Lord Denning MR founded his decision that the bank could be in contempt on the grounds that a Mareva order operated in rem in the same way as an Admiralty order arresting a ship (see [1982] 1 All ER 556 at 562, [1982] QB 558 at 573). With respect, I am unable to accept this as being correct. The Court of Appeal in an earlier case, *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 3 All ER 164, [1978] 1 WLR 966 (which was not cited in *Z Ltd v A*), expressly held that a Mareva injunction does not operate in rem but in personam (see [1978] 3 All ER 164 at 170, 172, [1978] 1 WLR 966 at 974, 976 per Buckley LJ). b
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d

Reverting to *Z Ltd v A*, Eveleigh LJ did not adopt the same reasoning as Lord Denning MR. He said [1982] 1 All ER 556 at 566–567, [1982] 1 QB 558 at 578:

‘I think that the following propositions may be stated as to the consequences which ensue when there are acts or omissions which are contrary to the terms of an injunction. (1) The person against whom the order is made will be liable for contempt of court if he acts in breach of the order after having notice of it. (2) A third party will also be liable if he knowingly assists in the breach, that is to say if knowing the terms of the injunction he wilfully assists the person to whom it was directed to disobey it. This will be so whether or not the person enjoined has had notice of the injunction . . . I will give my reasons for the second proposition and take first the question of prior notice to the defendant. It was argued that the liability of a third party arose because he was treated as aiding and abetting the defendant (ie he was an accessory) and as the defendant could himself not be in breach unless he had notice it followed that there was no offence to which the third party could be an accessory. In my opinion this argument misunderstands the true nature of the liability of the third party. He is liable for contempt of court committed by himself. It is true that his conduct may very often be seen as possessing a dual character of contempt of court by himself and aiding and abetting the contempt by another, but the conduct will always amount to contempt of court by himself. It will be conduct which knowingly interferes with the administration of justice by causing the order of the court to be thwarted.’ e
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As those words made clear, Eveleigh LJ was considering a case where the act of C (the bank) did constitute a breach of the order. Although B (the defendant) could not be liable for contempt until he had notice of the order, the order took immediate effect. Therefore if a bank in handling B's money disposes of it the bank is a party to a breach of the precise terms of the order. *Z Ltd v A* does show that an act by C can be a criminal contempt even if, in terms of strict criminal law, C is not ‘aiding and abetting’ B to commit the breach. But it is no authority for the proposition that C can be liable for doing or being party to any act which does not constitute a breach of the precise terms of the order. h
i

Counsel for the Attorney General also relied on a recent decision of Henry J in *UK Nirex Ltd v Barton* (1986) Times, 14 October, in which, at the end of a judgment in which he varied two injunctions granted against named defendants in a representative capacity so as to exclude such representative capacity, he said that if anyone were knowingly to do

a the acts which the named defendants were enjoined from doing that would prima facie be a wrongful interference with the administration of justice and would be a contempt. For this proposition he relied on *Z Ltd v A*. Although this directly supports counsel's main submissions, those remarks were obiter dicta and, so far as the judgment shows, were made without much argument being directed to the point.

b Certain Canadian authorities were referred to in argument. The guidance they offer is limited and confused. In English law an order should only restrain the defendant (B) from doing an act; it should not be framed so as to enjoin any person who is not a party: see *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406. In Canada the practice is apparently different. In *Bassel's Lunch Ltd v Kick (No 1)* [1936] OR 445 an order had been made restraining named defendants 'and any one assisting or aiding them' from picketing. It was held by the Court of Appeal of Ontario that persons not parties to the proceedings who had picketed were in contempt: it was said, in reliance on *Lord Wellesley v Earl of Mornington (No 2)* that anyone who knows of an injunction forbidding a person doing a specified act and who himself acts in contravention thereof can be committed for contempt in intermeddling. However in *Bassel's Lunch Ltd v Kick (No 2)* [1937] 1 DLR 235 a differently constituted Court of Appeal of Ontario apparently reached a different conclusion in relation to alleged contempt by different third parties in acting contrary to the same order. They said (at 235-236):

d 'An injunction restraining A from doing some act is not an injunction restraining B or C from doing it. In many instances, also, the fact that B or C do the act prohibited to A, does not amount to any assisting or aiding of A by B or C; the latter may be acting quite independently of A. On the other hand it is sophistry to argue that, because A refrains from doing the act, therefore B or C's doing it in his place is not assisting or aiding him. Where B and C act not independently but because of their interest in A, it may well be held that they are assisting or aiding him; at least they are intermeddling and so may be found guilty . . .'

e This later decision, accepting as it does that the third party may not be liable for contempt even though his actions thwart the effect of the order, is strongly against the submissions of counsel for the Attorney General.

f In *Re Tilco Plastics Ltd v Skurjat* (1966) 57 DLR (2d) 596 an order had been made restraining the defendants 'or person or persons having notice of this Order' from industrial picketing. It was held that persons other than the defendants who with knowledge of the order picketed were in contempt of court. The earlier decisions of the Ontario Court of Appeal were not cited. The judge sitting in the Ontario High Court at first instance expressly said (at 619): 'Any person who is aware of the substance or nature of a Court order cannot flout it simply because he is not expressly named in that order.' This again strongly supports the argument of counsel for the Attorney General. That decision was followed, on very similar facts, in *Catkey Construction Ltd v Moran* (1969) 8 DLR (3d) 413. The state of the authorities under the law of Canada seems to be confused. However one thing is clear: in every case the act by the third party which was held to be a contempt constituted a breach of the precise terms of the order, albeit the order was made in a form which could not properly be made under English law.

h Finally I should notice an Irish case, *Smith-Barry v Dawson* (1891) 27 LR Ir 558. The plaintiff in that case was entitled to a right of market. He had obtained an order against the defendants restraining them from disturbing it. Certain persons (not the defendants) had with knowledge of the order done acts which, if done by the defendants, would have been breaches of the order. They were held to be in contempt of court. Chatterton V-C based his decision on earlier Irish authorities: none of the English authorities were cited. There was no appearance or argument for those against who committal was sought. I do not find this a compelling authority.

j In my judgment the authorities show the present state of the law to be as follows. (a) In no case (apart from the Irish case) has a third party, C, been held to be in contempt of an order restraining a named person, B, from doing an act unless C has been privy or

party to the doing of an act which is a breach of precise terms of the order. (b) Under English law an injunction can only properly restrain a party to the proceedings from doing an act, although it may restrain him from doing the act 'by himself, his servant or agent'. (c) As a result of (a) and (b) above, there is no English case in which a third party, C, has been held in contempt for doing any act which does not constitute a breach by the defendant enjoined, B, of the precise terms of the order. (d) The plaintiff in the proceedings, A, can apply for the committal of C even though the act of C is a criminal contempt. (e) The principle underlying the law that C is in criminal contempt if he is party to a breach of the order is that the court will not allow its order to be knowingly flouted, thwarted or frustrated by any person even though he be a stranger to the action.

The first four of those propositions support the three newspapers in their defence to these proceedings. They show that the law has never hitherto extended to cover a case such as this where the three newspapers have not aided or abetted the Guardian and the Observer to breach the 1986 injunctions: there has been no breach of the 1986 injunctions since the only parties enjoined, the Guardian and the Observer, have done nothing. On the other hand, the final proposition ((e) above) supports the Attorney General, since the underlying principle could be held to cover the present case: the publication by the three newspapers, with knowledge of the 1986 injunctions, may well render those injunctions valueless and thwart the establishment of the Crown's rights against the Guardian and the Observer.

On this state of the authorities, it seems to me that the Attorney General is seeking to widen the application of the law of criminal contempt, albeit in accordance with established principle. The three newspapers submit that it is for Parliament, not the courts, to make any extension to the law of contempt since it is a change in the criminal law. I do not accept this contention. Punishment for contempt of court is the means by which the judges preserve the judicial process. It is essentially a matter on which the judges have to decide, in accordance with principle, whether or not certain types of action (which may well change over the years) are consistent with the maintenance of a fair and proper judicial process. However, I do accept that, in deciding whether to apply the law of contempt in new circumstances, the courts should tread warily bearing in mind that the law of contempt of court is a restriction on freedom of action which a citizen would otherwise enjoy and a breach of the law may lead to the loss of his liberty.

The strength of the argument of counsel for the Attorney General lies primarily in the facts of this case. Publication of the memoirs has been held by the courts in reasoned judgments to be contrary to national security: the 1986 injunctions were made to protect the public interest by preserving national security. Yet the three newspapers have, knowing of that decision, chosen to do what the court has held to be contrary to the public interest and published what was secret. How is the public interest to be protected if that is not a contempt of court? Even if, as is apparently the case, some people do not accept the decision of the court that the publication of the Wright memoirs would jeopardise national security, it is easy to postulate facts where the risks would be unarguable: for example if newspapers were publishing highly secret information as to the disposition of the Polaris submarines. It is almost incontrovertible that in such a case there ought to be a legal sanction against publication. But the question I have to decide is whether, due to the chance that there is in existence an order of the court preventing the Guardian and the Observer from publishing, the appropriate sanction is contempt of court.

I have reached the conclusion that it is not. So to hold would be to subvert the basic principles of our civil law and introduce into it uncertainty and unfairness.

English civil courts act in personam, that is to say they adjudicate on disputes between the parties to an action and make orders against those parties only. In certain instances where the court has assumed the care and administration of a person or property, the court does make orders which, in one sense, operate in rem. Any interference with the person or the property being administered constitutes a contempt of court: for example,

a acts in relation to a ward of court, a ship subject to attachment or property of which the court has appointed a receiver. But in other cases so far as I am aware injunctions can only properly be made to restrain a defendant to the proceedings (as opposed to a third party) from doing certain acts: see *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406 and *X CC v A* [1985] 1 All ER 53, [1984] 1 WLR 1422. Even a declaration made by a court is not binding on persons who are not parties to the suit. In my judgment this is the basis of the present state of the law that, for a third party, C, to be

b liable for contempt, the acts complained of must constitute a breach of the actual terms of the order. The Attorney General's contention, if correct, strikes at the root of this basic principle. An order of the court would, in effect, operate in rem, ie be enforceable against everyone who had notice of it. The practical implications of this in ordinary civil litigation would be far reaching and in many cases unjust. I will give a number of examples.

c Say an employer obtained an injunction against an employee restraining that employee from disclosing or using certain trade secrets. All other employees of that employer who knew of the order would be at risk of committal for contempt of court if they used or disclosed information derived from their employment: it is notoriously difficult to distinguish between information which is a true trade secret (and therefore protected) and other information which an employee is free to use on his own account. It would

d follow that, by getting an order against one employee, the employer would have imposed an effective muzzle on all his employees and that muzzle might well give protection to information that the employer was not entitled to protect.

Again, take the case of a newspaper, B, publishing an article defamatory of A. A obtains an injunction against B, B lacking the information necessary to justify the libel. Such order would expose any other newspaper which published the libel to proceedings

e for contempt of court. If newspaper C did have the information necessary to justify the libel and wished to justify, the law of contempt would operate indirectly so as to prevent publication by C in circumstances in which A could not have obtained an injunction directly against C: no injunction can be granted to restrain publication of a libel which the defendant intends to justify. Faced with this example, counsel for the Attorney General suggested that C could apply to the court for leave to publish. This would be

f a novel type of application. But, even assuming that some procedure could be found which enabled C to make it, the need for C to make such application is quite inconsistent with the normal concepts of freedom of the press. Newspapers are free to publish unless restrained by an order: their right hitherto, has not depended on obtaining prior leave of the court. Nor in my judgment should such leave be required.

g Again, say there was an industrial dispute and the employer obtained injunctions restraining named employees from picketing. Is that order to be enforceable by committal against all employees and others who have notice of the order thereby preventing anyone from picketing? That would be a grave inroad on private freedom and a power readily open to abuse.

h In a more commercial sphere, take the case of a take-over battle in which shareholder A is trying to maintain or secure a majority shareholding. A obtains an order restraining shareholder B from disposing of his shares to X, the rival bidder. Are all other shareholders to be at risk of committal for contempt if they sell their shares to X, whether or not A has any legal right to restrain them from selling? Yet the sale by other shareholders will thwart and frustrate the purpose of the injunction against B, ie to secure and maintain the majority shareholding for A.

j Finally, take the case of a householder, A, whose house enjoys a view of certain trees on adjoining land belonging to B. A obtains an injunction restraining B from cutting down the trees because of some agreement between A and B. Will it be contempt of court if C (in exercise of some right which he has against B) cuts down the trees otherwise than in collusion with B? Yet the felling of the trees by C will wholly frustrate the effect of the order against B.

These instances, which are not merely fanciful, to my mind show that the principle contended for by the Attorney General cannot be right.

There are other equally serious objections. Counsel for the Attorney General himself accepted that, in the case of some orders against B, it would not be a contempt for C to do the act which B is prohibited from doing. He instanced the case of an injunction granted in a matrimonial dispute which restrained the husband, B, from assaulting the wife, A: counsel accepts that if C assaults A he would not be in contempt of court. The reason, says counsel, is that the order restraining B is plainly personal to B. But the borderline between such 'plainly personal' orders and other orders must be very uncertain. All orders are expressed as being personal. Is an order restraining an act by B in breach of his contract with A personal? If so, can C safely do an act even if the result of such act will be to frustrate the order? For example, in the case I have given of the felling of the trees will it not be a contempt of court by C to fell the trees because A's right to prevent B from felling the trees lay in the contract between A and B? In my judgment, the distinction between personal and other orders is unworkable. It would lead to a degree of uncertainty whether or not an act was a contempt which is incompatible with the imposition of a criminal sanction.

The same vice of uncertainty could arise in a different way. Under the present law, committal for contempt of court is attended by very elaborate procedural safeguards. The order has to be personally served and in some cases carries a penal indorsement. When the proceedings are heard, great care is taken to ensure that the acts alleged do in fact constitute a breach of the express terms of the order: if they do not, then there is no contempt. Yet, if the Attorney General's contention is correct, a third party will enjoy none of those protections. In particular the alleged contempt will consist of the doing of some act inconsistent, not with the terms but with the purpose of the order. In the present case, it is clear what was the purpose of the 1986 injunctions. But, in most cases it would be far from clear. In my judgment it would be unjust to expose third parties to criminal sanctions for doing an act when it is not clear in advance whether or not the doing of that act is or is not lawful.

If, as I think, the effect of the Attorney General's contention would be to make enforceable against third parties an order made in their absence, such a result offends the basic principles of natural justice. If such an order were to be made by an inferior court or administrative body, it would be quashed by the High Court. This is again not merely a matter of principle but of substance. On an application by A for an interlocutory injunction against B, the judge has to consider the usual well-known factors, viz has A an arguable claim and B an arguable defence; will any damages payable by B be an adequate remedy to A and has B the means to pay such damages; will A's cross-undertaking in damages compensate B for any loss sustained by B if the injunction is not granted at the trial; what is the balance of convenience as between A and B?

On the making of the interlocutory order restraining B (which C is to be held to have contemptuously thwarted) C's circumstances will not have been known to, or considered by, the judge. C may have a defence where B had none. Damages may be an adequate remedy to A and C may be able to pay them but B not. Most importantly, the giving by A to B of the cross-undertaking in damages is a necessary precondition to the grant of any interlocutory injunction. But A will have given no such cross undertaking to C and C will have no recourse if, for fear of committing a contempt, he has refrained from taking a particular course of action.

For all these reasons, in my judgment, the law of contempt should not be extended, or held to apply, to a case where the only act alleged against the contemnor is the doing of an act which is not a breach of the express terms of the order and where the alleged contemnor has not been a party or privy to a breach of the order by others. I therefore answer the preliminary question No.

On the facts of this case (which have not been fully investigated before me) I reach the conclusion with some concern. There ought to be some sanction against the publication

a of matters which prejudice national security and the decision as to what does prejudice national security should not be left to the individual judgment of the editors of individual newspapers. I had assumed that the Official Secrets Acts 1911 to 1939 provided the necessary sanction. If it does not, then it is for Parliament, if it thinks fit, to provide the necessary sanction by providing a public law remedy linked directly to the protection of public rights. Private rights should not be bolstered by a distortion of the law of contempt in an attempt to produce a judge-made public law protecting official secrets.

b *Motion dismissed.*

Celia Fox Barrister.

Appeal

The Attorney General appealed to the Court of Appeal.

c *John Laws* and *Philip Havers* for the Attorney General.
Christopher S C S Clarke QC and *Adrienne Page* for the Independent and its editor.
John Mathew QC and *Jonathan Caplan* for the London Evening Standard and its editor.
Charles Gray QC and *David Pannick* for the London Daily News and its editor.

d At the conclusion of argument on 15 July Sir John Donaldson MR made the following statement.

SIR JOHN DONALDSON MR. We propose to give full judgments at a later date but we are all aware that the public may have some difficulty in understanding what are the issues in this appeal, so let me explain.

e In June 1986 the government sought and was granted orders forbidding the Guardian and the Observer newspapers from publishing information derived from or attributed to Mr Wright concerning the British security service. They were not final orders. They were intended to last until the trial of the action unless earlier revoked on the application of the Guardian or the Observer. Those newspapers have in fact made such application, and it will be considered in the near future by Sir Nicolas Browne-Wilkinson V-C.

f In April 1987 the Independent, the London Evening Standard and the London Daily News published information said to have been derived from Mr Wright. The Attorney General, acting in his official capacity as the person responsible for ensuring that there is no interference with the administration of justice in this country and *not* as a member of the government, complained that these publications constituted a contempt of court. The newspapers replied that the court orders did not require them to refrain from publication: they only required the Guardian and the Observer to do so.

g The matter came before the Vice-Chancellor. All concerned thought at the time, although with the benefit of hindsight possibly mistakenly, that the most convenient course was not to inquire into the full facts surrounding these publications, but instead to consider whether the conduct of the newspapers could in any circumstances be held to be a contempt of court. The Vice-Chancellor held that it could not.

h The Attorney General appealed. Once again, he was *not* acting on behalf of the government. He was performing his duty to safeguard the administration of justice. This does not mean to say that he was right, but, believing as he did that there had been a serious contempt of court, he was doing no more than his duty in bringing it to the attention of the court. It is this appeal with which we have been concerned.

j Last weekend the Sunday Times published extracts from Mr Wright's book. Yesterday the book was published in the United States and some copies were imported in a blaze of publicity. These are not matters which should or can concern us at present. It is for the government to decide what it wishes to do about its action against the Guardian and the Observer. It is for the Guardian and the Observer to ask the Vice-Chancellor to expedite their applications to be released from the injunctions which bind them at present, if that is what they wish. It is for the Attorney General to decide whether to charge the Sunday Times with contempt of court.

Our concern is solely with the appeal from the decision of the Vice-Chancellor. He held that the three newspapers could not be in contempt of court. In our judgment he was wrong. All three newspapers could indeed have been in contempt of court. So could the Sunday Times and any other newspaper which published information attributed to Mr Wright. We say 'could be' in contempt of court and not 'were' in contempt of court because none has as yet had an opportunity of putting forward a defence. We should also make it clear that if any publisher has been advised that the judgment of the Vice-Chancellor gave them a licence to publish without committing a contempt of court his adviser has made an elementary error of law. In reversing the decision of the Vice-Chancellor we are not changing the law; we are declaring what it has always been. If, for example, the publication by the Sunday Times would otherwise have been a contempt of court, the judgment of the Vice-Chancellor did not make it anything else. a

The situation which has arisen is completely novel, but it could be repeated in quite different contexts. It is therefore important that we should give guidance on the relevant law. This concerns in particular the intentions of the person said to be in contempt of court. This is a complex problem. Since, subject to the views of the House of Lords, our judgments will determine the law which is to be applied not only in these cases but in any other similar cases, we wish to take time to consider our judgments and put them into writing. I should like to emphasise that the issues with which we are concerned do not depend in any way on the continuance of the government's claims against the Observer and the Guardian. They are of permanent importance. b

That said, the media need to know where they stand. The answer is that any publication of information derived from or attributed to Mr Wright *could* be a contempt of court. Whether it will in the event be held to be a contempt of court will depend on a number of factors on which we shall seek to give guidance in our judgment. However, no one can be held guilty of being in contempt of court unless and until they have been given an opportunity of putting forward their defence. None of these three newspapers has as yet had that opportunity, which must await a further hearing in the Chancery Division of the High Court. Meanwhile, all we can say is that interference with the course of justice is a very serious matter, and publishers will no doubt wish to consider their duty with care before they do anything which could have this result. c

17 July. The following judgments were delivered. d

SIR JOHN DONALDSON MR. In this appeal the Attorney General seeks to reverse the answer given by Sir Nicolas Browne-Wilkinson V-C to a preliminary question of law formulated in contempt proceedings brought by him against the respondents. I can well understand the attraction of formulating such a preliminary point, but, as so often happens, it can seem less obviously sensible at a later stage in the proceedings. Thus, in the present case, I personally do not think that the question as framed permits of any answer other than 'It all depends', which is not very helpful. However, all concerned know that the real issue is whether in the circumstances of this case, which are not substantially in dispute, the respondents *could* be guilty of contempt of court and the question can, if necessary, be rephrased to raise that issue (see *Ismail v Polish Ocean Lines* [1976] 1 All ER 902, [1976] QB 893). e

The circumstances being all important, I must now advert to the background facts, although they are well known to all. Mr Wright, who lives in Tasmania, was for many years a servant of the Crown and a member of the British security service. He retired on 31 January 1976. Rightly or wrongly he concluded that the activities of the service whilst he was a member had been unlawful and that this should be investigated and exposed. He therefore submitted a memorandum to the chairman of a select committee of the House of Commons. The result was, in his view, unsatisfactory and he decided to write and publish his memoirs in Australia. This came to the notice of the authorities in this country and in September 1985 the Attorney General began proceedings in the Supreme f

a Court of New South Wales against Mr Wright and the proposed publishers, seeking to restrain publication.

b So much has been said about state secrets that I must stress that the basis of the Attorney General's claim to be entitled to restrain publication was *not* that Mr Wright might be in breach of the Official Secrets Acts 1911 to 1939. It was that by the terms of his employment with the security service he had a duty of confidentiality which would be breached if he published his memoirs. Confidentiality, *not* official secrecy, was and still is the central issue.

c Now it is a fact that a major legal action takes time to prepare and justice cannot be done if it is ill-prepared. Meanwhile the court does not know which party is right and it must therefore try to preserve the rights of *both* parties until the trial. This is plain common sense and basic justice. How this is done depends very much on the nature of the rights being asserted, the ability of each party to compensate the other if it is held to be in the wrong and the background circumstances of the case. Sometimes the court can allow the defendant, pending the trial, to continue with the action which is said to be unlawful, because it is satisfied that if indeed it is ultimately so held, the complainant, who has had to put up with the continuance of the unlawful action, can be compensated by an award of damages. In others it will decide that the rights of both parties are better preserved by forbidding the continuance of the allegedly unlawful action because, for example, if the action is ultimately held to have been lawful and the defendant has suffered damage by the suspension of his rights pending the trial, the complainant can be made to compensate him by an award of damages. This is not to say that a citizen can dash along to the court and get an order limiting the defendant's freedom of action simply on the basis of his, possibly paranoid, assertion that he will succeed at the trial. Far from it. The courts, whilst carefully refraining from reaching even a tentative conclusion on who is right, still have to make certain that the complainant citizen has a case which is sufficiently plausible to be taken seriously.

e In a word, if there is a genuine dispute which cannot be resolved at once, the court must hold the ring until this can be done. In that waiting period when each party is preparing for the trial, it must give each side the benefit of any doubts, it must assume that either party may win and it must seek to preserve the rights of both parties. In other words, it must undertake a damage limitation exercise for the benefit of whomsoever it may ultimately concern.

f It is at this point that a special consideration arises when the dispute concerns information which is said to be confidential. If the parties are arguing about the ownership of a horse or a car, it may not matter who keeps the horse or car pending the trial. If, as things turn out, the court has given it to the wrong party, it can get it back and give it to the right party after the trial, together with damages to compensate for having been deprived of the horse or car for the time being. Not so with confidential information where, as here, one party says that it is his private property and the other says that he is entitled to publish it to the world. If, pending the trial, the court prohibits publication, the information can still be published after the trial if the defendant succeeds. But if, pending the trial, the court allows publication, there is no point in having a trial since the cloak of confidentiality can never be restored. Confidential information is like an ice cube. Give it to the party who undertakes to keep it in his refrigerator and you still have an ice cube by the time the matter comes to trial. Either party may then succeed in obtaining possession of the cube. Give it to the party who has no refrigerator or will not agree to keep it in one, and by the time of the trial you just have a pool of water which neither party wants. It is the inherently perishable nature of confidential information which gives rise to unique problems.

j All this is totally elementary. So elementary is it that Mr Wright and his Australian publishers readily undertook to the Australian courts that, pending the trial of the action, neither they nor anyone acting on their behalf would publish Mr Wright's memoirs. Metaphorically they would be kept in the refrigerator. Had they not given this

undertaking, I do not doubt that the Australian court would have ordered them to refrain from publication. a

Some time during the next nine months, the Observer and the Guardian newspapers obtained some knowledge of the contents of Mr Wright's memoirs. Rightly or wrongly they came to the conclusion that even if this was confidential information which belonged to the security service, the allegations being made by Mr Wright were so serious and so plausible that the public interest required that every citizen should know about them. The newspapers may or may not have been right, but the English courts became involved when the Attorney General began an action to prevent them publishing information derived from or attributed to Mr Wright in his memoirs. This is, of course, a paraphrase of the relief which was sought, but it suffices for present purposes. b

What were the courts to do? They did not know whether the Attorney General was right or whether the newspapers were right. What they did know was that there was a very serious issue to be tried and that if they forbade publication pending the trial there would still be confidential information which could be published after the trial, but that if they did not forbid publication there would no longer be any confidential information and it would be pointless even to have a trial. It was the ice cube problem once again. So the courts forbade publication pending the trial. c

Unlike Mr Wright and the Australian publishers, the Guardian and the Observer did not accept the logic of this approach and resisted the Attorney General's applications both in the High Court and in the Court of Appeal. This was their right and I make no complaint. They also sought and obtained leave to appeal to the House of Lords. Again this was their right and again I make no complaint, although I do not understand why, having obtained leave to appeal to the House of Lords, they do not appear to have taken any very vigorous steps to have that appeal heard. But what is interesting, and highly relevant, is that in this court, and possibly also in the High Court, the newspapers complained that it was unjust that they should be singled out for an order forbidding further publication of what they had already published, when their competitors in and around Fleet Street were not being subjected to any such order. This, they said, was grossly unfair. It was a fair point. d

The Attorney General's answer was twofold. First, he said, no other newspaper had shown any inclination to publish this confidential information which, in his submission, was the private property of the state. He therefore had no grounds for obtaining similar orders against them. Second, he said, how could he be expected to seek an injunction against every newspaper, every radio and television station and every publisher of books and magazines who might obtain this information and take it into the heads to publish it. Again it was a fair point. e

My own view, which I expressed in my judgment, was that the newspapers' contention was based on a false premise. If the Guardian and the Observer were restrained from republishing this allegedly confidential information, other publishers were *not* free to do so. But I would be the first to admit that this was to some extent an instinctive reaction and the point was not very fully argued. I am, therefore, quite prepared to accept that I may have been wrong and think that I am in no way bound by my previous expression of opinion (see *A-G v Observer Ltd* (1986) 136 NLJ 799 (the *Observer/Guardian* case)). f

There matters rested until 27 April 1987. By that time the Australian courts had concluded the trial of the action in which Mr Wright and his publishers were defendants and had refused a final injunction against publication. That decision is currently under appeal, but the outcome of those proceedings, whilst possibly relevant to the continuation of the injunctions against the Observer and the Guardian, is quite irrelevant for the purposes of the current proceedings or this appeal. What happened on 27 April was that the Independent published extensive extracts and summaries from Mr Wright's book and was immediately followed by the London Evening Standard and the London Daily News, who appear to have been basing themselves on the Independent. The Independent itself claims to have received an unsolicited copy of Mr Wright's manuscript and, after using it, to have destroyed it. g
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a The Attorney General thereupon launched the present proceedings against the publishers and editors of the Independent, the London Evening Standard and the London Daily News, alleging that the publications to which I have referred were—

b 'intended or calculated to impede, obstruct or prejudice the administration of justice in that they were severally intended or calculated and in any event likely to thwart Orders of the Court of Appeal made on the 25th day of July 1986 in the High Court proceedings brought by the Applicants against The Observer Limited and Others (1986-A-2507) and by the Applicant against Guardian Newspapers Limited and Others (1986-A-2509)'

and claiming that accordingly the defendants were in contempt of court and should be punished.

c As I have said, the matter came before Sir Nicolas Browne-Wilkinson V-C on a preliminary point of law. This was:

d 'Whether a publication made in the knowledge of an outstanding Injunction against another party and which if made by that other party would be in breach thereof, constitutes a criminal contempt of Court upon the footing that it assaults or interferes with the process of Justice in relation to the said Injunction.'

e In a judgment of quite outstanding clarity the Vice-Chancellor reviewed the reported authorities both in this country and in Canada and concluded that this question was to be answered in the negative and that to answer it otherwise would be to 'subvert the basic principles of our civil law and introduce into it uncertainty and unfairness'. However, on the facts of the instant case he expressed concern at the conclusion which he had reached, saying:

f 'There ought to be some sanction against the publication of matters which prejudice national security and the decision as to what does prejudice national security should not be left to the individual judgment of the editors of individual newspapers. I had assumed that the Official Secrets Acts 1911 to 1939 provided the necessary sanction. If it does not, then it is for Parliament, if it thinks fit, to provide the necessary sanction by providing a public law remedy linked directly to the protection of public rights. Private rights should not be bolstered by a distortion of the law of contempt in an attempt to produce a judge-made public law protecting official secrets.'

g (See pp 289–290, ante.)

h Whilst I agree that there ought to be some sanction against the publication of matters which prejudice national security, I should like to re-emphasise with all the power at my command that this case is not primarily about national security or official secrets. It is about the right of private citizens and public authorities to seek and obtain the protection of the courts for confidential information which they claim to be their property. The national security element in the present dispute is peripheral and is no more than one factor which the court had to take into account when deciding whether or not to preserve the confidentiality of the Wright information pending the trial of the *Observer/Guardian* action. Legislation could well take care of national security as the Vice-Chancellor suggested, but that would leave large numbers of people who claim rights of confidentiality wholly unprotected. Obvious examples are disclosures, sometimes sensational and of great interest to newspapers and their readers, by the personal staff of the famous.

j Whilst I am loath to increase the length of this judgment, I do not think that I should do justice to the judgment of the Vice-Chancellor if I attempted to summarise that part in which, having set out the facts and reviewed the authorities, he stated his essential

reasoning and conclusions. It was in the following terms. [Sir John Donaldson MR then set out the passage at pp 285 j to 288 j of the judgment of the Vice-Chancellor and continued:] a

The situation with which we are faced is novel in the sense that there is no reported decision which provides any direct guidance. It is therefore appropriate to start with the first principles of the law of contempt of court and indeed by distancing myself from that phrase itself. As the Lord President (Clyde) pointed out in *Johnson v Grant* 1923 SC 789 at 790: b

'The phrase "contempt of Court" does not in the least describe the true nature of the class of offence with which we are here concerned . . . The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice . . . It is not the dignity of the Court which is offended—a petty and misleading view of the issues involved—it is the fundamental supremacy of the law which is challenged.' c

According to Borrie and Lowe *Law of Contempt* (2nd edn, 1983) p 1:

'It has been well said that the law of contempt is of ancient origin yet of fundamental contemporary importance. Contempt of court certainly has a long history—*contemptus curiae* is said to have been a recognised phrase in English law since the twelfth century, and, as will be evidenced by the rest of this book, the law continues to play a key role in protecting the administration of justice. Essentially a creature of common law, contempt has been and continues to be developed and adapted to meet changing challenges to the "supremacy of the law". One result of this continuing development and concern to protect the many facets of the administration of justice is that there are many forms of contempt. One commentator has described contempt as "the Proteus of the legal world assuming an almost infinite diversity of forms", but equally it can be said that contempt of court is as diverse as are the means of interfering with the due course of justice.' d
e

Despite its protean nature, contempt has been classified under two heads, namely 'civil contempt' and 'criminal contempt'. Whatever the value of this classification in earlier times, I venture to think that it now tends to mislead rather than assist, because the standard of proof is the same, namely the criminal standard, and there are now common rights of appeal. Of greater assistance is a reclassification as (a) conduct which involves a breach, or assisting in the breach, of a court order and (b) any other conduct which involves an interference with the due administration of justice, either in a particular case or more generally as a continuing process, the first category being a special form of the latter, such interference being a characteristic common to all contempts (see *A-G v Leveller Magazine Ltd* [1979] 1 All ER 745 at 749 [1979] AC 440 at 449 per Lord Diplock). What distinguishes the two categories is that in general conduct which involves a breach, or assisting in the breach, of a court order is treated as a matter for the parties to raise by complaint to the court, whereas other forms of contempt are in general considered to be a matter for the Attorney General to raise. In doing so he acts not as a government minister or legal adviser, but as the guardian of the public interest in the due administration of justice. There is a further, but less important, distinction in that in the case of a failure to comply with some court orders, for example those relating to procedural timetables, the appropriate reaction by the court is not punishment in the form of committal, attachment or a fine, but an order striking out all or part of a claim or refusing to entertain the whole or part of a defence. f
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Although it happens to be the case that the conduct complained of here is said to impinge on the trial of an action in which the Attorney General, acting as a minister and on behalf of the Crown, is the plaintiff, he brings the present proceedings in a quite different capacity independently of the government of the day, namely in that which I have described as 'guardian of the public interest in the due administration of justice'. In j

- the light of the fact that there has been a change in the holder of the office of Attorney General during the course of the proceedings, it should perhaps also be pointed out that they are brought not by an individual but by 'the Attorney General'. Consistently with acting in this capacity, the Attorney General's complaint is not that the respondent newspapers and their editors have breached or assisted in the breach of the orders which he obtained in the *Observer/Guardian* action, but that the conduct complained of 'was intended or calculated to impede obstruct or prejudice the administration of justice'.
- b* This raises two issues. What is the conduct complained of? Can it be said to have been intended or calculated to impede obstruct or prejudice the administration of justice? The latter is clearly a question which cannot be answered in the abstract, but depends on the course which the administration of justice has taken and is intended by the court to take. It is for this reason, and this reason alone, that it is necessary to take account of the course which the *Observer/Guardian* action had pursued, including the orders made restraining the *Guardian* and the *Observer*, but no other newspapers, from publishing what I may describe as 'Wright material', i.e. information obtained by Mr Wright in his capacity as a member of the British security service and which was known or reasonably believed to have come or been obtained, whether directly or indirectly, from Mr Wright or any information concerning the British security service which was attributed to Mr Wright.

- d* The *Observer/Guardian* action began on 27 June 1986 with the grant by Macpherson J of ex parte injunctions addressed to the two defendant newspapers restraining publication of Wright material. The newspapers applied to have them set aside and this application was heard and determined by Millett J on 11 July 1986. For present purposes the variations which he made in the ex parte order are immaterial. What is material is the judge's reasons which were expressed in a judgment given in open court and were widely reported. It is therefore relevant to recall extracts of what he said:

- e* 'It has not been disputed before me that Mr Wright's proposed book contains information acquired by him as a member of the security service, and that the disclosure of such information would constitute a breach of the duty of confidentiality which he owes to the Crown. Nor has this been challenged by Mr Wright himself in the Australian proceedings. There, his defence is that the information which he seeks to disclose is (i) in the public domain and no longer confidential; and
- f* (ii) evidence of unlawful acts or serious misconduct on the part of members of the British security service which it is in the public interest should be published. In the application before me, these defences are repeated, but in support of a wider and more fundamental proposition. It is said that: "Where an interim injunction is sought to restrain publication by a newspaper of information which is of public importance and legitimate public concern, only the most exceptional circumstances based on cogent and compelling evidence will induce the courts to prevent publication. This is because of the fundamental importance of the right to free expression in a democratic society. It is of even greater importance where the party seeking to prevent expression is the state or its agents, and the nature of the information whose publication is sought to be suppressed concerns serious
- g* allegations of criminal misconduct and other gravely reprehensible behaviour by agents of the state." Prior restraint of publication is a serious interference with the freedom of the press and the important constitutional right to freedom of speech. Those freedoms, however, are not absolute.'
- h*

Later in his judgment he said:

- j* '... pecuniary compensation to either party would be not merely inadequate but wholly inappropriate. In resolving the conflict, I must take all relevant considerations into account, and in my judgment these must include the facts that this is an interlocutory application and not the trial; that the injunctions sought are only temporary and not permanent; and that a refusal of injunctive relief may cause

irreparable harm and effectively deprive the plaintiff of his right . . . It makes no difference that the claim to suppress publication is made by the government and not by a private litigant; the principles remain the same. Nor does the court abdicate its responsibility to decide where the public interest lies merely because national security is invoked by the Crown. The safeguard in a free society is that the conflict falls to be resolved not by the state itself but by an independent judiciary . . . the refusal of injunctive relief would permit indirect publication and effectively and permanently deprive the Attorney General of his rights in advance of the trial.’

On appeal to this court, the same points were made in judgments which again received wide publicity and I need only cite two passages. The first is from my own judgment, when I said:

‘Allied to this complaint is a plea that it is unjust that the defendants should be restrained from republishing allegations made by them whilst every other publisher is free to do so. The short answer to this is that if the original publications were unlawful, other publishers are not free to republish. It is true that the consequences of their doing so would be less serious, but that is another matter.’

We were told, and I accept, that this paragraph could be misunderstood by those who did not read it carefully and did not realise that I was speaking of *republishing* as contrasted with a publication of hitherto unpublished Wright material and that it was only republication whose consequences would be less serious than an initial publication. Any further publication by the Guardian, the Observer or other newspapers would quite clearly add to any damage already done and so be more serious.

The second is from the judgment of Nourse LJ:

‘Moreover, for the reasons given by Sir John Donaldson MR, it is clear to me that confidential information which comes into the hands of a member of the security service is information which *prima facie* may not in any circumstances be used by the employee, either during or after the employment, except for the benefit of the employer. As for the newspapers and any other third party into whose hands the confidential information comes, an injunction can be granted against them on the simple ground that equity gives relief against all the world, including the innocent, save only a bona fide purchaser for value without notice. It is obvious that nobody could obtain the sort of information which is under consideration in this case without being on notice that it was confidential to the Crown.’

It is against this background that I ask myself whether at the end of July 1986 (when the interim injunctive order was made against the Guardian and the Observer) a publication by the Independent of new, and apparently more authentic, Wright material, allegedly based on possession of a copy of Mr Wright’s manuscript, which neither the Guardian nor the Observer ever claimed or admitted having had, would ‘be calculated to impede, obstruct or prejudice the administration of justice’, to quote the words of the Attorney General’s application or ‘to involve an interference with the due administration of justice’, to quote the words of Lord Diplock in *A-G v Leveller Magazine Ltd* [1979] 1 All ER 745 at 749, [1979] AC 440 at 449. To that question I think that there can be only one answer, namely that it would. The issue in the *Observer/Guardian* action was not whether the information had been confidential to the Crown, but whether for one reason or another that confidentiality had evaporated or was overridden by a countervailing public interest. Millett J, and this court on appeal, had not only prohibited publication, including republication, by the Guardian and the Observer, but had held that, to quote Millett J, indirect publication of Mr Wright’s memoirs, the direct publication of which was prohibited by the Australian courts, would ‘permanently deprive the Attorney General of his rights in advance of the trial’. It could not have been made clearer. The court was making an order for the preservation of the confidentiality of the Wright material

a pending the trial. Publication meanwhile, whether by those defendants or others, would deprive the Attorney General of his rights in advance of the trial, because information once published, at least on the scale achieved by publication in national newspapers, can never be truly confidential again.

I then ask myself whether this situation had changed in April 1987 when the Independent, the London Evening Standard and the London Daily News in fact published further Wright material. It is true that the Australian trial had concluded by then, and the judge had ruled that Mr Wright was entitled to publish, but the decision was under appeal and the *Observer/Guardian* action still awaited a full trial. The answer is plain. The publication of Mr Wright's memoirs in full at that time would have prevented any effective adjudication on the Attorney General's claim in the *Observer/Guardian* action and the publications complained of, whilst not going to this length, were very far from being of minimal effect. To the extent that they placed Wright material into the public domain, which had not previously been there, they deprived the Attorney General of a part of the rights which he was asserting in these actions and to this extent made it impossible for the court to do justice between the parties.

I now return to the judgment of Sir Nicolas Browne-Wilkinson V-C.

d '(a) In no case (apart from the Irish case) has a third party, C, been held to be in contempt of an order restraining a named person, B, from doing an act unless C has been privy or party to the doing of an act which is a breach of precise terms of the order' (see pp 285–286, ante)

The Irish case is *Smith-Barry v Dawson* (1891) 27 LR Ir 558. If the case is accurately reported, there was some confusion between the species of contempt which consists of disobeying, or assisting in the disobedience of, an order of the court and that which consists of interfering with the due administration of justice and this may have stemmed from the fact that no argument was addressed on behalf of the alleged contemnors. Mr Smith-Barry had been declared by a final judgment, to which the alleged contemnors were not parties, to be entitled to possession and to quiet enjoyment of his patent rights to hold a market in the Fair Green. The alleged contemnors had held a rival market in the Fair Green with knowledge of that decision and of the fact that an injunction had been granted against the defendant in the action prohibiting him from holding such a market. Chatterton V-C said that the alleged contemnors were—

g 'in my opinion, in just the same default as the original defendants would have been if they had done similar acts. The cases cited clearly established the right to have these attachments issued, and nothing can be more in point than the *Killiney Foreshore Case* (unreported). But even without any of these authorities, ordinary common sense would show that persons cannot be allowed to set at defiance the order of the Court because they do not happen to be named in the injunction.'

(See 27 LR Ir 558 at 559–560.)

h If in an action between A and B for the possession of a dwelling-house, B is ordered to give up possession and to refrain from retaking possession, A's remedy, if someone, C, subsequently tries to dispossess him, is an action against C, not proceedings for contempt of court in disobeying an order to which C was never a party and in the breach of which he was not assisting.

i So long as the full importance of Sir Nicolas Browne-Wilkinson V-C's words 'contempt of an order' are appreciated, I consider that this represents the law. The Attorney General does not allege that the defendants are in contempt of the orders made in the *Observer/Guardian* action or assisted in doing an act which is a 'breach of precise terms of the order', i.e. terms which restrained conduct by the Guardian and the Observer, their servants, agents, etc. He claims that, given the fact that these orders had been made with a view to preserving the subject matter of the dispute, destruction of that subject matter is an interference with the due administration of justice and so a contempt of court.

'(b) Under English law an injunction can only properly restrain a party to the proceedings from doing an act, although it may restrain him from doing the act "by himself, his servant or agent"' a
(see p 286, ante)

This appears to be a wholly correct statement of the law (see *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406), but it is capable of being misleading. The form of order now usually adopted which enjoins the defendant 'by himself, his servant or agent' does not enjoin the servants or agents at all. All that the additional words do is to serve as a warning to such agents that they should not assist in the doing of the prohibited act. If they do so, they will not have disobeyed the order, but they will have interfered with the due administration of justice and may be liable to be proceeded against on that account. b

That this is the position is made even clearer by the two motions in *Lord Wellesley v Earl of Mornington (No 1)* (1848) 11 Beav 180, 50 ER 785 and *Lord Wellesley v Earl of Mornington (No 2)* (1848) 11 Beav 181, 50 ER 786. There the injunctive order omitted any reference to servants or agents. Lord Langdale MR dismissed the first motion to commit Mr Batley, the Earl's land agent, who had cut down some trees which the Earl had been forbidden to cut. He did so because the motion was based on an allegation that Mr Batley had acted in breach of the order. As Lord Langdale MR pointed out, the order was not addressed to Mr Batley and he was not enjoined thereby. However the second motion accused Mr Batley not of breaching the order, but of knowingly assisting in a breach of the order and thereby obstructing the process of the court. As Lord Langdale MR put it, 'If the matter had been pressed, I should have found it my duty to commit Mr Batley for his contempt in intermeddling in these matters' (see 11 Beav 181 at 183, 50 ER 786 at 787). c

'(c) As a result of (a) and (b) above, there is no English case in which a third party, C, has been held in contempt for doing any act which does not constitute a breach by the defendant enjoined, B, of the precise terms of the order' (see p 286, ante) e

I am not sure whether this adds anything to (a) and (b). Whilst it certainly records that no one has been able to find a reported decision involving a finding of contempt by C, where the act complained of was intimately related to an order against B but did not involve assisting in doing that precise act, I am not sure of its significance, save that it underlines the fact that this is a novel situation. There is at least one case in the books which, if C had acted differently, would have raised the point. This is *Galaxia Maritime SA v Mineralimportexport, The Eleftherios* [1982] 1 All ER 796, [1982] 1 WLR 539 where A obtained a Mareva injunction against B ordering B not to remove his assets from the jurisdiction including, in particular, cargo loaded on C's ship. C for his own purposes (he wished to have the use of his ship and to allow the crew to get home for Christmas) and regardless of the wishes of B, wished to remove his ship from the jurisdiction with or without the cargo. C applied successfully for the injunction to be discharged and seems to have assumed, as the court also assumed, that absent permission from the court or the discharge of the injunction, the ship could not sail. I think that C was right, but had the ship sailed with the cargo, it certainly could not have been said that he was in breach of the precise terms of the order which prohibited B exporting the cargo and still less that B would have been in breach. f

'(d) The plaintiff in the proceedings, A, can apply for the committal of C even though the act of C is a criminal contempt' (see p 286, ante) g

This is an historical anomaly arising out of the classification of contempts as civil and criminal. If, instead, they are classified as contempts involving (a) disobedience or assisting in the disobedience of orders and (b) other conduct interfering with the administration of justice, there is no problem. A can apply in category (a) and the Attorney General can apply in category (b). In any event it appears to cast no light on what has to be decided in this appeal. h

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(e) *The principle underlying the law that C is in criminal contempt if he is party to a breach of the order is that the court will not allow its order to be knowingly flouted, thwarted or frustrated by any person even though he be a stranger to the action*' (see p 286, ante)

This is quite correct but, I think, nihil ad rem. The three newspapers were not parties to breaches of the actual orders in the *Observer/Guardian* action which prohibited publication by those newspapers. In publishing as they did, they were intending to serve their own interests or their view of the public interest and certainly not the interests of the *Guardian* and the *Observer*.

Based on these propositions of law, the Vice-Chancellor said that it seemed to him that the Attorney General was seeking to widen the application of the law of criminal contempt, albeit in accordance with established principle. This I am unable to accept. The law of contempt is based on the broadest of principles, namely that the courts cannot and will not permit interference with the due administration of justice. Its application is universal. The fact that it is applied in novel circumstances, for example to the punishment of a witness *after* he had given evidence (see *A-G v Butterworth* [1962] 3 All ER 326, [1963] 1 QB 696), is not a case of *widening* its application. It is merely a new example of its application. In that case, as here, the trial judge (Mocatta J) relied on the fact that there was no such case in the books, but this court held that that was a distinction of fact, not principle (see [1962] 3 All ER 326 at 332, [1963] 1 QB 696 at 724-725 per Donovan LJ).

Next, and this is really the final stage in his reasoning apart from the practical considerations with which I must deal hereafter, the Vice-Chancellor said (p 286, ante):

'... the question I have to decide is whether, due to the chance that there is in existence an order of the court preventing the *Guardian* and the *Observer* from publishing, the appropriate sanction is contempt of court.'

At the risk of appearing to be a carping critic, and I repeat my tribute to the clarity of his judgment, I think that the Vice-Chancellor misdirected himself in thus formulating the question. Contempt of court is not a sanction. Contempt of court is unlawful conduct, the sanction for which is imprisonment, attachment, a fine or an order to pay costs. So the question should at least be rephrased to read 'whether, due to the chance that there is in existence an order of the court preventing the *Guardian* and the *Observer* from publishing, the conduct of the *Independent*, the *London Evening Standard* and the *London Daily News* was unlawful as constituting an interference with the due administration of justice'. But even this is not correct. 'Chance' is not the right word. The existence of the restraining orders against the *Guardian* and the *Observer* was a fact. It was only a chance in the sense of being what I believe is known across the Atlantic as a 'happenstance', a past circumstance which was not created by any of the principal actors. So I would substitute 'fact' for 'chance', whilst at the same time appreciating that I have to consider whether it is a very material fact, one which made any real difference.

This brings me to the very interesting and, as I think, crucial decision in *X CC v A* [1985] 1 All ER 53, [1984] 1 WLR 1422. There Balcombe J made an order prohibiting publication of information about the ward by the *News of the World*, which was a party, and any other person who should have notice of the order. It was effective in fact and I am wholly satisfied that it was also effective in law. What is interesting is why it was effective in law.

As the Vice-Chancellor pointed out, English civil courts act in personam. They adjudicate disputes between the parties to an action and make orders against those parties only. This is true even in proceedings under RSC Ord 113, which permits proceedings against 'persons unknown'. They become parties. What is not permissible is to make an order against a stranger to the action:

'... I have no conception, that it is competent to this Court to hold a man bound by injunction, who is not a party in the cause for the purpose of the cause ...'

(See *Iveson v Harris* (1802) 7 Ves 251 at 256, 32 ER 102 at 104 per Lord Eldon LC.)

Yet that is what Balcombe J purported to do. To say that the jurisdiction of the court in wardship involves a peculiar parental or administrative responsibility to which the disposal of controverted questions is only incidental, is no explanation. This only means that this jurisdiction is unusual in the extent to which it involves extended judicial supervision throughout the wardship, which may last for years. a

I sympathise with the position in which Balcombe J found himself. The proper discharge of the wardship by the court in the exercise of the ancient duties of *parens patriae* made it essential that there should be no publication and he had to find a way of achieving this result. But had any newspaper, other than the *News of the World*, published details of the ward and had the Attorney General sought to commit it or its editor for contempt consisting of disobedience of the order, the motion would have been dismissed. It would have been a replay of *Lord Wellesley v Earl of Mornington* (No 1) (1848) 11 Beav 180, 50 ER 785, which would have been indistinguishable. The fact that the order was addressed to the alleged contemnor would rightly have been disregarded as done without jurisdiction. But if the Attorney General had moved, instead, on the grounds that the publication interfered with the administration of justice, he would have succeeded and the fact that publication had taken place notwithstanding the warning conveyed by the form of the order would have been an aggravating circumstance (*Lord Wellesley v Earl of Mornington* (No 2) (1848) 11 Beav 181, 50 ER 786). b
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Now what of the 'chance' or 'fact' that the court had made an order against the *News of the World*? The court is entitled to administer justice in whatever way it considers appropriate, although this is, of course, governed by precedent and principle. Thus, exceptionally, it can conduct proceedings wholly in camera, including concealing the identity of the parties and the judgment (see *R v Chief Registrar of Friendly Societies, ex p New Cross Building Society* [1984] 2 All ER 27 at 29, [1984] QB 227 at 232). In the particular case Balcombe J decided to administer justice by concealing details concerning the ward and announced this fact because it was unusual. He would have had no need to announce that the court would not permit its ward to be married without its consent, because this is well known. Having once determined how justice was to be administered, any interference with that course of action would be unlawful and punishable as a contempt. e
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The order was thus very material. Without it any newspaper could have said, rightly, that Balcombe J was not administering justice in a way which involved concealment of information about the ward, otherwise than in the context of particular applications in the wardship.

The instant case is almost exactly analogous. In fact the *ex parte* injunction was granted as soon as, or even before, the writ was issued and the proceedings begun. But suppose that there had been an interval of a week between the writ and the injunction, with publication of the Wright material meanwhile. This would not have been a contempt, because the court would not have indicated that it proposed to administer justice between the Attorney General and the Guardian and the Observer by preserving the confidentiality of the Wright material pending the trial and no one would have had any reason to know that it did so intend. Knowledge of how the court is administering, or intends to administer, justice is of the essence of the unlawfulness of conduct which interferes with that administration, whether or not that conduct consists of disobedience to an order. Once the court had announced its intention of preserving the confidentiality of the Wright material, the position was quite different. The order itself, reinforced by the statement of Millett J that 'the refusal of injunctive relief would permit indirect publication [of the Wright memoirs] and effectively and permanently deprive the Attorney General of his rights in advance of the trial' and by my own statement that other newspapers would not be free to republish, had made it abundantly clear that the court was intending to preserve the confidentiality of the Wright material pending the trial. This was its chosen method of administering justice and the Independent, the g
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London Evening Standard and the London Daily News can have been in no doubt that this was the case.

- a I now turn to the practical considerations which moved the Vice-Chancellor or confirmed him in his view.

A take-over bid

- b It is difficult to comment on this without knowing more of the cause of action being alleged by B, but the short answer is that a sale by C to X could not interfere with the course of justice in any circumstances which I can foresee, because the sale, and everything done in consequence of it, could be reversed by court order if justice so required.

Cutting down trees

- c In the example given, A alleges a right to prevent B from cutting down trees on B's land and C claims a right against B to cut them down. If there was any question of C's right being subject to A's right, as well there might be, this would be a contempt and C should apply to be joined in the action. If C's right was wholly independent, so that, in effect, A's right was admittedly subject to C not exercising his right, there would be no contempt, because the administration of justice between A and B would not be interfered with.

d *Defamation*

- e Defamation is an assault on reputation analogous to a physical assault on the person. If B is enjoined not to assault A and C then assaults A, there is no interference with the administration of justice in the action A v B. It is simply a further tort or crime. Similarly with defamation. The court will prohibit a second defamatory statement (or blow) by B, but the subsequent making of the same defamatory statement by C (ie an additional blow) will not interfere with the administration of justice as between A and B. It is simply an independent tort if, in the end, it cannot be successfully defended. This is not to say that the publication by C might constitute a contempt of court, even if C was not enjoined and even if he claimed that he was in a position to justify his defamatory statement. It would all depend on whether it would in fact interfere with the administration of justice (see *A-G v News Group Newspapers Ltd* [1986] 2 All ER 833, [1987] QB 1, where this court made it clear that the rule in *Bonnard v Perryman* [1891] 2 Ch 269, [1891-4] All ER Rep 965 was subordinate to the rule of law that conduct which interfered with the administration of justice was a contempt of court).

g *Trade secrets*

- h This is another case on which it is difficult to comment without knowing more of the facts. The issue would be whether the revelation of trade secrets by C, whether authorised or not, would thwart the administration of justice as between A and B. I can imagine differing scenarios in which different answers might be given and it certainly cannot be said that an injunction restraining B would automatically restrain C. Indeed I should be surprised if it did, if only because A's claim would usually relate to trade secrets entrusted by him to B and not those entrusted by him to C, even if they were the same. In the instant case, what is being asserted by all the newspapers concerned is a similar right to break the confidentiality of the Wright material. This is being determined in the *Observer/Guardian* action and any publication by anyone else meanwhile would frustrate the administration of justice in that action. The element of uncertainty stems only from not knowing the full facts of the hypothetical case.

j *An industrial dispute*

An order restraining B from picketing A's premises would not render picketing by C a contempt of court, because it would not interfere with a determination of whether B was entitled to picket and the giving of remedies to A if it was unjustified. It is only if

picketing by C would lead to the irreparable collapse of A's business rendering a resolution of his dispute with B impossible or irrelevant, that there would begin to be an analogy with the present situation. a

The Vice-Chancellor also expressed the view that if the Attorney General's submissions were correct, third parties alleged to be in contempt would be deprived of what he described as 'very elaborate procedural safeguards' and he instanced personal service of the order, the indorsement of a penal notice on the order and the care which is taken to ensure that the conduct complained of constitutes a breach of the express terms of the order. In particular, he said that if the Attorney General's contentions were right, the alleged contempt could consist of doing some act inconsistent, not with the terms of the order, but with the purpose of the order. This confuses the category of contempt which consists of disobeying or assisting in the disobedience of an order with the general category of contempt, namely interfering with the due administration of justice. None of these procedural safeguards has ever been applied, or could apply, in the latter category. The test of contempt or no contempt in that category is not inconsistency with the purpose of the court's order, it is in every case, and whether or not there is an order, simply whether the alleged contemnor knowingly interfered with the due administration of justice by the court. In almost all cases, given the facts the answer is obvious to anyone, as it is in this case, and, for my part, I can see nothing in the result which offends the basic principles of natural justice. What would offend those principles would be to hold that these newspapers were free to destroy the subject matter of the action between the Attorney General and the Guardian and the Observer newspapers, incidentally whilst denying the defendants in that action the same right, thus depriving both the Attorney General and those newspapers of their right to have their dispute determined in accordance with law. b
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I am conscious that, despite the length of this judgment, I have not referred to the Canadian authorities. Suffice it perhaps to say that I, like the Vice-Chancellor, have found the guidance which they offer limited and confused. e

In general I think that there is force in the submission of counsel for the Attorney General that it would be unwise for courts to spell out in orders addressed to B what would or would not constitute a contempt by C, lest the failure to do so lead C to think that he was free to take any action not so specified, regardless of whether or not it would interfere with the due administration of justice. In the exceptional circumstances that one or more newspapers are forbidden to publish confidential information because to do so would destroy any rights which the plaintiff may have and that any publication by other newspapers would have the same effect, it seems, with hindsight, that this might have been a sensible course to have adopted and one which, however irregular, would probably in fact have prevented the present situation arising. However, I am quite clear that the failure to do so does not render the newspapers' conduct any less capable of constituting a serious contempt of court. f
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In seeking to do justice to the judgment of the Vice-Chancellor I have strayed, albeit sometimes somewhat tentatively, down a number of byways. Now I shall return to what actually happened. The first to publish was the Independent which stated in a leading article: h

'THE DECISION to publish material from the manuscript of Peter Wright's thus far unpublished book *Spycatcher* was not taken lightly. The Government's determined effort to prevent publication in Australia of Mr Wright's memoirs speaks for itself. Our justification is simple. It is in the public interest that facts about the operation of M15 become known in order that the debate about the proper oversight and supervision of the security and intelligence services can be better informed.'

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The other two newspapers presumably were of the same view.

The preliminary question of law does not address itself to the questions of what was the justification for the newspapers' actions or what were their intentions in publishing.

a The assumption being made was that, on the view of the law which was put forward by the newspapers and accepted by the Vice-Chancellor, these considerations were irrelevant. With all respect I cannot accept this. Test it this way. Suppose, contrary to the facts, that the sole intention of the newspapers in publishing was to render nugatory the trial of the action brought by the government against the Guardian and the Observer. In my judgment there could not be a clearer contempt of court, but, on the answer given by the Vice-Chancellor, the newspapers could say that no offence had been committed. That
b cannot be right.

Curiously, this point was never put to the Vice-Chancellor and was never raised in argument before us. It only occurred to us after we had adjourned to consider our judgments and it seemed so fundamental that we thought it right to invite further argument on whether intent to impede or prejudice the administration of justice (to quote s 6(c) of the Contempt of Court Act 1981) was or was not a relevant consideration
c and, if it was, what was the nature of the intention which had to be proved if a contempt of court was to be established.

Counsel for the Independent submitted that if the conduct of the newspapers does not constitute an actus reus, or criminal act, it matters not whether they have the necessary mens rea, or criminal intent. This is quite right and perhaps fortunate. If ordinary
d citizens could be convicted of offences which they intended to commit, but never got round to committing, the prisons would be even fuller than they are at present. But that is not this case. Indeed this is the converse of that case. Here the newspapers without doubt have interfered with the administration of justice by rendering the trial of the government's claims against the Guardian and the Observer less effective. They have therefore committed the actus reus. The real question is whether they had the necessary
e mens rea or criminal intent. It is to that question that I now turn.

Mens rea in the law of contempt is something of a minefield. The reason is that it is wholly the creature of the common law and has developed on a case by case basis, as no doubt it will continue to do.

The 1981 Act did not seek to systematise the approach of the courts. It simply defined, in s 1, a term of art, namely 'the strict liability rule' as meaning—

f 'the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.'

There may well be instances of conduct which would be treated as contempt of court regardless of intent to do so, but which do not fall within this defined term. One example
g may be *A-G v Butterworth* [1962] 3 All ER 326, [1963] 1 QB 696, because the act complained of (punishing a witness for having given evidence in proceedings after those proceedings had been concluded) was calculated to interfere with future proceedings in general and not 'particular legal proceedings'. Another would be the offence of marrying a ward of court or taking the ward out of the jurisdiction without in each case first obtaining the court's permission, because the gravamen of the charge is not interfering
h with the course of justice in proceedings.

The contempt alleged against the three newspapers quite clearly falls within the category of contempt to which the 1981 Act applies and accordingly the limitations and defences set out in ss 2 to 5 apply. The most important of these is s 2(3), which provides:

i 'The strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section at the time of the publication.'

The proceedings between the government and the Guardian and the Observer newspapers were not active in this sense when the three newspapers published the Wright material and accordingly they cannot be charged with contempt of court on a strict liability basis. This, counsel for the Attorney General fully accepts. But this does

not mean that they cannot be charged on a basis which involves having regard to intent and indeed s 6(c) expressly contemplates and saves such a possibility when it provides: a

‘Nothing in the foregoing provisions of this Act . . . (c) restricts liability for contempt of court in respect of conduct intended to impede or prejudice the administration of justice.’

This at once raises the question, ‘What kind of intent?’, counsel for the Attorney General contending for a general or basic intent and the newspapers for a specific intent. In the light of the policy of Parliament as evidenced by s 8 of the Criminal Justice Act 1967, and the likelihood that in passing the 1981 Act Parliament intended to accept the recommendations of the Phillimore Committee in 1977 (Report of the Committee on Contempt of Court (Cmnd 5794)), I am quite satisfied that what is contemplated, and what is ‘saved’, is the power of the court to commit for contempt where the conduct complained of is specifically intended to impede or prejudice the administration of justice. Such an intent need not be expressly avowed or admitted, but can be inferred from all the circumstances, including the foreseeability of the consequences of the conduct. Nor need it be the sole intention of the contemnor. And intent is to be distinguished from motive or desire (see *R v Moloney* [1985] 1 All ER 1025 at 1037, [1985] AC 905 at 926 per Lord Bridge). b
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Summary

Although it has been necessary to explore this matter in considerable detail and depth, I can summarise the position very shortly. (1) Confidential information, whatever its nature (personal, financial, technical or security) has one essential common characteristic. It is *irremediably* damaged in its confidential character by every publication and the more widespread the publication, the greater the damage. (2) If a *prima facie* claim to confidentiality can be established, but this is opposed by a claim of a right to publish, whether on grounds of the public interest or otherwise, these opposing and wholly inconsistent claims must be evaluated and balanced the one against the other. (3) The public interest in ensuring that disputes are resolved justly and by due process of law may require a different balance to be struck at different stages. Thus, pending the trial of the action, the balance will normally come down in favour of preserving confidentiality, for the very obvious reason that, if this is not done and publication is permitted, there will be nothing left to have a trial about. (4) It is for the courts, and not for either of the opposing parties, to decide where, in the public interest, that balance lies. (5) Third parties (strangers to the action) who know that the court has made orders or accepted undertakings designed to protect the confidentiality of the information pending the trial, commit a serious offence against justice itself if they take action which will damage or destroy the confidentiality which the court is seeking to protect and so render the due process of law ineffectual. (6) If such third parties, having a legitimate interest in so doing, wish to contest the court’s decision to protect the confidentiality of the information on any grounds, including in particular that they have special rights or interests of which account has not been taken, they should apply to the court which will hear them and make any modification of its orders which may be appropriate. This is a well-established procedure which works speedily and well in the context of *ex parte* orders such as those made in the exercise of the *Mareva* and *Anton Piller* jurisdictions. Similarly they should apply to the court if they have doubts whether the action which they contemplate taking is lawful. (7) It is for the courts, and not for third parties, to decide whether, balancing competing public and private interests including those of the third parties, confidentiality should continue to be preserved at any particular time. e
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I would answer the question raised on this appeal by holding that the conduct of the newspapers could constitute a criminal contempt of court, but that it is impossible to say whether it did or did not do so until they have been given an opportunity of being

- further heard and the court has determined whether, in so conducting themselves, the newspapers intended to impede or prejudice the administration of justice.
- a I would allow the appeal and remit the matter to the High Court.

- LLOYD LJ.** On the day on which the Independent published material from the manuscript of Peter Wright's book *Spycatcher*, there appeared in the same paper a leader under the heading 'When the Security Service turns to treason'. The theme of the leader
- b can be gathered from a single sentence:

'Mr Wright's first-hand description of illegality and incompetence within the Security Service is deeply shocking and amounts to an unambiguous case for a form of scrutiny which goes beyond the present system of ministerial oversight.'

- The Independent's justification for publishing the material is equally succinct:

- c '... It is in the public interest that facts about the operation of MI5 become known in order that the debate about the proper oversight and supervision of the security and intelligence services can be better informed.'

- It is obvious from these extracts that this case involves issues of the greatest public importance. It is therefore all the more important to be clear what this particular appeal
- d is about and what it is not about.

- It is not about the oversight and supervision of the security and intelligence services. Nor do we have to decide whether the articles in the Independent, the London Evening Standard and the London Daily News are in contempt of court. Our sole task is to answer the preliminary question of law formulated by Sir Nicolas Browne-Wilkinson V-C, namely whether a person who is not party to an order of the court can nevertheless be in
- e contempt of court if he does something which interferes with the course of justice, by frustrating the purpose of that order. The Vice-Chancellor, in a judgment to which I too would pay my respectful tribute, has answered the question of law in favour of the respondents. The effect of answering the questions that way will be, as I understand it, to bring these contempt proceedings to an end. Thus the Independent and the other newspapers would not be liable for contempt even if it turned out that they intended to
- f interfere with the course of justice by frustrating the purpose of the order in *A-G v Observer Newspapers Ltd* (1986) 136 NLJ 799 (the *Observer/Guardian* case).

- The grounds of the Vice-Chancellor's judgment can be summarised as follows. (i) In no case other than the Irish case of *Smith-Barry v Dawson* (1891) 27 LR Ir 558 has a third party, not subject to the order of the court, been held liable for contempt for doing an act
- g which is prohibited by the order, unless he has aided and abetted a breach of the order by the person enjoined. Since there is no question here of the Independent having aided or abetted a breach by the Guardian or the Observer, it would involve an extension of the law of criminal contempt to apply it in the present case. (ii) While it is open to the court to extend the law, nevertheless the court should be wary of doing so, since the liberty of the subject is involved. (iii) To apply the law of contempt to a person who is not party to the order in question would not only widen the application of the law, but also infringe
- h a fundamental principle that the courts do not make orders against all the world. The court acts in personam. Accordingly its orders only operate in personam, never in rem. (iv) To hold that a person who is not party to the order, and not party to the breach of the order as aider and abetter, may nevertheless be liable for contempt on the grounds that he has contravened or frustrated the spirit of the order would be to introduce
- j a degree of uncertainty which is incompatible with the imposition of a criminal sanction. It would also be contrary to natural justice, since he would be bound by the effect of an order in respect of which he had no opportunity to be heard.

Now I agree entirely with the first two steps in the Vice-Chancellor's reasoning. Although there are dicta in *Seaward v Paterson* [1897] 1 Ch 545, [1895-9] All ER Rep

1127 and *Lord Wellesley v Earl of Mornington* (No 1)(1848) 11 Beav 180, 50 ER 785 which may be said to support a wider principle, I regard those cases as having decided, and decided only, that a person may be liable in contempt if, with knowledge of the order, he aids and abets a breach of the order by the person enjoined. a

The same is true of *Z Ltd v A* [1982] 1 All ER 556, [1982] QB 558, on which counsel for the Attorney General also relied. It was held in that case that the bank would be liable for contempt if, with knowledge of the Mareva injunction, it enabled its customer to act in breach of the terms of the injunction, even though the injunction had not yet been served on the customer. The customer could not, of course, be liable in contempt himself until notice of the injunction had been properly served. But he could breach the injunction as soon as it was granted; and the bank could therefore be liable in contempt for aiding and abetting that breach. b

So the cases are of no help to counsel for the Attorney General. I would only add, before leaving the cases, that it would be an improvement of this branch of the law if aiding and abetting a breach of a court order were reclassified as a civil contempt rather than a criminal contempt. The best course would no doubt be to abolish what remains of the distinction altogether, in accordance with the recommendations of the Phillimore Committee in 1977 (Report of the Committee on Contempt of Court (Cmnd 5794)). But if the distinction is to remain, it does not make sense that a stranger to the order, who aids and abets a breach, should be criminally liable while the person to whom the order is directed and who himself commits a breach should only be liable for civil contempt. That is the sort of nonsense which does no credit to the law, as was pointed out forcibly enough by Lord Atkinson nearly 75 years ago in *Scott v Scott* [1913] AC 417, [1911-13] All ER Rep 1. c

It is when he comes to the third step in his reasoning that I begin with great respect to part company from the Vice-Chancellor. I accept, of course, that it is a fundamental principle with certain very limited exceptions, of which the best established is wardship, that our courts act in personam. As Lord Eldon LC said in *Iveson v Harris* (1802) 7 Ves 251 at 256, 32 ER 102 at 104: d

‘I have no conception, that it is competent to this Court to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause.’ e

That dictum was repeated with approval by Lord Uthwatt in *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406 at 407. See also *Brydges v Brydges* [1909] P 187 at 191. f

But the question here is not whether a third party is bound by the injunction, but whether he can be liable for contempt even though he is *not* bound by the injunction. He cannot be liable in contempt for breach of an order to which he is not a party; nor, on the facts of the present case, could the respondents be liable for aiding and abetting a breach. But it does not follow that they may not be liable for interfering with the course of justice. Thus, to take a wholly improbable example in order to illustrate the point, suppose a party to certain proceedings assaults or abuses the judge; suppose the judge makes an order against him in the proceedings prohibiting him from repeating his abusive conduct. If a stranger comes to court and abuses the judge in like manner, it will surely not be a defence to a charge of contempt that he was not a party to the order. His conduct amounts to a contempt of court independently of any order made in the proceedings. Nor would holding such a man liable for contempt create any undesirable uncertainty or injustice. He is assumed to know that abusing the judge is a contempt of court. Ignorance of the law will afford him no more excuse in this than in any other branch of the criminal law. g

It may be said that abusing the judge is an obvious contempt, whereas interfering with the course of justice, in particular proceedings, is much less precise. This is true. Moreover, I would accept that not all acts which are calculated to interfere with the course of justice will necessarily ground a charge of contempt. The act must be sufficiently serious and sufficiently closely connected with the particular proceedings. h

a But in the present case the conduct relied on by the Attorney General is not marginal. It is not a mere pre-judging of the issue to be decided in the particular proceedings. It is not a mere usurpation of the court's function. It is the destruction, in whole or in part, of the subject matter of the action itself. The central issue in the *Observer/Guardian* action is whether the Guardian should be restrained from publishing confidential information attributable to Mr Wright. Once the information has been published by another newspaper, the confidentiality evaporates. The point of the action is gone. It is difficult to imagine a more obvious and more serious interference with the course of justice than to destroy the thing in dispute.

b That brings me to what I regard as the central difficulty in this case. If the destruction of the subject matter, that is to say the publication of the confidential material, is sufficient to constitute the actus reus of contempt, then the injunction against the Guardian becomes irrelevant. The Independent, and the other newspapers, would be liable for contempt by reason of the destruction of the subject matter of the action, even if the court had never granted an interlocutory injunction against the Guardian. Counsel for the Attorney General was unwilling to take his argument that far, and I can understand why not. To take another example mentioned in the course of the argument, suppose the subject matter of the action (the *res litigiosa*) were the ownership of a racehorse. If a third party, knowing of the litigation, were to shoot the horse for reasons of his own, or for no reason at all, could he be liable for contempt? Counsel for the Attorney General shied away from answering that question Yes. Yet the subject matter of the action would have been destroyed just as surely as in the case of confidential information. So he was driven to accepting that the injunction against the Guardian is indeed an essential plank in the Attorney General's proceedings for contempt. The injunction is not irrelevant, as in the example of the stranger who abuses the judge.

e But if the injunction is not irrelevant, if it is something more than the fifth wheel of the coach, then counsel for the Attorney General is in the difficulty, which the Vice-Chancellor regarded as insuperable, that the injunction is being given at least *some* legal effect against a stranger, who is not party to the proceedings, and has not had an opportunity to be heard; the injunction is being treated as having at least *some* validity contra mundum.

f I am bound to say that I have not found the solution to this conundrum easy, and my mind has wavered during the course of the argument and since. The reasons marshalled by the Vice-Chancellor in his judgment, and the arguments advanced on behalf of the respondents in this court, are very powerful. But in the end I have come down in favour of the Attorney General. Before stating my reasons, I wish to quote what I regard as a crucial paragraph from the judgment of the Vice-Chancellor, in which he is dealing with the objections to the principle contended for by the Attorney General (p 288, ante):

h "There are other equally serious objections. Counsel for the Attorney General himself accepted that, in the case of some orders against B, it would not be a contempt for C to do the act which B is prohibited from doing. He instanced the case of an injunction granted in a matrimonial dispute which restrained the husband, B, from assaulting the wife, A; counsel accepts that if C assaults A he would not be in contempt of court. The reason, says counsel, is that the order restraining B is plainly personal to B. But the borderline between such "plainly personal" orders and other orders must be very uncertain. All orders are *expressed* as being personal. Is an order restraining an act by B in breach of his contract with A personal? If so, can C safely do an act even if the result of such act will be to frustrate the order? For example, in the case I have given of the felling of the trees will it not be a contempt of court by C to fell the trees because A's right to prevent B from felling the trees lay in the contract between A and B? In my judgment, the distinction between personal and other orders is unworkable. It would lead to a degree of uncertainty whether or not an act was a contempt which is incompatible with the imposition of a criminal sanction." (The Vice-Chancellor's emphasis.)

Now I accept that the distinction between 'personal' and 'other' orders (though I would not adopt the terminology) may be hard to state in theory. But the line is by no means hard to draw in practice. For it corresponds to a difference in real life. 'Personal' orders are those which are made, usually at the conclusion of proceedings, but often at an interlocutory stage, which affect the person to whom the order is directed, and those who aid and abet him, but nobody else. 'Other' orders include orders by which the court regulates its own procedure, and determines how a case is to be tried. 'Other' orders will, of course, bind the parties to the proceedings. But I see no reason why such orders should not also be regarded as having a wider effect in shaping, or determining, the way in which justice is to be achieved in the particular case. If a third party with knowledge of such an order does something which disables the court from conducting the case in the intended manner, then I see no reason why that should not be regarded as an ordinary interference with the process of justice. The third party would be liable for contempt, subject to proof of mens rea, not because he is in breach of the order, but because he has prevented the court from conducting the proceedings in accordance with its intention.

Thus if, to return to the example of the racehorse, the court were to make an order under RSC Ord 29, r 2 for the interim preservation of the racehorse, pending the outcome of the proceedings, I can see no reason why a stranger who, with knowledge of the order, shoots the racehorse, should not be liable for contempt on the ground that he has interfered with the course of justice, even though he may not be bound by the order as such.

There is, I think, a useful analogy to be drawn with the power of a court to order a hearing in camera. Putting aside s 12 of the Administration of Justice Act 1960, publication of proceedings held in camera may be a contempt, not because it is in breach of the order of the court but because it is an interference with the course of justice. In Arlidge and Eady *The Law of Contempt* (1982) para 4-151 the authors, having discussed *Scott v Scott* [1913] AC 417, [1911-13] All ER Rep 1, *Re F (a minor) (publication of information)* [1977] 1 All ER 114, [1977] Fam 58, and *A-G v Leveller Magazine Ltd* [1979] 1 All ER 745, [1979] AC 440, conclude:

'Since the test of contempt is not breach of the order but interference with the administration of justice, it follows that at common law a contempt may be committed even if no specific order has been made by the court affecting anyone other than those involved in the proceedings. At common law, if the court makes an order regulating its own procedure and the purpose of the order is plainly to protect the administration of justice, then anyone who subverts that order will be guilty of contempt.' (The author's emphasis.)

In my judgment that represents an accurate statement of the law.

So my answer to the question of law, in general terms, would be in the affirmative. But in order to avoid any doubt as to what precisely I, for my part, am deciding, I would put it this way: 'The publication of confidential information which is the subject matter of a pending action, and which (i) is made in the knowledge of an outstanding injunction prohibiting the publication of that information and (ii) would have the effect of destroying the subject matter of that action, in whole or in part, may constitute the actus reus of contempt.'

I too would allow the appeal. But since the underlying question whether these articles are in contempt of court will now have to be tried, it may be helpful if, like Sir John Donaldson MR, I say a word or two on the question of mens rea.

Counsel for the Attorney General sought to persuade us that the strict liability rule, that is to say, the rule whereby a person may be liable for contempt of court regardless of whether he intends to interfere with the course of justice, never did apply to a case such as the present. I am not sure what counsel's purpose was in advancing that submission. But whatever his purpose, I was not persuaded. I can see no reason for distinguishing between an interference with the course of justice by, for example, pre-judging the issue

a or bringing unfair pressure to bear on the parties, to which admittedly the strict liability rule always applied, and an interference with the course of justice by destruction of the subject matter. So the strict liability rule would, in my view, have applied to the present case prior to the passing of the 1981 Act.

b The purpose of s 2 of the 1981 Act was to confine strict liability as defined within narrow limits. Thus it was common ground that strict liability does not apply to the facts of the present case, because the proceedings against the Guardian were not active, within the statutory definition, at the time of publication. But the fact that the Independent could not be liable under the strict liability rule does not mean that the Independent cannot be liable at all. Section 6(c) specifically provides that nothing in s 2 shall restrict liability in respect of conduct intended to impede or prejudice the administration of justice. The question is what is the nature of that intent?

c There are three possibilities. The first is that the contemnor is liable if he intends to do the act in question, in this case publish the article, even though he does not intend to impede or prejudice the administration of justice. It is sufficient if the article in fact impedes or prejudices the administration of justice. The second possibility is that the contemnor is liable if he intends to interfere with the course of justice (I use that phrase for brevity) or is reckless whether or not he interferes with the course of justice. The third possibility is that the contemnor is only liable if he intends to interfere with the course of justice.

d Counsel for the Attorney General did not seek to support the first possibility. But he argued strongly in favour of the second. There was, he says, nothing in the pre-existing law to suggest that contempt of court was ever a crime of specific intent. If therefore it was necessary to show a guilty mind on the part of the contemnor, in other words when the strict liability rule did not apply, it was sufficient to show *either* that he intended to interfere with the course of justice, *or* that he was reckless whether he did so or not. This would be in accordance with the ordinary principles of criminal law. Moreover, if it were necessary to show in every case that the contemnor intended to interfere with the course of justice, the protection afforded by the law of contempt to the administration of justice would be undermined.

e Counsel for the Attorney General relied on the following passage from Arlidge and Eady, *The Law of Contempt* para 2-80:

'The best view is that contempt of court is a crime of general intent. There is insufficient authority to indicate that it is a crime of specific intent and the purpose of the jurisdiction might be too easily defeated if it were.'

f He also relied on a later passage, where the authors sound a less certain note (para 4-46):

g 'Since this type of offence has hitherto been absolute, there are no authorities which indicate the precise nature of the *mens rea* required in the case of prejudicial publications which fall outside the Act but which are nevertheless *prima facie* contempts. On principle the contemnor must know the publication contains matter capable of prejudicing particular proceedings; he must know the proceedings are pending or imminent, and he must intend to prejudice these proceedings. It may be that if he is reckless as to any or all of these requirements he will also be guilty.'

h If reckless interference with the course of justice was a ground of liability before the Act, as counsel for the Attorney General submits it was, then there is nothing in the Act itself which restricts that ground of liability. It is true that s 6(c) refers to conduct intended to impede or prejudice the administration of justice, and there is nothing about recklessness. But s 6(c) was enacted for the avoidance of doubt. Since there is nothing in ss 1 or 2 to restrict liability based on recklessness, there was no need to refer to recklessness in s 6(c). Alternatively, 'intent' in s 1 and 'intended to impede etc', in s 6(c) must refer to *general* intent, i.e. basic *mens rea*, which would include recklessness.

j Such was the argument of counsel for the Attorney General. I cannot accept it. Counsel

for the Independent is surely right when he submits that the statutory purpose behind the 1981 Act was to effect a permanent shift in the balance of public interest away from the protection of the administration of justice and in favour of freedom of speech. Such a shift was forced on the United Kingdom by the decision of the European Court of Human Rights in *Sunday Times v UK* (1979) 2 EHRR 245, and was in any event foreshadowed by the recommendations of the Phillimore Committee. If we were to hold that, where the strict liability rule does not apply (because, for example, the publication does not create a *substantial* risk that the course of justice would be *seriously* impeded, but only some lesser risk, or some minor impediment), the publisher might nevertheless be liable if he is reckless, we would certainly not be furthering the statutory purpose. a

But counsel for the Independent has a narrower, and even more compelling, point based on the language on s 1. The strict liability rule is expressed to be a rule whereby a person may be liable 'regardless of intent'. Now whatever else recklessness may or may not mean (and the cases show that the concept is not without its difficulties) it is clear that it is independent of, and frequently contrasted with, intent. Liability based on recklessness is thus a liability regardless of intent. If that is so, then liability based on recklessness is included within the statutory description of the strict liability rule, and is therefore subject to the restrictions imposed by s 2. It must follow that recklessness does not provide the Attorney General with an avenue of escape from s 2, which is the essence of the submission of counsel for the Attorney General. b

Putting the matter another way, s 6(c) of the 1981 Act saves from the operation of ss 1 and 2 conduct which is intended to impede or prejudice the administration of justice. If it was the object of Parliament to save also conduct which is reckless, then Parliament would surely have said so. Sections 1, 2 and 6(c) cover the whole ground. In cases covered by the Act to which the strict liability rule does not apply, there is no room for a state of mind which falls short of intention. There is no middle way. c

I would therefore hold that the mens rea required in the present case is an intent to interfere with the course of justice. As in other branches of the criminal law, that intent may exist, even though there is no desire to interfere with the course of justice. Nor need it be the sole intent. It may be inferred, even though there is no overt proof. The more obvious the interference with the course of justice, the more readily will the requisite intent be referred. d

BALCOMBE LJ. I have had the advantage of reading in draft the judgments of Sir John Donaldson MR and Lloyd LJ, and I gratefully adopt Sir John Donaldson's exposition of the facts relevant to this appeal. e

The question which Sir Nicolas Browne-Wilkinson V-C ordered to be tried as a preliminary point of law, and which he answered in the negative, was in the following terms: f

'Whether a publication made in the knowledge of an outstanding Injunction against another party and which if made by that other party would be in breach thereof, constitutes a criminal contempt of Court upon the footing that it assaults or interferes with the process of Justice in relation to the said Injunction.' g

In the course of the argument before us this preliminary point was refined in two particular respects. (i) It was taken to relate only to a case where the injunction in question is designed to preserve the subject matter of the action (in this case confidential information) pending the trial, and the nature of the subject matter is such that, if the injunction is broken, the subject matter will have ceased to exist, thereby rendering any trial between the parties pointless. (ii) The question was modified so as to ask whether such a publication was capable of constituting a criminal contempt of court, it being accepted by the parties that even if the publication was capable of being contempt of court, it would not be such unless the necessary element of intent were present. If this appeal is to be allowed, the question whether the respondents had the necessary intention h

a to impede or prejudice the administration of justice will have to be decided, on evidence, by the court of first instance. In the event, and with the benefit of hindsight, I think that all parties would now accept that to try and resolve the issues between the parties by the determination of a preliminary point of law was a mistake.

b Contempt of court is generally categorised under two heads. Civil contempt comprises a specific failure to comply with an order of the court by which the contemnor is bound. Criminal contempt is constituted by interference with the administration of justice (see *A-G v Times Newspapers Ltd* [1973] 3 All ER 54 at 71, [1974] AC 273 at 307–308 per Lord Diplock). It is a contempt of the latter class which the Attorney General contends may have been committed in the present case.

c Undoubtedly an act which interferes with the course of justice is capable of constituting a contempt of court. The books are full of cases about such acts. Some, such as assaulting an officer of the court, interference with witnesses or jurors, or disrupting court proceedings, bear little relation to the present case. Much nearer to the circumstances of the present case are those cases where a person has been held guilty of contempt by 'aiding and abetting' the commission of the act forbidden by the court's order. A good example is the early case of *Lord Wellesley v Earl of Mornington* (1848) 11 Beav 180, 181, 50 ER 785, 786 where the distinction is made very clear. The Earl of Mornington was restrained by injunction from cutting timber. His agent, one Batley, cut the timber in question, knowing that this was forbidden. A motion to commit Batley for breach of the injunction was refused, since he was not enjoined, but a motion to commit him for contempt, in knowingly assisting in a breach of the injunction, would have been granted by Lord Langdale MR but for the forbearance of the plaintiff. So also in *Seaward v Paterson* [1897] 1 Ch 545, [1895–9] All ER Rep 1127 it was held that the court had jurisdiction to commit for contempt a person (one Murray) not bound by an injunction, and who, knowing of the injunction, aided and abetted a defendant in committing a breach of it. In the course of his judgment Lindley LJ said ([1897] 1 Ch 545 at 554, [1895–9] All ER Rep 112 at 1130):

f 'Now, let us consider what jurisdiction the Court has to make an order against Murray. There is no injunction against him—he is no more bound by the injunction granted against Paterson than any other member of the public. He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this—not that he has technically infringed the injunction, which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the Court at defiance, and deliberately treating the order of the Court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt as distinguished from a breach of the injunction, which has a technical meaning. . . . It has always been familiar doctrine to my brother Rigby and myself that the orders of the Court ought to be obeyed, and could not be set at naught and violated by any member of the public, either by interfering with the officers of the Court, or by assisting those who were bound by their orders.'

j A modern example is to be found in *Z Ltd v A* [1982] 1 All ER 556, [1982] QB 558. That case concerned the position of a bank which had notice of the terms of a Mareva injunction before the defendant had himself received notice of the injunction. The argument and the effect of the decision is summarised in the following passage from the judgment of Eveleigh LJ ([1982] 1 All ER 556 at 566–567, [1982] QB 558 at 578):

'As was recognised early in the arguments before us in determining what action is called for by a bank which has notice of the terms of a Mareva injunction it is necessary to determine the basis of liability for contempt of court. I think that the following propositions may be stated as to the consequences which ensue when

there are acts or omissions which are contrary to the terms of an injunction. (1) The person against whom the order is made will be liable for contempt of court if he acts in breach of the order after having notice of it. (2) A third party will also be liable if he knowingly assists in the breach, that is to say if knowing the terms of the injunction he wilfully assists the person to whom it was directed to disobey it. This will be so whether or not the person enjoined has had notice of the injunction. The first proposition is clear enough. As to the second, however, it was submitted that until the defendant had notice of the injunction nothing done by the bank could amount to contempt of court. Also two opposing views were canvassed (I use this expression as the arguments were not strictly contentious) as to the extent to which mens rea was a necessary ingredient in determining the bank's responsibility to the court. I will give my reasons for the second proposition and take first the question of prior notice to the defendant. It was argued that the liability of a third party arose because he was treated as aiding and abetting the defendant (i.e. he was an accessory) and as the defendant could himself not be in breach unless he had notice it followed that there was no offence to which the third party could be an accessory. In my opinion this argument misunderstands the true nature of the liability of the third party. He is liable for contempt of court committed by himself. It is true that his conduct may very often be seen as possessing a dual character of contempt of court by himself and aiding and abetting the contempt by another, but the conduct will always amount to contempt of court by himself. It will be conduct which knowingly interferes with the administration of justice by causing the order of the court to be thwarted.'

My use of the phrase 'aiding and abetting' is intended to include conduct of the kind considered by the court in *Z Ltd v A*. But that is the extent of the English cases. There is no English authority which establishes that it is a contempt of court, in the sense of knowingly interfering with the course of justice, for a person who is not prohibited by an order to do something which is forbidden by the order, unless he is 'aiding and abetting' the person named in the order. (There is, however, an obiter dictum to this effect by Henry J in *UK Nirex Ltd v Barton* (1986) Times, 14 October.)

We were also referred to one Irish and three Canadian cases. The Irish case, *Smith-Barry v Dawson* (1891) 27 LR Ir 558, a decision of Chatterton V-C at first instance, is undoubtedly authority for the proposition which the appellant seeks to establish. However, the parties against whom attachment for contempt was sought did not appear and were not represented so that there was no argument against the application, and gave no reasoned judgment but followed an unreported case to the like effect (the *Killiney Foreshore* case). The persuasive effect of this case is thus extremely limited.

The Canadian cases were all concerned with injunctions to restrain picketing in the course of a labour dispute. In all cases the order in question was expressed to operate on third parties. Thus in *Bassel's Lunch Ltd v Kick (No 1)* [1936] OR 445, the order in question restrained 'the defendants . . . or any one assisting or aiding them'. In *Tilco Plastics Ltd v Skurjat* (1966) 57 DLR (2d) 596 the order restrained the defendants 'or person or persons having notice of this Order'. In *Catkey Construction Ltd v Moran* (1969) 8 DLR (3d) 413 the order restrained the defendants 'or anyone having notice or knowledge of such order'. If the court has jurisdiction to restrain persons who are not parties to the proceedings in which the injunction is granted, then it follows that the court will enforce its orders against those persons who knowingly break them, and this could be the explanation of all these cases. However, it is fair to say that in the *Tilco Plastics* case Gale CJHC expressly disclaimed this as the grounds of his decision. He said (at 619):

'In my opinion, the insertion of those words in the order of King, J., did not affect the legal obligations of members of the public, one way or the other. The words may have been inserted to remind the respondent that the order could not be circumvented by any one having knowledge of it, but that is not material. Any

a person who is aware of the substance or nature of a Court order cannot flout it simply because he is not expressly named in that order.”

b Further, a second decision of the Ontario Court of Appeal in *Bassel's Lunch Ltd v Kick* (No 2) [1937] 1 DLR 235, and which was not referred to in the *Tilco Plastics* case, is to the opposite effect. In my judgment the Vice-Chancellor in the present case was fully justified in saying that the state of the authorities under the law of Canada seems to be confused and I derive little or no assistance from these cases.

Accordingly, I reach the conclusion, as did the Vice-Chancellor, that the particular question we have to decide is not covered by binding authority. The result is that we have to approach the question as a matter of principle.

c I have already stated the principle that criminal contempt is constituted by interference with the administration of justice. Thus it will normally require two elements: (1) conduct which interferes with the administration of justice: the ‘actus reus’; and (2) the state of mind which accompanies this conduct: the ‘mens rea’. It was to the question whether the publication by the respondents of material prohibited by the *Observer/Guardian* injunctions constituted the actus reus that the Vice-Chancellor devoted his attention; the question of mens rea was not argued before him. It may have been the absence of any argument as to intent that caused the Vice-Chancellor to fall into error.

d Certainly for my part I was much impressed by the arguments of the respondents as to uncertainty and unfairness, which seemed conclusive to the Vice-Chancellor, as is apparent from the passages from his judgment that have been cited by Sir John Donaldson MR. Nevertheless, once the question of intent was raised, in the circumstances mentioned by the Master of the Rolls, it seems to me that the answer to the preliminary question of law became reasonably clear. I accept, of course, that wholly different considerations are e relevant in considering what conduct may constitute the actus reus, and what state of mind may constitute the mens rea. Nevertheless, in considering whether or not particular conduct is capable of constituting the actus reus, it may be appropriate to test it by considering it in relation to a particular state of mind.

f In the present case the orders made in the *Observer/Guardian* proceedings (*A-G v Observer Ltd* (1986) 136 NLJ 799) indicated the way in which the court intended those proceedings should be conducted, viz that the information derived from or attributed to Mr Wright should remain confidential until the trial of those actions. It cannot seriously be denied that the publications on 27 April 1987 by the present respondents may well have rendered the trial of those actions pointless, at least in relation to those matters which were then disclosed, and thereby prevented the court from conducting those proceedings in accordance with its intention. If one then considers the possibility that g those publications by the respondents might have been made with the sole intention of rendering pointless the *Guardian/Observer* litigation, then it seems to me impossible to say that there would then be no contempt of court: there would be both the necessary actus reus, the publications interfering with the prescribed course of justice in the *Observer/Guardian* action, and the necessary mens rea. I accept that it is highly improbable that it was the respondents’ sole intention to interfere with the *Observer/Guardian* actions, h but that is the difficulty of raising a preliminary question of law: the answer to it must be apt to fit all possible hypotheses.

i So for the reasons which have been given more fully by Sir John Donaldson MR and Lloyd LJ, I, too, would allow this appeal and would respectfully agree with Lloyd LJ in his formulation of the precise ambit of the decision at which we have arrived. I would remit the matter to the High Court.

j On the question of the necessary element of mens rea, it is sufficient to say that I agree with Sir John Donaldson MR and Lloyd LJ that it will be necessary for the Attorney General to establish that the respondents ‘intended to impede or prejudice the administration of justice’ within the saving provision of s 6(c) of the Contempt of Court Act 1981 and that such intent does not include recklessness.

Although I hope I have made it clear in the earlier part of this judgment that the reason why I consider that the publications of the respondents are capable of constituting a criminal contempt of court is because they interfered with the administration of justice, and not because they disobey orders made in the *Observer/Guardian* actions which were not addressed to them, I am conscious that this conclusion is reached by a sophisticated argument which may not be readily apparent to the layman. It seems to me that it would be preferable, in an appropriate case, where it is apparent that the subject matter of an action (e.g. confidential information or a secret process) could be destroyed by its publication by any person, whether a party to the action or not, for the court to make its initial protective order in terms which make it clear to third parties that they, too, must not destroy that subject matter. The question is whether the court has power, in an appropriate case, directly to order third parties not to destroy the subject matter of the action. The general principle was stated by Farwell LJ in *Brydges v Brydges* [1909] P 187 at 191:

"But the Court has no jurisdiction, inherent or otherwise, over any person other than those properly brought before it as parties or as persons treated as if they were parties under statutory jurisdiction (e.g., persons served with notice of an administration decree or in the same interest with a defendant appointed to represent them), or persons coming in and submitting to the jurisdiction of their own free will, to the extent to which they so submit (e.g., creditors of a bankrupt executor, who has carried on business under a power in the will, coming in to claim against the testator's estate in order to obtain subrogation to the executor's right of indemnity). But the Courts have no jurisdiction to make orders against persons not so before them merely because an order made, or to be made, may or will be ineffectual without it. Even in the case of an injunction Lord Eldon says in *Iveson v. Harris* ((1802) 7 Ves 251 at 256-257, 32 ER 102 at 104): "I have no conception, that it is competent to this Court to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause. The old practice was that he must be brought into Court, so as according to the ancient laws and usages of the country to be made a subject of the writ."

See also *Ranson v Platt* [1911] 2 KB 291 and *Marengo v Daily Sketch and Sunday Graphic* [1948] 1 All ER 406. The last case, being a decision of the House of Lords, is clearly binding on this court, unless there is any relevant exception to the general rule. That there is at least one exception appears from a case of my own at first instance, *X CC v A* [1985] 1 All ER 53, [1984] 1 WLR 1422. In that case I held that, in the exercise of the wardship jurisdiction, there was power to make an order (prohibiting the publication of information about the ward) binding on the world at large, when persons who were potentially subject to that order had not been parties to the proceedings in which the order was obtained. (With all respect to Sir John Donaldson MR that was the ratio of my decision, and I still believe it to have been correct.) It is true that I then said that I was satisfied that, if it were not an exercise of the parental jurisdiction in wardship, there would be no such power, but the question whether there might be other exceptions to the general rule was not then before me. I believe that there can be another exception to the general rule which would enable the court to make an order, binding on the world at large, in the circumstances of the present case, where such an order may be appropriate to preserve the subject matter of an action pending trial. The law of contempt is but one example of the court's ability to regulate its own procedures so as to ensure that justice prevails. The rule that courts normally act only in personam is but another example of the same process. If the court needs to ensure that the subject matter of an existing action be preserved against all comers pending the trial of the action, then in my judgment the court can obtain the desired result by introducing another exception to the general rule that the court acts only in personam. I can find nothing in the cases to which I have referred, in which the general rule is stated, to say that the rule is wholly without

exception, and it is not without significance that the Canadian courts have felt themselves able to make such orders.

In this connection the following passage from the speech of Viscount Haldane LC in *Scott v Scott* [1913] AC 417 at 437, [1911-13] All ER Rep 1 at 9 is very much in point:

'While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity.'

In my judgment this passage can apply, *mutatis mutandis*, to the circumstances of the present case. If an interlocutory order to prevent publication of the details of a secret process, where the effect of publicity would be to destroy the subject matter, requires to be made so as to affect third parties, then the inability to make such an order would be just as much a denial of justice as if the litigation had to take place in public.

The ability to make an order against the world at large would of necessity be extremely limited, to be granted only in the most exceptional cases (of which I concede the present could be one), but this seems to me the more satisfactory way of dealing with the problem thrown up by the facts of this case. What I have said in the last part of this judgment is merely an attempt to suggest how the problem might better be dealt with in the future. This course would also have the advantage that a third party in breach of the terms of the order would be liable for civil, rather than criminal, contempt. There is much to be said for treating all contempt which consists (in effect) of disobedience to the terms of an order of the court in one and the same manner.

Appeal allowed. Matter to be remitted to High Court. Leave to appeal to the House of Lords refused.

Solicitors: *Treasury Solicitor; Oswald Hickson Collier & Co* (for the Independent and its editor); *D J Freeman & Co* (for the London Evening Standard and its editor); *Victor Mishcon & Co* (for the London Daily News and its editor).

Diana Procter Barrister.

Attorney General v Guardian Newspapers Ltd and others and related appeals

CHANCERY DIVISION

SIR NICOLAS BROWNE-WILKINSON V-C

20, 21, 22 JULY 1987

COURT OF APPEAL, CIVIL DIVISION

SIR JOHN DONALDSON MR, RALPH GIBSON AND RUSSELL LJJ

22, 23, 24 JULY 1987

HOUSE OF LORDS

LORD BRIDGE OF HARWICH, LORD BRANDON OF OAKBROOK, LORD TEMPLEMAN, LORD ACKNER
AND LORD OLIVER OF AYLERTON

27, 28, 29, 30 JULY, 13 AUGUST 1987

Injunction – Interlocutory – Preservation of position pending trial – Prevention of disclosure of confidential information – Protection of security service – Former security service officer proposing to publish memoirs – Attorney-General obtaining interlocutory injunction against defendant newspapers restraining publication of material derived from officer's memoirs – Subsequent publication of memoirs outside jurisdiction – Whether protection of security service a ground for granting interlocutory injunction – Whether interlocutory injunction should be continued.

W, a former member of the British security service, who had had access to highly classified and sensitive information, proposed to publish his memoirs in Australia but the Attorney General, claiming that in doing so W would be committing flagrant breaches of his duties of secrecy and confidentiality owed to the Crown, obtained an interim injunction in Australia restraining him from publishing there. In June 1986 two national newspapers, the Guardian and the Observer, published an outline of certain allegations made by W in the manuscript of his memoirs. On 11 July the Attorney General obtained interlocutory injunctions in the Chancery Division restraining them from disclosing or publishing any information obtained by W in his capacity as a member of the British security service. The Attorney General intended to seek final injunctions in the same or similar terms, on the grounds that W owed to the Crown a life-long duty of confidentiality and non-disclosure relating to his work in the security service and would be in breach of that duty if he published his memoirs, that the newspapers were under the same duty and that publication would do great harm to the security service. The interlocutory injunctions did, however, except publication of material which was disclosed in open court in the Australian proceedings. In April 1987 three more newspapers, which had not been parties to the injunction proceedings, published further material derived or taken from the manuscript of W's memoirs. The Attorney General subsequently brought proceedings for criminal contempt against those newspapers. In July W's memoirs were published in the United States and became freely available there. Under United States law it was not possible for the Attorney General to obtain an injunction restraining publication. W's book was not disseminated commercially in the United Kingdom but no attempt was made to ban its importation and individual copies could be obtained in the United Kingdom. At the same time another national newspaper, the Sunday Times, published substantial extracts from W's book. Because of the changed circumstances arising from the publication in the United States, the availability in the United Kingdom of W's book and the disclosures in other newspapers, the Guardian and the Observer applied to have the interlocutory injunctions discharged. Meanwhile the Attorney General applied to commit the Sunday Times for contempt. The applications by the Guardian, the Observer and the Attorney General

were heard together by the Vice-Chancellor who discharged the interlocutory injunctions made against the Guardian and the Observer and dismissed the application to commit the Sunday Times. On appeal by the Attorney General the Court of Appeal reversed the Vice-Chancellor's decision and reimposed the injunctions with variations. The newspapers appealed to the House of Lords. The Attorney General cross-appealed against the variation of the injunctions.

b Held (Lord Bridge and Lord Oliver dissenting) – The appeals would be dismissed and the cross-appeals allowed for the following reasons—

(1) (Per Lord Brandon and Lord Ackner) The Attorney General's case for obtaining a final injunction at trial restraining publication of material obtained by W as a member of the security service remained arguable notwithstanding the publication of W's book in the USA, and since the effect of discharging the interlocutory injunctions would be to deprive the Attorney General of any chance of success at trial it would be a denial of justice to refuse to allow the injunctions to continue until the action was heard (see p 347 g to j, p 351 c d f to h j to p 352 a, p 360 g, p 362 d and p 365 j, post).

(2) (Per Lord Templeman and Lord Ackner) The right of the public to be protected by the security service, the need to protect the efficient functioning of the security service in its defence of the realm and the need to prevent the disclosure of information received by W in confidence prevailed over the right of the public to be fully informed by the press and therefore the continuance of the interlocutory injunctions was necessary in the interests of national security (see p 355 c, p 356 a to c, p 358 c d, p 361 a to c, p 362 e h j to p 363 d and p 365 j, post).

(3) Furthermore, in the interests of preventing publication of W's memoirs the proviso to the interlocutory injunctions permitting the publication of material disclosed in the Australian proceedings would be deleted with the result that such material would fall within the ambit of the injunctions (see p 351 h, p 358 a to c and p 365 e f, post).

Notes

For interlocutory injunctions generally, see 24 Halsbury's Laws (4th edn) paras 953–956, for injunctions restraining disclosure of confidential information, see *ibid* para 1014, and for proceedings by the Attorney General to protect a public right, see *ibid* paras 1030–1031.

Cases referred to in judgments and opinions

- A-G v Newspaper Publishing plc and ors* [1987] 3 All ER 276, Ch D and CA.
- A-G v Observer Ltd* (1986) 136 NLJ 799, [1986] CA Transcript 696.
- American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396, [1975] 2 WLR 316, HL.
- Barnes v Addy* (1874) LR 9 Ch App 244.
- Boardman v Phipps* [1966] 3 All ER 721, [1967] 2 AC 46, [1966] 3 WLR 1009, HL.
- Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39, Aust HC.
- Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289, [1965] 1 WLR 1293, QBD.
- Franchi v Franchi* [1967] RPC 149.
- Fraser v Evans* [1969] 1 All ER 8, [1969] 1 QB 349, [1968] 3 WLR 1172, CA.
- G v G* [1985] 2 All ER 225, [1985] 1 WLR 647, HL.
- Hadmor Productions Ltd v Hamilton* [1982] 1 All ER 1042, [1983] 1 AC 191, [1982] 2 WLR 322, HL.
- Mustad (O) & Son v S Allcock & Co Ltd and Dosen* (1928) [1963] 3 All ER 416, [1964] 1 WLR 109n, HL.
- Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413, CA.
- Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA.
- Schering Chemicals Ltd v Falkman Ltd* [1981] 2 All ER 321, [1982] QB 1, [1981] 2 WLR 848, CA.

Snepp v US (1980) 444 US 507, US SC.

Speed Seal Products Ltd v Paddington [1986] 1 All ER 91, [1985] 1 WLR 1327, CA.

Sunday Times v UK (1979) 2 EHRR 245, E Ct HR.

Williams v Williams (1817) 3 Mer 157, 36 ER 61, LC.

Woodward v Hutchins [1977] 2 All ER 751, [1977] 1 WLR 760, CA.

Cases also cited

A-G v Colney Hatch Lunatic Asylum (1868) LR 4 Ch App 146.

A-G v Jonathan Cape Ltd [1975] 3 All ER 484, [1976] QB 752.

A-G v Times Newspapers Ltd [1973] 3 All ER 54, [1974] AC 273, HL.

Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd [1967] VR 37, Vict SC.

Argyll (Duchess) v Argyll (Duke) [1965] 1 All ER 611, [1967] Ch 302.

Coco v A N Clark (Engineers) Ltd [1969] RPC 41.

Cork v McVicar (1984) Times, 31 October.

Francombe v Mirror Group Newspapers Ltd [1984] 2 All ER 408, [1984] 1 WLR 892, CA.

Fraser v Thames Television Ltd [1983] 2 All ER 101, [1984] QB 44.

Garden Cottage Foods Ltd v Milk Marketing Board [1983] 2 All ER 770, [1984] AC 130, HL.

Harbottle (R D) (Mercantile) Ltd v National Westminster Bank Ltd [1977] 2 All ER 862, [1978] QB 146.

Lion Laboratories Ltd v Evans [1984] 2 All ER 417, [1985] QB 526, CA.

Malone v Comr of Police of the Metropolis (No 2) [1979] 2 All ER 620, [1979] Ch 344.

R v Civil Service Appeal Board, ex p Bruce (1987) Times, 22 June, DC.

Reading v A-G [1951] 1 All ER 617, [1951] AC 507, HL.

Motions

On 11 July 1986, on the application of Her Majesty's Attorney General, Millett J granted injunctions restraining the defendants, (1) Guardian Newspapers Ltd, Peter Preston and Richard Norton-Taylor and (2) The Observer Ltd, Donald Treford, David Leigh and Paul Lashmar, until after judgment in the action or further order from (a) disclosing or publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British security service and which they knew, or had reasonable grounds to believe to have come or been obtained directly or indirectly from Mr Wright, and (b) attributing in any disclosure or publication made by them to any person any information concerning the British security service to Mr Wright whether by name or otherwise. On 25 July 1986 the Court of Appeal affirmed the injunctions but subject to, inter alia, the proviso that no breach of the order would be constituted by the disclosure or publication of any material disclosed in open court in the Supreme Court of New South Wales unless prohibited by the judge there sitting or which after the trial there in action no 4382 of 1985 was not prohibited from publication. On 1 May 1987 the defendants applied by notice of motion for the injunctions to be discharged. On 13 July 1987 the Attorney General applied for an order under RSC Ord 52 that Times Newspapers Ltd and Andrew Neil, the publisher and editor of the Sunday Times, be respectively fined and committed to prison for contempt of court in publishing articles entitled 'My MI5 memoirs, by Peter Wright' and 'Spycatcher—the book they tried to ban' published in the issue of the Sunday Times for 12 July 1987. The three motions were heard together. The facts are set out in the judgment of Sir Nicolas Browne-Wilkinson V-C.

John Mummery and Philip Havers for the Attorney General.

Desmond Browne for the Guardian.

Stephen Nathan for the Observer.

Anthony Lester QC and David Pannick for the Sunday Times.

SIR NICOLAS BROWNE-WILKINSON V-C. These are three applications. The first two are made by the Guardian and Observer newspapers to discharge interlocutory injunctions made against them in two orders made by Millett J on 11 July 1986 and confirmed (subject to minor modifications) by the Court of Appeal on 25 July 1986. The two orders made against the newspapers are in the same terms. As amended, the newspaper is restrained from—

(1) disclosing or publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service and which they know, or have reasonable grounds to believe to have come or been obtained whether directly or indirectly from the said Peter Maurice Wright

(2) attributing, in any disclosure or publication made by them to any person any information concerning the British Security Service to the said Peter Maurice Wright whether by name or otherwise

Provided that

(1) this Order shall not prohibit direct quotation of attributions to Peter Maurice Wright already made by Mr. Chapman Pincher in published works, or in a television programme or programmes broadcast by Granada Television

(2) no breach of this Order shall be constituted by the disclosure of publication of any material disclosed in open Court in the Supreme Court of New South Wales unless prohibited by the Judge there sitting or which, after the trial there in action no 4382 of 1985 is not prohibited from publication

[(3)] that no breach of this Order shall be constituted by a fair and accurate report of proceedings in (A) either House of Parliament in the United Kingdom whose publication is permitted by that House; or (B) a court of the United Kingdom sitting in public.'

The order gives the parties liberty to apply.

The third application is technically one by the Attorney General against the Sunday Times claiming an injunction restraining the further publication of extracts from Mr Wright's memoirs called *Spycatcher*, the ground of the application in that case being that such publication would constitute a contempt of court in that it would thwart or frustrate the orders of the Court of Appeal made against the Guardian and the Observer.

It is common ground that if I discharge the orders of 25 July 1986 made against the Guardian and the Observer, the Attorney General's claim for relief against the Sunday Times on the ground of contempt of court must also fail. I will therefore consider, first, the applications made by the Guardian and the Observer to vary or discharge the orders made against them.

The questions raised on this application are of very great importance, of public interest and of not a little legal difficulty. In any ordinary circumstances I would have reserved my judgment, but, due to the pressure of time and the desire of all parties (whatever the outcome) to go to the Court of Appeal, I must do my best to give my reasons at once.

The background facts are by now only too well known. It is not necessary for me to state them again in any detail. Shortly, Mr Wright was employed for many years in a senior capacity by the British security service. He retired in 1976 and now lives in Australia. Due to circumstances which I need not recount, he was determined to write and publish his memoirs in which he detailed allegations, amongst other things, of activities in the security service, some of which are allegedly illegal.

The publication by Mr Wright appears to be a most serious breach of the duty of confidence which, so the Crown alleges, might gravely prejudice the efficiency of the British security service.

When it became known that he was to write his memoirs the Crown began proceedings in Australia in the Supreme Court of New South Wales against Mr Wright and the

publishers who were proposing to publish his memoirs. The claim in Australia is based on breach of the duty of confidentiality which exists between the Crown and its servants. As I understand it, that such a duty of confidentiality existed has been admitted at all times by all concerned. The question arising in the Australian case was whether the Crown had in some way lost its right to enforce that obligation of confidentiality. a

The subsequent history is long and rather involved. On Sunday, 22 June and Monday, 23 June 1986 the Observer and the Guardian published an outline of the allegations, so it was said, that were going to be made in the Australian proceedings. As a result the Crown, in the form of the Attorney General, moved for an order before Millett J, which, as I have said, was made on 11 July. On appeal by the newspapers Millett J's judgment was upheld. At that time there was no subsisting publication of any reports, let alone memoirs, of Mr Wright and the allegations that he made. It was the first breach in the security wall. b

The Guardian and the Observer obtained leave to appeal to the House of Lords and, unfortunately, due to circumstances beyond everybody's control, that appeal against the interlocutory order has not yet been heard and is not to be heard until, I think, November of this year. c

After the Court of Appeal order, the trial in Australia took place before Powell J, in November and December 1986. It received massive publicity in this country and, I believe, elsewhere. On 13 March 1987 Powell J gave judgment in New South Wales in which he rejected the Attorney General's claim for injunctions against Mr Wright and the publishers. The Attorney General immediately appealed to the Court of Appeal of New South Wales. That appeal is to commence being heard on 27 July this year. Pending the appeal Mr Wright and the publishers have given undertakings in the Australian courts not to publish the memoirs. d

On 27 April 1987 the Independent published a major summary of the allegations and statements made in Mr Wright's book, attributed them expressly to Mr Wright and, I think I am right in saying, included verbatim quotations from the book. On the same day the London Evening Standard and the London Daily News copied parts of what the Independent published. Similarly, at much the same time, I think on 28 and 29 April, the Melbourne Age and the Canberra Times in Australia published a major disclosure of what was contained in *Spycatcher*, the book. e

Prompted by the Independent's publication, the Attorney General moved to commit the editor of the Independent and to sequester its assets for contempt of court, on the grounds that the Independent by so publishing was frustrating the administration of justice, in that the publication by the Independent would frustrate and render worthless the orders which the Attorney General had obtained against the Guardian and the Observer. f

At much the same time the Guardian and the Observer themselves applied to discharge the injunctions made against them. The grounds of such application were that there was a change of circumstance, that the decision in the Australian court and the cross-examination of the Crown's leading witness, Sir Robert Armstrong, showed a material change in circumstance since the order was granted by Millett J and they additionally relied on the publication in the Independent. g

At much the same time, again, I think, on 3 May, the Washington Post published an extensive article about the contents of *Spycatcher*. h

On 7 May I started to hear the application by the Guardian and the Observer to discharge the order made against them. At that stage it seemed to me that the determination on the facts then before me of the question whether or not the order should be discharged was largely dependent on whether similar injunctions could directly or indirectly be made to restrict the rest of the English press from publishing the material which the Guardian and the Observer were publishing. I accordingly determined to deal with the contempt proceedings against the Independent on a preliminary point, to see whether or not the application by the Attorney General for contempt against the i

Independent, not being a party enjoined by any order of the court, could succeed. I ruled that it could not succeed since no order was extant against the Independent (see *A-G v Newspaper Publishing plc* [1987] 3 All ER 276).

On 14 May Viking Penguin Inc, a subsidiary of an English company, announced its intention of publishing *Spycatcher* in the United States.

On 2 June I gave the judgment that I have mentioned, holding that the Independent was not in contempt. There was an immediate appeal to the Court of Appeal. On 15 June the Guardian and the Observer applied to restore the hearing designed to discharge the orders against them, relying on the threatened publication by Viking Penguin in the United States. I refused to deal with the matter until the Court of Appeal had given their decision on the contempt case.

On Sunday, 12 July, the Sunday Times contained the first instalment of the serialisation of very extensive extracts from the book *Spycatcher* itself. The editorial covering the publication stated that the serialisation in the Sunday Times was timed to coincide with the publication of the book in the United States and was also thought not to breach the law of this country, on the basis of the judgment that I had given, ie that the Independent was not in contempt. On the next day, 13 July, the Attorney General launched committal proceedings against the Sunday Times on the basis that the publication of the *Spycatcher* extracts was a contempt of court.

On 14 July Viking Penguin in the United States had copies of the book *Spycatcher* on sale throughout the United States. The putting of the book on sale took nobody by surprise. The Treasury Solicitor was aware of the matter. The evidence before me shows that steps were taken, first to try and persuade the English holding company to use its powers to dissuade Viking Penguin Inc in New York from publishing. The English company declined so to do, whether rightly or wrong it is not for me to say, on the basis that that would be interfering with the internal business of one of their subsidiaries. The Treasury Solicitor, as I understand it, also took advice whether proceedings in the United States court could succeed in restraining the publication of *Spycatcher* in the United States. He was told that he would not succeed, and no proceedings were started. However, a letter seeking to dissuade Viking Penguin Inc from publishing was sent, without success.

The putting of the book on sale on the United States produced, according to the evidence, this result. The book rapidly moved into the best seller category, being on display in bookshops throughout the United States, and in particular on the bookstall at John F Kennedy Airport. The book was selling like 'hot cakes', if I may use a colloquialism, particularly to people of English descent. The evidence shows that books purchased in the United States were being brought back from the United States to this country. One entrepreneurially-minded person brought a very substantial quantity of the books, sought to sell them in Parliament Square and, having failed there, was apparently last seen trying to sell them on the A40. The fact is that the book is available in this country and has been imported. In addition, it is possible by mail order and use of credit cards to order the book by telephone from the United States. The position is, therefore, that the total text of *Spycatcher* has now been published in the United States and is readily available to anybody in this country who has the necessary money and knowhow to obtain it from America.

The evidence discloses that the government considered whether they should use available powers to prevent the import of the book. The decision was taken not to prevent such import, on the grounds that it would be unworkable and ineffective.

On 15 July the Court of Appeal concluded the hearing of the Independent contempt proceedings, and announced that it was allowing the appeal against my decision, but without giving its reasons at that stage.

On 16 July the Attorney General applied for an injunction against the Sunday Times to restrain it from continuing the serialisation of *Spycatcher* in that paper. At the time the reasons of the Court of Appeal for holding that a contempt was possible were not available, and I granted an injunction against the Sunday Times prohibiting the

publication last Sunday, such injunction to last over until Tuesday of this week.

On 17 July the Court of Appeal gave its reasons for holding that the Independent could be guilty of contempt (see *A-G v Newspaper Publishing plc* [1987] 3 All ER 276). Very shortly stated, they were these: that the publication of excerpts from Mr Wright's book was capable of being a contempt of court, as being the guilty act, provided that in publishing the Independent had the necessary intent to constitute contempt of court.

On the same day, I am told, in New South Wales an application was made by Mr Wright and the publishers to the Court of Appeal, which application is to be heard on 27 July, that they should in any event be released from their undertakings not to publish in Australia on the grounds of the publication by Viking Penguin of the whole book.

On 20 July these three applications started to be heard before me. That is the history to date.

The application by the Guardian and the Observer is made under the liberty to apply reserved in the orders. There is no dispute as to my jurisdiction to vary the order or as to the proper approach to the matter. It is common ground that the first thing that has to be shown is that there has been a material change of circumstances since July 1986. If there has been a material change of circumstances, then I must start afresh and determine whether, in the light of the circumstances which now exist, it is or is not appropriate to grant injunctions against the Guardian and the Observer.

As I understand it, counsel for the Attorney General did submit that there was no material change in circumstances justifying my reviewing and discharging the existing order. He points out that many of the material factors which existed in 1986 still exist. The injunction was purely an interlocutory injunction against the Guardian and the Observer until the trial of the action: that action against the Guardian and the Observer is still pending. The appeal to the House of Lords against the interlocutory order is still pending. The Australian action has not yet been determined, the appeal there is still pending. There is an undertaking prohibiting publication in Australia still. And he submits that the facts relied on in Sir Robert Armstrong's affidavit, which was the basis of the judgment given in July 1986, remain the same.

I am unable to accept those submissions. In my judgment, there has been a most substantial change in circumstances. In 1986, as I have said, the publication in the Guardian and the Observer was, so far as that court was aware and so far as I am aware, the only breach in the security walls. Otherwise the matter had not hit the press in any way, save that the action was pending in Australia. Of the allegations made by Mr Wright in the book there had been no other indication.

The case as made before Millett J in 1986 was based on Sir Robert Armstrong's affidavit, which was not contraverted as a matter of fact and on which there was no cross-examination, a fact to which the Court of Appeal attached importance. In para 10 of that affidavit, his first affidavit, he deposed as follows:

'The publication of any narrative prepared or contributed to by the Second Defendant [Mr Wright] which is based upon information available to him as a senior member of the British Security Service would be likely to cause unquantifiable damage by reason of the disclosures involved. Additionally, it will clearly damage the work of the British Security Service and thereby the national security of the United Kingdom in the following further respects:—(a) the intelligence and security services of friendly foreign countries with which the British Security Service is in liaison would be likely to lose confidence in its ability to protect classified information (b) the British Security Service depends upon the confidence and co-operation of other organisations and persons. That confidence would suffer serious damage should the Second Defendant [Mr Wright] reveal information of the nature described above (c) there would be a risk that other persons who are or have been employed in the British Security Service who have had access to similar information might seek to publish it.'

Millet J summed up the position as it was before him in these words:

a 'It is clear from those passages that the true nature of the Attorney General's objection is not to the fresh dissemination of allegations about past activities of security service of the kind outlined in the recent articles published by the defendants. They are ancient history and have been the subject of widespread previous publicity. The Attorney General's concern is twofold: first, that a former senior officer of the security service should publicise what he has learnt in the service, a fact which of itself has grave consequences for the proper working of the security service; and secondly, that he should disclose the part he played himself in the actions of the security service, disclosure which could provide information not previously known to foreign powers and endanger the effective discharge by the service of its responsibilities. Although I do not overlook or underestimate this second aspect, the whole thrust of Sir Robert's evidence seems to me to be directed principally to the first . . . If the appearance of confidentiality is essential to the effective operation of the security service, then damage will have been caused by the news that Mr Wright was even contemplating writing his memoirs. That is unfortunate, but cannot be helped. The damage can, however, be undone only if he is swiftly and *effectively* stopped, and seen to be stopped. There can be no objection to the disclosure of the fact that Mr Wright is seeking to publish information acquired by him as a member of the security service, and that the government is seeking to restrain him. But publication in the meantime of extracts from or summaries of what Mr Wright wishes to publish must cause the very harm which Sir Robert Armstrong describes.'

e Therefore, the approach taken by Millet J, which was expressly approved and upheld by the Court of Appeal, was that the essence of the claim then before him was that the Crown must be able to stop the publication and attribution to Mr Wright of his version of events occurring within the security service at the time when he was in a relationship of the strictest confidence. The only way that could be achieved was by granting an injunction effectively to demonstrate that the security service was leakproof.

f In my judgment, the facts I have already recounted show that that position has radically altered since 1986. First of all, the trial in Australia has taken place amid wide publicity. There has been the publication by the Independent which may well be a contempt of court. In any event, summaries and quotations from the book have appeared. There has been widespread publicity in the foreign press. The Sunday Times, again possibly in contempt of court, has published the first instalment. Those matters by themselves might not be sufficient. Certainly there must be some question whether publications in contempt of court can have any effect on the validity of an existing order. But, far more important than any of those, is the outstanding fact that the whole book *Spycatcher* has been published. It is not a question of part revelation of what is in it: the whole of it has been published in the United States and is available and has reached this country. The scale of publication appears to be that some 50,000 copies have already been printed and largely sold and a further order for 25,000 has been made.

h On the grant of the original injunction the judge had to weigh up various conflicting issues. The issue that he had before him at that stage was the freedom of the press to publish allegations of unlawful conduct by the security service as opposed to the harm done, outlined by Sir Robert Armstrong in his affidavit, in allowing an ex-member of the security service to publish his memoirs with all the consequent effects on the confidence of friendly intelligence services and the possible disclosure of damaging information to less friendly intelligence services.

j In the contempt proceedings in the Court of Appeal Sir John Donaldson MR graphically described the nature of confidential information. He explained why proceedings relating to confidential information fall into such a very special category, and in particular why

an interlocutory injunction preserving the confidentiality is so critical. In *A-G v Newspaper Publishing plc* [1987] 3 All ER 276 at 291 he said:

'But if, pending the trial, the court allows publication, there is no point in having a trial since the cloak of confidentiality can never be restored. Confidential information is like an ice cube. Give it to the party who undertakes to keep it in his refrigerator and you still have an ice cube by the time the matter comes to trial. Either party may then succeed in obtaining possession of the cube. Give it to the party who has no refrigerator or will not agree to keep it in one, and by the time of the trial you just have a pool of water which neither party wants. It is the inherently perishable nature of confidential information which gives rise to unique problems.'

It was that factor which led the Court of Appeal, on the facts of that case, to hold that publication by another newspaper of the confidential information could destroy the subject matter of the claim by the Crown in the action against the Guardian and the Observer and, thereby, could constitute a contempt of court. The point is mentioned at several points by Sir John Donaldson MR. He said of the 1986 orders (at 296-297):

'The court was making an order for the preservation of the confidentiality of the Wright material pending the trial. Publication meanwhile, whether by those defendants or others, would deprive the Attorney General of his rights in advance of the trial, because information once published, at least on the scale achieved by publication in national newspapers, can never be truly confidential again . . . The publication of Mr Wright's memoirs in full at that time [that is, in 1986] would have prevented any effective adjudication on the Attorney General's claim in the *Observer/Guardian* action and the publications complained of, whilst not going to this length, were very far from being of minimal effect. To the extent that they placed Wright material into the public domain, which had not previously been there, they deprived the Attorney General of a part of the rights which he was asserting in these actions and to this extent made it impossible for the court to do justice between the parties.'

Speaking of an argument that to allow the contempt of court would offend the principles of natural justice, he said (at 302):

'What would offend those principles would be to hold that these newspapers were free to destroy the subject matter of the action between the Attorney General and the Guardian and Observer newspapers, incidentally whilst denying the defendants in that action the same right, thus depriving both the Attorney General and those newspapers of their right to have their dispute determined in accordance with law.'

To a similar effect was Lloyd LJ's judgment, where he said of the Independent's actions (at 307):

'It is not a mere usurpation of the court's function. It is the destruction, in whole or in part, of the subject matter of the action itself.'

Now all those statements were made in a different context, namely the context of contempt of court; the Court of Appeal made clear that in the Independent contempt proceedings they were not dealing with the impact of the Viking/Penguin publication or the Sunday Times publication. But the reasoning behind the decision in the contempt case seems to me to apply with great force on the applications before me. If it is right that publication of part of the Wright memoirs is destructive of the Attorney General's rights in the action against the Guardian and the Observer, the same must be true, and indeed truer, of the publication and availability of the whole of the memoirs even if published by a third party. The publication of the book in the United States had completely undermined the basis on which Millett J weighed the conflicting public interest in the way that he had to do. It has, to my mind most unfortunately, been

demonstrated that the security service is not leakproof. Publication in the United States is publication and those friendly allied security services which, on Sir Robert Armstrong's evidence, rely to a considerable extent on the leakproofness of the British security service will have been disillusioned by that publication wherever it took place. Similarly all the allegations that Mr Wright has made in his memoirs and all the information that is sensitive if it reaches the hands of unfriendly powers is now available. It would be naive to suppose that those in the security field for other governments are less able to buy the book in New York than anybody else. Therefore, to my mind, there is a basic change in the very matters which were the foundation of the grant of the injunctions in 1986. They have ceased to apply; the injunction no longer preserves a position in which it can be said that the British security service is leakproof; the various matters which Sir Robert Armstrong deposed to in his affidavit are now known. Accordingly, I approach this case on the basis that there has been a material change of circumstances and I must now, in the light of present circumstances, decide how it is proper to exercise my discretion.

The Attorney General maintains that it is right, even in the present circumstances, to restrain the Guardian and the Observer from publication. The first question I have to determine is whether the Attorney General, in the changed circumstances, has an arguable case such that at the trial he might obtain an injunction against the Guardian and the Observer.

The contention by the Guardian and the Observer is that the publication of *Spycatcher* and its free availability to anyone in the United Kingdom who has the money and the skill to obtain it has completely changed the matter. They say the Crown no longer has an arguable case for an injunction at the trial. They say it is of the essence of any claim based on confidential information that the information should be confidential and remain confidential. They submit that if the information in question is known to an appreciable section of the public an injunction can no longer be granted against republication of such information. They rely on the well-known statement of Lord Greene MR in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413 at 415 where he said:

'I think that I shall not be stating the principle wrongly, if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge.'

They also rely on other decisions: *Williams v Williams* (1817) 3 Mer 157, 36 ER 61, the decision of the House of Lords in *O Mustad & Son v S Allcock & Co Ltd and Dosen* [1963] 3 All ER 416, [1964] 1 WLR 109 and *Franchi v Franchi* [1967] RPC 149.

They also rely on the statement by Lord Denning MR in *Woodward v Hutchins* [1977] 2 All ER 751 at 754-755, [1977] 1 WLR 760 at 764. In that case it was sought to restrain Mr Hutchins, the former press agent of the plaintiffs, from disclosing information. Lord Denning MR said:

'As Bridge LJ pointed out in the course of the argument, Mr Hutchins, as a press agent, might attend a dance which many others attended. Any incident which took place at the dance would be known to all present. The information would be in the public domain. There could be no objection to the incidents being made known generally. It would not be confidential information. So in this case the incident on this jumbo jet was in the public domain. It was known to all the passengers on the flight. Likewise with several other incidents in the series.'

Lord Denning MR is plainly indicating that once in the public domain no injunction will be granted.

In *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 the Crown was claiming an injunction against the publishers of certain government documents which were plainly confidential and which were to be serialised in a newspaper. An

injunction was granted but before the existence of the injunction was known certain newspapers and certain copies of the book had been distributed. Mason J held that the Crown was not entitled to an injunction on the grounds of breach of confidence, but went on and said (at 54):

'In any event, the question whether an injunction should be granted on this ground is resolved against the plaintiff by the publication that has taken, and is likely to take, place. The sales of the book already made, including those made to Indonesia and the United States, the countries most likely to be affected by its contents, and the publication of the first instalment in the two newspapers, indicate that the detriment which the plaintiff apprehends will not be avoided by the grant of an injunction. In other circumstances the circulation of about 100 copies of a book may not be enough to disentitle the possessor of confidential information from protection by injunction, but in this case it is likely that what is in the book will become known to an ever-widening group of people here and overseas, including foreign governments.'

It should be noted that the publication in that case was publication by the very defendants themselves and not by any third party.

That is a substantial body of authority supporting the proposition that once information has got into the public domain, as it has in the present case, the right to an injunction goes. However, counsel for the Attorney General submits that is far too simplistic a view, and I agree with him. He submits that there is here a difficult point of law which, on ordinary principles of *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396, should await the trial of the action. He submits that a distinction must be drawn between the position at the date the confidential information was communicated and any later date. He accepts that if, at the date the information was communicated, it was not in fact confidential it cannot be confidential information capable of protection. That position, says counsel, is to be contrasted with one in which, there having been the imparting of confidential information to a confidant, there has been a subsequent publication, in whole or part, after the information has been imparted in confidence. He says that is the present case. The information acquired by Mr Wright was acquired in confidence. That duty of confidentiality remains and is a live one. That confidentiality having attached in Mr Wright, the fact that information subsequently becomes available to the public cannot alter the position. It remains confidential information; anybody obtaining it with notice of the fact that it was communicated in confidence himself comes under the same obligation not to disclose it further, whether or not at the time he learns of it it is still confidential information.

Counsel for the Attorney General relies heavily on two decisions of the Court of Appeal. The first is the decision in *Speed Seal Products Ltd v Paddington* [1986] 1 All ER 91, [1985] 1 WLR 1327. That was a case in which an injunction was claimed restraining the defendants from disclosing confidential information. The defendants applied to strike out the claim for an injunction on the ground that they, the defendants, by their own action had rendered the information unconfidential. The judge had struck out the claim for an injunction. The Court of Appeal reversed him and Fox LJ said ([1986] 1 All ER 91 at 94, [1985] 1 WLR 1327 at 1331):

'In relation to the protection of confidential information which has been published, there are three situations. (1) The publication is made by or with the consent of A (the person to whom the obligation is owed). In such a case, the owner of the confidential information, A, has given it to the public at large. B, who previously owed A a duty not to disclose the information is released from that duty (see *O Mustad & Son v S Allcock & Co Ltd and Dosen* [1963] 3 All ER 416, [1964] 1 WLR 109). He has the same rights as every other member of the public. (2) The publication is made by or with the consent of X (a stranger).'

a Fox LJ then read certain quotations from a judgment of Roskill J in *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289 at 300, 302, [1965] 1 WLR 1293 at 1316, 1319 and continued ([1986] 1 All ER 91 at 95, [1985] 1 WLR 1327 at 1332):

b 'It appears, therefore, that the fact that a third party has published the information does not necessarily release B (the person who owed the duty of confidence) from his obligations. The court will prevent B from abusing his position of confidence. (3) The third case is where the publication is by or with the consent of B (the person who owes the obligation of confidence). He, I would suppose, cannot be in a better position than he would be if publication had been made by a stranger.'

c It should be noted that the Court of Appeal is there dealing with a case in which an injunction is sought against the person to whom the information is disclosed in confidence, that is to say the person who owed the direct duty to the confider.

d Counsel for the Attorney General also relied on the decision of the Court of Appeal in *Schering Chemicals Ltd v Falkman Ltd* [1982] 2 All ER 321, [1982] QB 1. In that case an injunction was granted against the original confidant of the information, a Mr Elstein, and also against Thames Television, who were employing Mr Elstein to publish the confidential material. That injunction was granted notwithstanding the fact that the information which they were using was apparently available from some other public source. It may well be that *Schering Chemicals Ltd v Falkman Ltd* is explicable on the basis of the springboard doctrine, namely that you cannot protect yourself from liability for the use of confidential information if you have used a compilation of that information as a springboard to get yourself into the market quicker.

e So stand the arguments. I find the difficulty of this subject arises largely from the fact that virtually all cases, like the present, have been decided under pressure of time. The principles on which the law of confidential information is based have never been clarified and remain, to my mind, obscure. That makes it difficult when, as I believe is the present case, the law is applicable to a different set of circumstances from those which have previously arisen. In most cases it is not necessary to determine what is the position of a third party coming into possession of the confidential information. The proceedings are usually between the impartor of the confidential information (the confider) and the person to whom confidential information was disclosed (the confidant). To the extent that third parties are involved, so far as I can see in all cases hitherto decided the third parties are those who have been assisting the confidant in committing the very breach of duty that he was precluded from doing, namely publication. For example, the third parties have been publishers or employers who have sought to use the confidential information of 'poached' employees. In such cases it really does not matter much whether the claim by the confider is based on contract, equitable rights, property rights or many other different forms of rights which have been mentioned in the cases. The matter only becomes of importance where one has the use of confidential information by a third party who has not himself been a party in any way to the revelation of the confidential information to the public. So, in the present case, it is not suggested, nor could it be, that the Guardian and the Observer have in any sense been involved in any activity with Mr Wright leading to the publication of his book. Anything they would wish to publish in the future would be obtainable from the public domain from *Spycatcher* itself. They have not aided and abetted Mr Wright in his breach of duty. That seems to me to be a new case not covered by authority.

f As at present advised I consider that the law as to the enforceability of rights of confidence against third parties would be best analysed in the traditional terms of equitable rights over property. This is a field in which the experience of equity has spread over many centuries in seeking to enforce property rights against others who have come into possession of the property. The position, as I see it, is this. Information as such is not property in any sense; it is available to the whole world. If, however, it is communicated

in circumstances which impose a duty of confidence on a confidant, the information becomes subject to certain specific rights. Those rights may arise under contract between the confidant and the confider, or they may arise by way of some fiduciary duty enforceable in equity. That duty as between confidant and confider, as in many other spheres, will be specifically enforceable in equity. The personal obligation as between the two original parties may, therefore, give rise to a property right, i.e. an equitable interest in the property in relation to which the duty exists. That would apply whether the property was tangible or intangible. The equitable interest of the confider in the confidential information would, in accordance with ordinary equitable principles, be enforceable against the whole world save the bona fide purchaser for value without notice of the confider's rights to confidentiality. So far as I can see, such a formulation covers all the cases to which I have been referred. a

As between the confider and the confidant there may be a duty, either under contract or in some other way, which remains enforceable by injunction notwithstanding that the information in relation to which it arose has since come into the public domain, as in *Schering Chemicals Ltd v Falkman Ltd* and *Speed Seal Products Ltd v Paddington*. The same would be true of any person who knowingly participated in the dishonest breach of trust, that is the unlawful disclosure by the confidant of the information, for example the publisher or the employer of the employee who is disclosing trade secrets in breach of obligation. Such a person, on ordinary equitable principles as set out in *Barnes v Addy* (1874) LR 9 Ch App 244, would be liable himself for participating in the dishonest breach of trust and to have an injunction granted against him even though the information had otherwise ceased to be wholly confidential. That would cover the position of Thames Television in *Schering Chemicals Ltd v Falkman Ltd*. b

If, as in a number of the cases, the confider himself had been the person who has made public the information which he subsequently claims to be confidential, on ordinary principles he is precluded from enforcing an obligation of confidentiality when he himself has breached it. That, as I understand it, is *O Mustad & Son v S Allcock & Co Ltd and Dosen*. A third party, learning of information which is still confidential, and who has knowledge of the fact that it is confidential, will himself be bound by the equitable right of the confider because he has obtained a species of property, or quasi-property, namely the confidential information, with notice of the confider's rights and otherwise than by way of purchase for value. On ordinary equitable principles the duty of confidence would be enforceable against him. That approach is clearly reflected, although without full argument, in the judgment of Nourse LJ, where he said ([1986] CA Transcript 696): c

'As for the newspapers and any other third party into whose hands the confidential information comes, an injunction can be granted against them on the simple ground that equity gives relief against all the world, including the innocent, save only a bona fide purchaser for value without notice.'d

If, on the other hand, a third party who is not a participator in the confidant's breach of duty receives information which at the time of receipt is in the public domain, that is to say, he gets it from the public domain, in my judgment he would not, as at present advised, come under any duty of confidence. Once the information has got into the public domain it again ceases to be property in which any right can subsist. It is again information available freely to everybody; nobody has a right in it. There is no longer trust property in which the confider can have an interest. That analysis, if right, would provide an answer to the present case. In this case the Guardian and the Observer, if they go out tomorrow and buy *Spycatcher*, will be buying something which is public knowledge and publicly available. They will acquire that information at a time when it is public information and information in which the Crown no longer can have any property. They would accordingly not be subject to any injunction against them to restrain further republication of what is already public property. e

However, that is simply my view on what is a novel and difficult point of law. Counsel f

- for the Attorney General quite rightly presses me with the fact that the duty of third parties as to confidential information cannot necessarily be properly defined in terms of property interests. He relies particularly on *Fraser v Evans* [1969] 1 All ER 8 at 11, [1969] 1 QB 349 at 361–362, where Lord Denning MR indicates that the confider's right is not a property right, but a right of a special kind which affects the conscience of the person who receives the information with knowledge that it has originally been communicated in confidence. He also relies on *Boardman v Phipps* [1967] 3 All ER 721 [1967] 2 AC 46, where there was a dispute between their Lordships whether information could or could not be property at all.

- The submission of counsel for the Attorney General is that there is a triable case along the following lines. He says that if information has been impressed with a duty of confidentiality, and somebody acquires that information knowing that it was so communicated originally, then any person acquiring that information with that knowledge himself comes under a duty not further to disclose it, and that duty exists whether or not the information is otherwise in the public sphere. For myself I have grave doubts whether that is good law, even on the analysis of Lord Denning MR. It would seem to me surprising if a duty of confidence could be imposed for the first time on the third party at a time when the information was no longer confidential. In the present case it would lead to strange results. The businessman who bought *Spycatcher* at John F Kennedy Airport, read it on the flight back, knowing that it was an unlawful revelation by Mr Wright of his experience in the security service, would, I think counsel had to accept, come under a duty not to tell his wife about it when he got home. Counsel for the Attorney General said, and obviously quite rightly, that nobody would start proceedings for an injunction in such a case: a claim for an injunction would only be made against a widespread republication such as by the press. But I find it a strange state of the law that the gentleman could be under a legal obligation not to tell his wife and be doing an unlawful act if he did it. Likewise, in the much more common case of trade secrets. If a trade secret imparted to an employee was published by the employee quite generally, and somebody else in the same trade knowing that, but in no sense dealing with the confidant, learnt of the trade process which had been imparted in confidence, but had now been made public, presumably, if the submission of counsel for the Attorney General is right, the third party could be restrained from the use of that information, even though he obtained it from an entirely public and separate source, because he knew that it had originally been communicated in confidence.

- I have great reservations whether the law as proposed by the Attorney General is good law. But I do accept what counsel for the Attorney General says, namely that I have been trespassing in novel fields raising difficult points of law. Loyally following the principle of *American Cyanamid* I must hold that being such a point of law I should not determine it on this application. I must assume, with however much reservation, that there is here an arguable point of law available to the Attorney General that he will get an injunction at trial, notwithstanding the publication of *Spycatcher*. That throws me on to the ordinary *American Cyanamid* principles, an arguable case having been shown.

- As in 1986, damages would be an ineffective and inappropriate remedy for the Attorney General. An injunction is the only thing that is any good to him. Likewise (although it does not seem to arise in this case since there is no cross-undertaking in damages) damages would be no compensation to the newspapers if they were restrained from publishing what is by any standards at the moment very hot news indeed.

- So one has to determine where the balance of convenience or, as Sir John Donaldson MR prefers it, the balance of inconvenience lies. The principle is that, where there is confidentiality of information and that is in conflict with a public interest of some sort, then the court should, other things being equal, favour the preservation of confidentiality, unless convinced that the other public interest outweighs it. The process is one which is laid down by Sir John Donaldson MR in the earlier 1986 case, where he says (136 NLJ 799 at 800):

'Where there is confidentiality, the public interest in its maintenance has to be overborne by a countervailing public interest, if publication is not to be restrained. In some cases the weight of the public interest in the maintenance of the confidentiality will be small and the weight of the public interest in publication will be great. But in weighing these countervailing public interests or, perhaps more accurately, those countervailing aspects of a single public interest, both the nature and circumstances of the confidentiality and the nature and circumstances of the proposed publication have to be examined with considerable care. This is what is sometimes referred to as the principle of proportionality—[that] is the restraint or lack of restraint proportionate to the overall assessment of the public interest.'

It is that approach that I adopt in dealing with the case.

Despite the undue length of this judgment, I have not set out all the background facts that exist in this case. I have read a very large amount of material on it, and in exercising my discretion I pay, I hope, full regard to all the circumstances of the case. I have certainly tried to take them into account in reaching my decision. However, there seem to me to be certain factors which are of special importance in deciding what is the right exercise of discretion.

Firstly, in favour of granting an injunction, it seems to me material that the injunction now sought is still an interlocutory injunction pending trial. It is not a final order locking out the press from reporting this matter, if at the trial it is held that the Attorney General is not entitled to an injunction. Moreover, the appeal is pending in the House of Lords against the original injunction.

Secondly, it is right to bear in mind that the allegations made by Mr Wright in *Spycatcher* are in a number of respects 'old hat'. They have been bandied around, some would think ad nauseam, in Mr Chapman Pincher's book and in subsequent articles. There is nothing very new about them. There is nothing urgent about them, in the sense that they concern recent events. I also bear in mind that it is no fault of the Crown that this information has come into the public domain to the extent it has. The Crown has done everything that it thought itself able to do to stop publication worldwide of these memoirs.

I also take into account what I think flows from the decision of the Court of Appeal in the Independent contempt case (*A-G v Newspaper Publishing plc* [1987] 3 All ER 276), namely that, if I continue the injunction against the Guardian and the Observer, that will probably be effective to prevent publication by any elements of the press in the United Kingdom, since after the Court of Appeal decision on contempt publication by any other newspaper is likely to be held to be a contempt. There is, therefore, no discriminatory effect in injuncting simply two newspapers out of the whole of the press.

I take further into account that in some respects these proceedings are ancillary to the Australian proceedings. There has been a trial on the merits there, there has been a judgment on the merits, and there is to be an appeal on the merits. There is an injunction or undertaking running still in Australia. In some respects it would be unusual if in ancillary proceedings I were to discharge the injunction pending the determination of the Australian appeal. But I think that is of limited force. The injunction in Australia applies to the person I have called the 'confidant', namely Mr Wright, and somebody who aided and abetted Mr Wright, namely the publisher in Australia. I think that different considerations apply there.

I next take into account a fact which is unpalatable but true, that to permit publication would be to admit that this court was unable to safeguard secrets of great public importance. And let nobody underestimate how important these secrets are. There seems to have been a temptation to treat this case as an unreasonable pursuit by the government of unreasonable ends. That is not a view I share. The revelation of secrets of a security

- agent, it seems to me, is highly undesirable. I therefore think it is most regrettable, if it
- a proves to be the case, that there is no way in which the court can preserve that confidentiality. On the other hand, it seems to me idle to shut one's eyes to the realities of the position. The book has been published. Its contents are known in this country. They are available to whoever wants to buy them. Taking Sir John Donaldson MR's 'ice cube', it is not that either of the parties has melted it. It has been put in a refrigerator, but the American publication is as though somebody had turned off the refrigerator: the
- b ice-cube has melted, without the intervention either of the Crown or of the defendants, the Guardian and the Observer. The reality of the matter is that under American law this confidentiality was not preservable. The other factor is that this court's jurisdiction does not extend beyond these shores and beyond the people who are here. It is the combination of publication abroad and the nature of the confidential information which together have led to the result, which in my judgment is undoubtedly true, that this court cannot
- c now secure what the Crown wish to achieve, namely that the book is not published.

- There remains what counsel for the Attorney General urges is the persisting public interest, namely to prevent general dissemination of the contents of this book through the press within the United Kingdom. By discouraging general dissemination those who are tempted to follow Mr Wright's example in the future and write their memoirs hot from the security service will not find it such a satisfactory or profitable business. I think
- d there is force in that. I think that the ability to restrain the unauthorised use of confidential memoirs by those who do not mind abusing their confidence, so as to discourage others from doing it, is a real point. I do not think it can just be swept aside.

- The United Kingdom is likely to be the best market for anybody writing these memoirs, and to discourage the use of that market by such people would be, I think, a
- e discouragement. But I confess that I find that element of 'pour encourager les autres' a very limited public interest as compared with what was under consideration in 1986. That is the public interest which has to be put into the balance in the weighing operation. It has to be borne in mind that discouragement can also be provided by the course that the government is now pursuing, of claiming an account of profits. There is also evidence before me to suggest that if the contract of employment with members of the security
- f service adopted a rather less broad brush and were limited so as to preclude publication containing material not approved by the security service, that would be a contract which would be enforceable in the United States of America, so that the long-term harm in other cases may not be so great. 'The American route' may not be open for long.

Those are the factors as I see them in favour of granting an injunction.

- On the other side, I see these as the primary factors. Since the full text of *Spycatcher* is
- g now available in this country to anyone with the money to get it, a large part of the purpose of the Attorney General's proceedings in this case has now been defeated. I echo the words in the contempt proceedings in the Court of Appeal: the purpose has been destroyed. That that has happened is not, as I understand it, the fault of the Guardian or the Observer. They have not assisted the publication by Mr Wright of his book. The matter has been a matter of acute public discussion and concern on the material that is
- h already available. In some respects it is a cause célèbre. It seems to me undesirable in those circumstances of half knowing that the matter should stay in that state of half-light unless there are compelling reasons against full publication. I also think that the freedom of the press, and counsel for the Attorney General accepts this, is a matter of very great public importance in its own right. It is true that it is not absolute. If there is a countervailing public interest, then the freedom of the press cannot prevail. One of the
- j safeguards of our country and our system is to have a press that can search matters out, disclose them, and give rise to informed public discussion. In my judgment, in weighing the harm to the public by the discouragement of future memoirs by future members of the security services one has to bear in mind what to my mind is a very important factor, namely, that one should not restrain publication in the press unless it is unavoidable.

I think that is particularly so in the present case where the Guardian and the Observer allege that what they wish to publish discloses iniquity and unlawful conduct in the public service. Other pressures short of publication, it is said, have not lead to an investigation. They wish to publish. a

I should mention a suggestion which I understood counsel for the Attorney General to make, namely, that although the information might not be restrained if a private individual were going to publish it, it should be restrained if the press were going to publish it because that would do so much more damage. I entirely accept that it would do more damage, but that seems to me the negation of the freedom of the press. If the press is precluded from saying things that other people are not precluded from, that seems to be not a freedom of the press but an additional fetter on it. b

Finally, I have borne in mind, rightly or wrongly, one further factor of the public interest. I think the public interest requires that we have a legal system and courts which command public respect. It is frequently said that the law is an ass. I, of course, do not agree. But there is a limit to what can be achieved by orders of the court. If the courts were to make orders manifestly incapable of achieving their avowed purpose, such as to prevent the dissemination of information which is already disseminated, the law would to my mind indeed be an ass. Counsel for the Guardian likened the Crown's attitude to Canute forbidding the tide to come in, and I confess there have been occasions recently when I have felt like the little Dutch boy being asked to put a finger in the hole in the dyke when in fact the whole embankment has broken down two hundred yards upstream. The checking of small leakages when in fact the whole of the news is out in the form of a book is likely in my judgment to give rise to a degree of lack of respect for the court seeking to achieve the unachievable. c

The truth of the matter is that in the contemporary world of electronics and jumbo jets news anywhere is news everywhere. But whilst the news is international, the jurisdiction of this court is strictly territorial. Once the news is out by publication in the United States and the importation of the book into this country, the law could, I think be justifiably accused of being an ass and brought into disrepute if it closed its eyes to that reality and sought by injunction to prevent the press or anyone else from repeating information which is now freely available to all. It is an old maxim that equity does not act in vain. To my mind that is good law and the court should not make orders which would be ineffective to achieve what they set out to do. d

For those reasons I prefer, and on balance with considerable hesitation, the arguments against granting any further injunction in this matter. I believe the matter to be quite nicely weighted and in no sense obvious. But, doing the best I can with the materials, and in particular the matters I have stressed, I do not think that a sufficient degree of public interest has been shown in the present case. True it is that the presumption is in favour of confidentiality, but the public interest to be weighed in terms of the security service in this case now seems to be so small as compared with the public interest in freedom of the press and the other matters I have mentioned that I do not think that presumption can prevail. e

For those reasons I will discharge the orders against the Guardian and the Observer. It follows that the relief by way of injunction to restrain the contempt of court against the Sunday Times will also fail. f

I would finally like to stress two points. I have been dealing, and dealing only, with the case of the Guardian and the Observer where they, as third parties not involved in the publication of the work itself, have hitherto been restrained from reproducing information now freely available to the general public. I would not like anything I have said to be taken as directly applicable to or indeed as meant to apply to the pending application in Australia to discharge the undertakings given by Mr Wright and the publishers there. In the terminology I have used, Mr Wright was the confidant, the person who undertook directly the duty of confidence which he is proposing to break. g

a His publishers are directly involved in that publication. To my mind such a case raises different considerations from those that I have been dealing with.

b Secondly, I would not like anybody to think that this judgment is a charter for other members of the security services who are considering publishing their memoirs. It may well be that anybody who, unlike Mr Wright, is in this country and subject to the jurisdiction of this court, who seeks to join in the business of publishing memoirs of confidential information in breach of his or her duty would be enjoined from breaching that duty and suffer the consequences if they chose to break it. I say again that I do not underestimate the seriousness of what Mr Wright has done in this case. I do not in any sense criticise, even if it were my job, the seriousness with which the government has pursued this case. Anybody else who thinks that they can play fast and loose with the public security of this country should not treat this case as suggesting that they will be free to do so, unless they choose to leave this country for good.

c For those reasons, I will discharge the injunction.

Injunctions against the Guardian and the Observer discharged. Application for continuing injunction against the Sunday Times dismissed.

Celia Fox Barrister.

d Appeal

The Attorney General appealed to the Court of Appeal.

John Mummery and Philip Havers for the Attorney General.

Desmond Browne for the Guardian.

e *Stephen Nathan for the Observer.*

Anthony Lester QC and David Pannick for the Sunday Times.

SIR JOHN DONALDSON MR.

The timetable

f The Attorney General has appealed against orders made by Sir Nicolas Browne-Wilkinson V-C at 2 pm on Wednesday, 22 July after a hearing which lasted a little over two days. This court sat 20 minutes later on the same day in order that we might be told what papers to read before the oral argument, which began at 10 am yesterday. The time is now 3 pm on Friday, 24 July. I understand that if any party is sufficiently dissatisfied with our decision to wish to appeal to the House of Lords, their Lordships would probably be prepared to entertain such an appeal on Monday, 27 July, which, coincidentally, is the day on which a related appeal is to be heard in the Court of Appeal of New South Wales.

g I mention this chronology in the possibly vain hope that it may help to dispel the popular myth that the courts are slow to reach decisions in situations of real urgency. This has been such a situation because the Sunday Times wishes to know at the earliest possible moment whether it can resume its serialisation of *Spycatcher*, and the media generally have a need to have all uncertainty removed concerning what they may or may not publish.

The applications to the Vice-Chancellor

j The Observer and the Guardian newspapers applied to discharge the injunctions granted by Millett J on 11 July 1986, as varied by this court on 25 July 1986. In each case the injunctions had been sought and obtained on behalf of Her Majesty's government suing in the name of the Attorney General. The Sunday Times has appeared to support the Observer and the Guardian, as it is entitled to do, because it is affected by these injunctions.

The injunctions

These injunctions have been in force from 25 July 1986. They are in the following terms: the newspaper is restrained and the editor is restrained from— a

(1) disclosing or publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service and which they know, or have reasonable grounds to believe to have come or been obtained whether directly or indirectly, from the said Peter Maurice Wright b

(2) attributing in any disclosure or publication made by them to any person any information concerning the British Security Service to the said Peter Maurice Wright whether by name or otherwise

Provided that

(1) this Order shall not prohibit direct quotation of attributions to Peter Maurice Wright already made by Mr. Chapman Pincher in published works or in a television programme or programmes broadcast by Granada Television c

(2) no breach of this Order shall be constituted by the disclosure or publication of any material disclosed in Open Court in the Supreme Court of New South Wales unless prohibited by the Judge there sitting or which, after the trial there in action no 4382 of 1985 is not prohibited from publication d

[(3)] that no breach of this Order shall be constituted by a fair and accurate report of proceedings in (A) either House of Parliament in the United Kingdom whose publication is permitted by that House; or (B) a court of the United Kingdom sitting in public.

Events since July 1986

It is not necessary to elaborate on the general background to this litigation, as it is well known and was set out in some detail in the judgment of this court given on Friday, 17 July 1987 in the contempt proceedings brought against the Independent, the London Evening Standard and the London Daily News (see *A-G v Newspaper Publishing plc and ors* [1987] 3 All ER 276). However, I should list the matters relied on by the applicant newspapers as justifying the discharge of the July 1986 injunctions. They are: (1) the trial in Australia of the action brought by Her Majesty's government against Mr Wright and his Australian publishers, which received wide publicity in this country; (2) the decision of Powell J that Her Majesty's government was not entitled to a final injunction, although there was no challenge to their right to have publication of *Spycatcher* prohibited in Australia pending the result of the appeal to be heard by the Court of Appeal of New South Wales this Monday, 27 July 1987; (3) the publication by the Independent on 27 April of a summary of the allegations made in Mr Wright's book, including some quotations from that book; (4) the publication on 27 or 28 April 1987 in the Melbourne Age and the Canberra Times of disclosures of what is said to be contained in *Spycatcher*; (5) the publication of the first instalment of the serialisation of *Spycatcher* in the Sunday Times on 12 July 1987; (6) the publication in the United States on 14 July 1987 of an edition of *Spycatcher* by Viking Penguin Inc of New York. The initial print run was 50,000 copies, but there is to be a further printing; (7) the failure by Her Majesty's government to place import restrictions on this edition of *Spycatcher*, as a result of which some copies have been brought to this country by travellers and advertisements have appeared inviting British residents to order copies for posting to them in this country; (8) a very recent publication by the Washington Post of a 40,000 word summary of *Spycatcher*. e
f
g
h
j

The stage which the primary proceedings have reached

The primary proceedings, to which all other proceedings are in a sense ancillary, although the contempt proceedings do not necessarily stand or fall with them, are the actions by Her Majesty's government against the Observer and the Guardian claiming permanent injunctions substantially in the terms of the interlocutory injunctions with

a which this appeal is concerned. No date for trial has yet been fixed and the purpose of the interlocutory injunctions was to limit the damage suffered by all the parties concerned, pending a full and final hearing of the mutually inconsistent claims of the government on the one hand and the Observer and the Guardian on the other. Their purpose, in a word, was damage limitation for the benefit of whomsoever should later be found to have been right when the action had been fully tried. By contrast, the Australian proceedings have been fully tried and the Australian courts, unlike our courts, are in a position to determine the rights of the parties which have appeared before them. This does not, of course, dispense with the need for a full trial here for at least two reasons. The first is that none of the defendant newspapers have been parties to the Australian proceedings. The second is that the Australian courts will be applying Australian law in an Australian context and, in particular, in the context of the public interest from an Australian point of view.

c

The Vice-Chancellor's decision

The Vice-Chancellor held that there had been a material change of circumstances since July 1986 and that, as a consequence, he had to re-exercise the court's discretion to restrain the Guardian and the Observer from publication. I venture to doubt whether this was the right approach. The government had obtained an injunction in terms approved by this court. The proper question was not whether, if the government had been applying for an injunction in July 1987, it would have succeeded, but whether, in the light of events between July 1986 and July 1987, justice required that the existing injunctions be wholly discharged or varied in any particular.

e *The triable issue*

Consistently with this approach, the Vice-Chancellor first asked himself whether there was an arguable case that the government might obtain a permanent injunction at the conclusion of the full trial, which has yet to come. The point was fully argued before him and his conclusion was that the relevant issue was whether the confider (the government) had rights of confidentiality against third parties (the Observer and the Guardian) who had not themselves been a party in any way to the revelation of the confidential information to the public by the confidant (Mr Wright). He said that this was something which was not covered by any reported decision of the courts and that, whilst he might doubt whether the confider had such rights, it was certainly arguable that the government has such rights and would obtain an injunction at the trial notwithstanding the publication of *Spycatcher*.

g This conclusion is accepted for the purposes of this appeal.

The balancing exercise

The Vice-Chancellor rightly concluded that an award of damages to neither party would provide an adequate or appropriate remedy for any wrongs suffered pending the trial of the action. He therefore addressed himself to the question of whether the justice of the case called for the continuation of the injunction. Both parties may have been adopting extreme positions, which they did not wish to weaken. However that may be, it seems to have been the fact that neither they nor the Vice-Chancellor considered the option of modifying the injunction. As the matter was presented to him, and as he appears to have perceived it, it was all or nothing. In this I think he was in error.

j The Vice-Chancellor expressed his reasons for deciding to discharge the injunctions in the following terms. [Sir John Donaldson MR then set out the passage at p 329 j to p 333 c of the Vice-Chancellor's judgment and continued:]

The appellate function

Before turning to the submissions of the parties I remind myself that the appeal is against the exercise of a judicial discretion and it is not sufficient that we may think that,

faced with this problem, we would have exercised the discretion differently. Initially our function is one of review only (see *Hadmor Productions v Hamilton* [1982] 1 All ER 1042 at 1046, [1983] 1 AC 191 at 220). This court, as an appellate court, may not intervene, unless it is satisfied that the judge exercised his discretion on a wrong principle or that, the judge's decision being so plainly wrong, he must have exercised his discretion wrongly (see *G v G* [1985] 2 All ER 225 at 228–229, [1985] 1 WLR 647 at 652). a

The newspapers' case

There is no cross-appeal and no respondent's notice seeking to uphold the decision under appeal on different or additional grounds. The newspapers' case is thus essentially that which the judge upheld. b

The Attorney General's case

Counsel for the Attorney General advanced three interlocking and cumulative submissions. c

1. *Inconsistency.* The judge's judgment contained, he said, a fundamental internal inconsistency in that, having held that the government had an arguable case for a permanent injunction at the trial, he failed to provide any available protection for that potential right. Consciously or subconsciously, whilst holding that the government had an arguable case, he was being swayed by his personal doubts whether that case was well founded in law. The Vice-Chancellor said (p 328, ante): d

'In this case the Guardian and the Observer, if they go out tomorrow and buy *Spycatcher*, will be buying something which is public knowledge and publicly available. They will acquire that information at a time when it is public information and information in which the Crown no longer can have any property. They would accordingly not be subject to any injunction against them to restrain further republication of what is already public property.' e

2. *Finality.* The effect of discharging the injunction would be to render any injunction granted at a much later date after a full trial an empty gesture without substance or effect, because of the publications which would have occurred meanwhile. f

3. *Futility.* The Vice-Chancellor, having rightly directed himself that the law would be regarded as an ass and be brought into disrepute if the courts ever closed their eyes to reality and that, in the words of the maxim, 'equity does not act in vain', failed to analyse correctly what could be done by way of effective injunctive relief at the present juncture. g

Conclusion

I have come to the firm conclusion that the Vice-Chancellor erred in his reasoning and that his exercise of discretion was 'wrong' within the meaning of the authorities in circumstances in which it becomes both the right and the duty of an appellate court to substitute its own exercise of discretion for that of the trial judge. h

The starting point is that any information concerning the British security service which was acquired by Mr Wright as a senior officer of that service was impressed with the seal of confidentiality, the confider being Her Majesty's government and the confidant being Mr Wright.

If the matter stopped there, the fact that, in breach of his duty of trust, he published information which purported to be so acquired would not place such information 'in the public domain' in the sense that the seal of confidentiality would be broken and anyone would be free to use it or republish it. (I say 'purported to be so acquired' because there is no evidence of how much, if any, of the text of *Spycatcher* has any basis of truth. For aught I know it may all be true or it may all represent the embittered imaginings of an elderly man in poor health or there may be some mixture of fact and fiction. Furthermore, where national security is concerned, the confider cannot be expected to i

confirm or deny the accuracy of individual passages or to confirm or deny their sensitivity.)

I invited counsel for the Guardian to consider the case of a palace servant who, in breach of his duty of confidentiality, published his memoirs in the United States, and I suggested that there could be no doubt but that, even if he could not under United States law be restrained from further publication, he would be restrained in this jurisdiction both from republishing and from further publishing. Counsel did not dissent, but suggested that the servant would have been employed under a contract making express provision for a lifelong obligation of confidentiality. For my part I do not accept that a palace servant has a greater obligation of confidentiality than that of a senior officer of the security service.

But this is not the straightforward case of palace servant. The newspapers' case is and always has been that part of the matters with which Mr Wright deals in *Spycatcher* (he says a small part) were already in the public domain by reason of publications to which the government had tacitly agreed. This is not accepted, but for the purposes of the balancing exercise, I have to assume that this *might* prove to be the case. I shall not, however, assume that it *will* prove to be the case. The second part of their case is and always has been that Mr Wright has revealed unlawful conduct on the part of the service or some of its officers and that the public interest in the exposure of what is quaintly known as 'iniquity' overrides the public interest in confidentiality, even when the need for confidentiality is so overwhelmingly and obviously necessary in the national interest. Here again I have to remind myself that, whilst I must assume that this *might* prove to be the case, it might not, and, in any event, mere allegations of iniquity can never override confidentiality. They must be proved and the burden of proof will lie on the newspapers.

Subject to the effect of events subsequent to July 1986, these considerations are those which led to this court affirming the existing injunctions and, on ordinary principles, would require both the Vice-Chancellor and this court to reaffirm them. Only the House of Lords could take a different view.

So I turn to those subsequent events. The newspapers contend that during this 12-month period a mass of material emanating directly or indirectly from Mr Wright has entered the public domain and so lost the seal of confidentiality. To use the words of Lord Greene MR in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413 at 415, it has become 'public property and public knowledge' and so has lost 'the necessary quality of confidence about it'. Or, to use the Vice-Chancellor's phrase (p 327, ante): 'Anything they [the newspapers] would wish to publish in the future would be obtainable from the public domain from *Spycatcher* itself.'

For my part I accept that to the extent that these publications have been read the information to which they relate has become public knowledge, but not that it has entered the public domain, so losing the seal of confidentiality, because that only occurs when information not only becomes a matter of public knowledge, but also public property. The only post-July 1986 publication which *could* render confidential information public property is that revealed in the Australian proceedings or in the United Kingdom Parliament. On the hypothesis that the government would otherwise successfully establish its right to confidentiality at the trial, it will be able to require the court to treat all other publications as tainted by the fact that Mr Wright was their source and so incapable of becoming public property. This, of course, applies in particular to the publication of *Spycatcher* itself, which counsel for the Attorney General described, not inaccurately and in a very happy phrase, as 'just Mr Wright in hard covers'.

For these reasons I do not consider that the government's right to interlocutory protection for its claim to confidentiality is in any material respects dented by the events since July 1986. This does not, however, establish that the Vice-Chancellor reached a wrong decision because, as he so rightly said, equity does nothing in vain. In homely language, the law and the courts do not make empty gestures. So I ask myself: how empty a gesture would it be to maintain this injunction?

This takes me back to the grounds put forward by the government when seeking the injunction in July 1986 and to para 10 of Sir Robert Armstrong's affidavit of 9 September 1985, sworn in the Australian proceedings and exhibited to Mr M L Saunders's affidavit of 27 June 1986. This was in the following terms:

'The publication of any narrative prepared or contributed to by the Second Defendant [Mr Wright] which is based upon information available to him as a senior member of the British Security Service would be likely to cause unquantifiable damage by reason of the disclosures involved. Additionally, it will clearly damage the work of the British Security Service and thereby the national security of the United Kingdom in the following further respects:—(a) the intelligence and security services of friendly foreign countries with which the British Security Service is in liaison would be likely to lose confidence in its ability to protect classified information (b) the British Security Service depends upon the confidence and co-operation of other organisations and persons. That confidence would suffer serious damage should the Second Defendant [Mr Wright] reveal information of the nature described above (c) there would be a risk that other persons who are or have been employed in the British Security Service who have had access to similar information might seek to publish it.'

Quite apart from other publications, the publication of *Spycatcher* itself will have given every national intelligence agency information, whether true or false, which cannot be retrieved by injunction or otherwise. To grant or maintain an injunction with this object in view would be a totally empty gesture and wholly wrong.

But the claim that publication, or further publication, would damage the work of the British security service and thereby the national security of the United Kingdom requires more careful study. The actual protection of national secrets was, of course, a major ground for the original claim to injunctive protection. That can no longer be achieved, but this secondary ground which is elaborated in paras (a), (b) and (c) is not to be underrated and, even if part of it may have been undermined, it is still necessary to consider whether what remains would justify interlocutory injunctive relief of some sort or whether that would be an empty gesture, rightly to be regarded as the law making an ass of itself.

All three paragraphs are interlinked, but paras (a) and (b) involve the proposition that the co-operation which may be expected from the intelligence and security services of friendly foreign countries will be adversely affected to the extent that they believe that there might be a repetition of Mr Wright's conduct by another officer or officers. It is no doubt with this consideration in mind that Her Majesty's government has relentlessly sought to limit the publication of Wright material, although it cannot achieve the impossible if the laws of foreign countries do not provide the necessary assistance. I make that observation as a statement of fact rather than as a criticism, for foreign countries are entitled to make such laws as they see fit.

But there is another way in which the government can restore the confidence of friendly foreign countries, or at least limit the loss of confidence. This is the aspect to which para (c) is directed and consists of seeking in every possible way to deprive Mr Wright, and all who seek to profit from his disclosures, of any benefit which they may already have derived or which they would derive from further publication. No doubt it is with this in mind that indications have been given of an intention to seek an account and payment to the government of all profits made by Mr Wright from his allegedly unlawful conduct. We are not at present concerned with this aspect, but let no one think that this involves a volte-face or U-turn, a change from a stance of 'Thou shalt not publish' to 'Let us go into partnership'. It is entirely consistent to seek to prevent a dishonest servant or agent from pursuing an unlawful course of conduct and, to the extent that that fails, to seek to deprive him of all benefit.

In the context of injunctive relief, the Vice-Chancellor recognised that the United Kingdom was 'the best market', i.e. the most profitable market, for memoirs such as *Spycatcher* and that a denial of this market to the maximum extent practicable would 'encourager les autres'. I would not myself have put it that way, because I hope and believe that Mr Wright is almost unique. What I would have said is that the knowledge that Mr Wright's breach of trust would not be rewarded financially would very significantly raise the morale of all the hardworking, honest and trustworthy members of the security service who could not conceive of ever doing what Mr Wright has done. But, whichever way it is put, it seems to me that anything which has this result could make a significant contribution to restoring the confidence of friendly foreign intelligence agencies.

So I look again at the existing injunctions. Clearly they are much too wide for the achievement of this limited purpose. But a revised injunction would be quite another matter. The variation which I have in mind would involve the deletion of substantive paras (1) and (2) and the substitution of a new single paragraph reading:

'In the course of business, publishing or causing or permitting to be published to any person the whole of, or any passage, extract or excerpt from, the text of the book entitled *Spycatcher* purporting to be written by Peter Maurice Wright and the whole of, any passage, extract or excerpt from, any statement whether written or oral by or purporting to be made by Peter Maurice Wright concerning the British security service or its activities or any other security service or its activities.'

And there would be a new proviso immediately following that, reading:

'This order shall not prevent the publication of a summary in very general terms of the allegations made by Mr Wright.'

The other provisos would remain unaltered, save that I would delete the words 'or which, after the trial there in action no 4382 of 1985 is not prohibited from publication'. If it be held that the law of Australia does not prevent publication by or on behalf of Mr Wright in that commonwealth, the position there will be the same as it appears to be in the United States and it is not clear to me why such a conclusion should be treated as decisive of a quite different issue, namely whether as a matter of English law Mr Wright, or anyone else within the jurisdiction, should be permitted to profit from the exploitation of the United Kingdom market for Wright material. Certainly this should not be an automatic consequence and the newspapers and anyone else affected by the injunction should be free to apply to the court for a modification of the injunction after the Australian proceedings are fully concluded, if they consider the result of those proceedings to be material.

We did, in the course of argument, indicate to the parties that we were minded to make some such injunction as I have indicated, and we asked for their comments. We have taken account of their comments, and in particular a request that I indicate in the course of my judgment, by words if I could not indicate it precisely in the injunction itself, what was the purpose which we were seeking to serve. The answer is this: the purpose of the proviso which I have indicated, namely that this order shall not prevent the publication of a summary in very general terms of the allegations made by Mr Wright, is to enable the media to report on Mr Wright as legitimate news but not to act as his publishers or publicists.

To the extent that the Vice-Chancellor discharged the injunctions rather than modifying them along these lines, I consider that, for the reasons submitted by counsel for the Attorney General and because the Vice-Chancellor treated the application to discharge the injunctions as if it was an application by the Attorney General for new injunctions, his decision was wrong and we are bound ourselves to exercise the discretion vested in the court, which I would do by modifying the injunction in the manner which I have indicated.

If I might conclude with a summary. (1) The task of the court at this stage in the action is to seek to preserve the rights being claimed by Her Majesty's government on the one hand and by the newspapers on the other. (2) The best way to have done this would have been by preventing Mr Wright and everyone else from publishing *Spycatcher* until, after a speedy trial, his right to make disclosures about the work of the security service had been fully investigated. (3) If Mr Wright was *not* entitled to make those disclosures, much damage would have been avoided. If Mr Wright *was* entitled to make them, the delay would have been of no consequence, since his disclosures relate to a period which is already long past. (4) It having proved possible for *Spycatcher* to be published in the United States, everyone having any interest, whether legitimate or otherwise, in Mr Wright's allegations may be assumed to have bought a copy. There is, therefore, no point in seeking to keep these allegations secret, although in some circumstances the offence which will be given to friendly countries would probably be increased if the allegations were given additional credence by widespread publicity in the United Kingdom. (5) Since it is *not* unlawful to possess or read a copy of *Spycatcher* in the United Kingdom or abroad, it would be wrong to impose any injunction which limited this freedom. (6) It is, however, quite another matter to allow Mr Wright and those assisting in the commercial exploitation of his allegations to be allowed to profit thereby at a time when *prima facie* this involves a gross breach of Mr Wright's obligation of confidentiality. This should therefore be prohibited unless and until it is established to the satisfaction of the court that the making of these allegations does not involve such a breach of duty on the part of Mr Wright because, for example, the confidentiality is overridden by the public interest in the exposure of alleged 'iniquity'.

I very much appreciate that, owing to the time factor, the judgment which I have just delivered could be considerably improved as a matter of presentation. But in substance, this is my view and I would allow the appeal accordingly.

RALPH GIBSON LJ. I agree that these appeals should be allowed to the extent proposed by Sir John Donaldson MR and for the reasons given by him.

Sir Nicolas Browne-Wilkinson V-C, because of the great urgency and pressure of time in which these proceedings have unavoidably been conducted, was required to give judgment immediately after the ending of the arguments in what is a difficult and important case. In a judgment which has drawn the admiration, I believe, of all who have read it, and which has made the task of counsel and of this court so much easier on these appeals, he 'on balance [and] with considerable hesitation' concluded that the arguments against continuing the injunctions were to be preferred to those in favour of that course.

If the choice were between discharging the injunctions entirely and maintaining the injunctions in the form in which they were made, notwithstanding the alterations in the circumstances already described by Sir John Donaldson MR and in the judgment of the Sir Nicolas Browne-Wilkinson V-C, I would, I think, with regret at the impotence of the law as the Vice-Chancellor expressed it but, having had the benefit of the Vice-Chancellor's judgment, without the hesitation which he experienced, have upheld his conclusion that the injunctions must be discharged. In my judgment, however, the court is not faced with that stark choice. Events over which our law can have no control have impaired the extent to which our law can protect those rights of the Attorney General which, pending trial of the issues, this court assumes he may prove. Those events have not, in my judgment, impaired in any way the rights which may be established: they are as good against Mr Wright as ever they were, and as good against the Guardian and the Observer who have always known of the obligation of confidence which Mr Wright was under and that, unless special defence or answer could be established, had been gravely breached by him.

In carrying out the balancing exercise to which the Vice-Chancellor set himself, he had to consider the importance of the public interest in the unfettered freedom of the

a press against the utility of maintaining this injunction in the new circumstances in service of what the Vice-Chancellor identified as 'the remaining public interest' to prevent general dissemination of the contents of the book through the press within the United Kingdom, so that by discouraging general dissemination those who are tempted to follow Mr Wright's example in the future and write their memoirs hot from the security service will not find it a satisfactory or profitable business. The Vice-Chancellor said that there was force in that and that it was a real point.

b He thought, however, that that was a very limited public interest compared with what was under consideration in 1986. As to the freedom of the press he considered that it was of particular relevance that what the Guardian and the Observer wished to publish is material which, if true, discloses iniquity and unlawful conduct in the public service. He concluded that, on balance and, as I have said, with hesitation, the arguments against granting a further injunction outweighed those in favour of retaining the existing injunction.

c That process of balancing requires to be carried out again, in my judgment, once consideration is given to modification of the injunctions to meet the new circumstances. The book has been published and is available in this country, and I accept that it is not reasonable to try to maintain the injunctions in their original form because so to do causes public inconvenience and impairment of public discussion and information for no sufficient benefit in maintenance of the rights which the Attorney General is seeking to enforce. If the injunction is modified so as to permit the reporting and discussion of the relevant facts, namely the nature of what Wright has alleged, then the interference with the freedom of the press will, in my view, be tolerable until the trial of the action. If the injunction is directed to commercial publication of Wright's book etc, the law will not appear to be trying to prevent a man handing his copy of the book bought abroad to another person in this country. The injunction so modified will not, in my judgment, be futile but, on the contrary, will do what the law sets out to do, namely to protect asserted rights as far as can fairly be achieved until, by trial, they are proved or disproved.

e Moreover, as I think, by making such an order the court will not lose, or deserve to lose, public respect for the legal system. It will go some way, as far as it is now in my view reasonable to go, to fulfill the court's task, which is to protect the rights of a litigant until the trial. The secrets themselves, of course, cannot now be safeguarded. The rights of the Attorney General, which he will seek to prove at the trial, include the right to prevent the further publication of the confidential information which Wright acquired, whether directly by him to his own profit or through others who have acquired what they hope will be publication rights to the confidential information. It would be wrong, in my view, for the court to decline to continue the injunctions if modified to the extent proposed by Sir John Donaldson MR.

f Sir John Donaldson MR has referred to the principles which govern the interference by this court with the exercise of the discretion of the judge. I agree with him that, for the reasons he has given, the Vice-Chancellor, who was not asked to consider the modification of the injunctions, is shown to have gone wrong, in particular in concluding that continuation of the injunctions as modified would be futile.

g I agree that this appeal should be allowed.

RUSSELL LJ. On 31 January 1976 Mr Peter Maurice Wright left the service of the Crown as a senior officer in the British security service. He then owed duties of confidentiality to the Crown not to disclose any information as to his activities or experiences within the service. Those duties have not changed with the passage of years. They remain exactly the same in July 1987 as they did in January 1976.

j These are interlocutory appeals. In the primary actions the pleadings disclose the issues to be tried. They are concerned with breach of duty and confidentiality. The defendants allege, and I endeavour to summarise their contentions in somewhat inelegant language, that the confidence can be broken by third parties, in this case by organs of the press, if

publication is in the public interest, if it discloses iniquity or if it is already in the public domain. a

The burden of proving those matters, however, must rest with those who assert them. *Prima facie* the veil is not to be lifted. Hence, in my judgment, until the trial of the action it was right that there should be a holding operation in the form of the injunctions that were imposed in 1986.

Has there been a change of circumstance of sufficient magnitude and significance to require those injunctions to be discharged or varied? In his judgment, Sir Nicolas Browne-Wilkinson V-C referred to the proceedings in Australia still under appeal, the publication in the *Independent* which may possibly be in contempt, and likewise the publication in the *Sunday Times*. He had this to say (p 323, ante): 'Certainly there must be some question whether publications in contempt of court can have any effect on the validity of an existing order.' The Vice-Chancellor went on to consider what he regarded as the difficult issue to be tried, namely the responsibility, or rather the duty of third parties not in collusion with Mr Wright, not to perpetuate his breach of duty by the dissemination of material for which Mr Wright was primarily responsible. b

In my judgment, however, it is manifestly plain from what the Vice-Chancellor had to say that it was the publication of *Spycatcher* in the United States of America which was at the heart of the application before him. The question has to be posed: has such a publication outside the jurisdiction effectively blunted the law so as to make the injunctions futile? Have the floodgates been opened so that unlimited dissemination of confidential information within the jurisdiction can take place whilst the law stands by helpless and impotent? c

The duty of confidence remains. There may well be (it will ultimately have to be tried at the hearing) a duty on others, in this case the defendants, not to breach the confidence for which Mr Wright was primarily responsible. I respectfully part company with the Vice-Chancellor when he said (p 331, ante): d

'Since the full text of *Spycatcher* is now available in this country to anyone with the money to get it, a large part of the purpose of the Attorney General's proceedings in this case has now been defeated.' e

The 'purpose' of the Attorney General's proceedings is to restrain the perpetuation, some would say the aggravation, of Mr Wright's *breach of duty* (and I emphasise those words 'breach of duty') by the dissemination of his book. The 'purpose' of the proceedings cannot be the preservation of secrecy in the British security service: that has been irretrievably lost. Nor can it be, save to a very limited extent, the restoration of confidence amongst other organisations. But, in my judgment, the law and the courts must still continue to strive, and must give all the appearances of continuing to strive, to deter the commercial dissemination of the contents of *Spycatcher* when every word written in the book is *prima facie* in breach of duty. In the amended form of injunctions proposed by Sir John Donaldson MR there is built in a measure of protection for the legitimate interests of the press, which it is no part of the function of this court to stultify. f

Whilst wishing to associate myself with the admiration for the judgment of the Vice-Chancellor, I too have come to the conclusion that he fell into error for the reasons which have been indicated by Sir John Donaldson MR. I would, therefore, agree with the order that he proposes and agree that this appeal should be allowed. g

Appeal allowed. Injunctions varied. Leave to appeal granted.

Diana Procter Barrister. h

Appeals and cross-appeals

The *Guardian*, the *Observer* and the *Sunday Times* appealed. The Attorney General cross-appealed against the variation of the injunction. i

Charles Gray QC and Desmond Browne for the Guardian.

- a Charles Gray QC and Stephen Nathan for the Observer,
Anthony Lester QC and David Pannick for the Sunday Times.
John Mummery and Philip Havers for the Attorney General.*

b LORD BRIDGE OF HARWICH. My Lords, for reasons which I shall in due course express in a considered opinion, I would for my part allow the appeals of the newspapers, dismiss the cross-appeals of the Attorney General and discharge the injunctions.

c I understand that the majority of their Lordships have reached a contrary conclusion. I am sure we all appreciate that, especially in view of our disagreement, it is desirable we should make our respective reasons known as soon as possible. Unfortunately, a variety of personal commitments will prevent us from publishing our reasons before September, but I think we can all agree in expressing the hope that they will be made available to the press and public at the earliest practicable date.

d LORD BRANDON OF OAKBROOK. My Lords, for reasons which I shall give later in writing, I would order that the orders of the Court of Appeal of 25 July 1986 be set aside, save as to costs, and that the orders of Millett J of 11 July 1986 be restored but varied to the extent that para 2 of the proviso be omitted. In the result, I would dismiss the newspapers' appeals and allow the cross-appeals of the Crown.

e LORD TEMPLEMAN. My Lords, for reasons which I shall in due course make clear, I would propose that the orders of the Court of Appeal of 25 July 1986 be set aside and that the orders of Millett J of 11 July 1986 be restored, but varied to the extent that para 2 of the proviso be omitted.

f LORD ACKNER. My Lords, for the reasons which I intend to set out shortly in a written opinion, I too would order that the orders of the Court of Appeal of 25 July 1986 be set aside, save as to costs, and that the orders of Millett J of 11 July 1986 be restored, but varied to the extent that para 2 of the proviso be omitted.

g LORD OLIVER OF AYMERTON. My Lords, for reasons which I shall in due course express in a considered opinion, I would, in agreement with my noble and learned friend Lord Bridge, allow the appeals, dismiss the cross-appeals and restore the order of Sir Nicolas Browne-Wilkinson V-C.

g 30 July. The following opinions were delivered.

h LORD BRIDGE OF HARWICH. My Lords, I write this opinion in wholly exceptional circumstances. On 30 July your Lordships announced in the House your decision by a majority of three to two to maintain in full force the injunctions granted by Millett J and affirmed by the Court of Appeal in 1986 (the Millett injunctions) (see *A-G v Observer Ltd* (1986) 136 NLJ 799) against publication of what I shall refer to for brevity as Mr Wright's *Spycatcher* allegations and to extend the scope of the injunctions to cover reports on the proceedings now current in Australia against Mr Wright and his publishers there. Because I am about to leave the country and shall not be back until September I thought it would not be possible to publish the reasons for the decision before September and I so indicated to the House. I had in mind that, in the usual way, each member of the House participating in the decision would wish to have the opportunity, before publication, of reading the considered opinions of the others. I have since been persuaded that the urgency of informing the public of the reasons which underlie the conclusions reached by the majority and the minority alike is such that delay until September would be unacceptable. I understand that your Lordships all share

this view. This means, however, that I must accept the disadvantage of expressing my dissent before I have had a chance of reading and at least trying to understand the reasons which your Lordships in the majority are going to give in support of your decision. a

The proceedings arise from an application to discharge the Millett injunctions. I have no doubt that the Millett injunctions were properly granted in the first place. As the law now stands, under a decision of the Court of Appeal¹ in contempt proceedings which for present purposes I assume to be correct, the Millett injunctions operate as a universal ban on any publication within the jurisdiction of anything which would contravene the injunctions. I attach little importance, as relevant changes of circumstance, to the partial disclosures of the *Spycatcher* allegations which some newspapers have succeeded in making. The watershed, to my mind, came with the publication of *Spycatcher* in the United States of America. Her Majesty's government did not attempt to stop this, because they knew they would fail. They have also announced that they will not attempt to prevent the importation of *Spycatcher* into this country. These two vital facts set the scene for the present controversy. b c

I shall excuse myself from giving any extended account of the proceedings in the courts below. I note however that no judge considering the matter so far has thought it appropriate to maintain the Millett injunctions without qualification. Sir Nicolas Browne-Wilkinson V-C favoured their total discharge for the reasons which he gave. The Court of Appeal favoured a variation of the injunctions with the introduction of a new proviso to permit publication of 'a summary in very general terms' of the *Spycatcher* allegations. Sir John Donaldson MR thought that the existing injunctions were 'clearly much too wide' to achieve the strictly limited purpose which he believed still to be capable of achievement and that was why he added the new proviso. Ralph Gibson LJ said (pp 340-341, ante): d

'If the choice were between discharging the injunctions entirely and maintaining the injunctions in the form in which they were made, notwithstanding the alterations in the circumstances already described by Sir John Donaldson MR and in the judgment of Sir Nicolas Browne-Wilkinson V-C, I would, I think, with regret at the impotence of the law as the Vice-Chancellor expressed it but, having had the benefit of the Vice-Chancellor's judgment without the hesitation which he experienced, have upheld his conclusion that the injunctions must be discharged . . . I accept that it is not reasonable to try to maintain the injunctions in their original form because so to do causes public inconvenience and impairment of public discussion and information for no sufficient benefit in maintenance of the rights which the Attorney General is seeking to enforce.' e f

Russell LJ said (p 342, ante): g

'In the amended form of injunctions proposed by Sir John Donaldson MR there is built in a measure of protection for the legitimate interests of the press, which it is no part of the function of this court to stultify.'

Before your Lordships all parties accepted that the compromise solution favoured by the Court of Appeal could not be supported in law and would be unworkable in practice. There was and is no escape by way of any compromise from the need to resolve the issue. The injunctions must either be maintained or discharged. h

I appreciate that the decision of your Lordships' House is in form merely interlocutory. But it was quite rightly accepted by counsel for the Attorney General that the case in favour of maintaining the injunctions cannot be any stronger at the trial than it is today. It must follow from this, in my view, that the real question raised by the newspapers' appeals and the cross-appeal of the Attorney General is whether the Attorney General, on the relevant and undisputed facts, can sustain a claim for permanent injunctions. If no j

¹ See *A-G v Newspaper Publishing plc* [1987] 3 All ER 276

a case for permanent injunctions can be made out, it must be absurd to keep the interim injunctions in force. Conversely, although a trial of the action would, at least theoretically, leave the door open for the newspapers to canvass afresh every issue canvassed before your Lordships in these appeals and, of course, to adduce fresh evidence and argument on issues not already canvassed, I fear that, in practice, your Lordships' decision of the present appeals will effectively foreclose the options open to the trial judge.

The basis of the claim for the Millett injunctions was to prevent disclosure of the
b *Spycatcher* allegations in breach of the life-long obligation of confidence which Mr Wright, as a former officer of the security service, owed to Her Majesty's government. So long as any of the *Spycatcher* allegations remained undisclosed, I should have been wholeheartedly in favour of maintaining the injunctions in the interests of national security for all the reasons so cogently deployed in the affidavit of Sir Robert Armstrong. But it is perfectly obvious and elementary that, once information is freely available to the
c general public, it is nonsensical to talk about preventing its 'disclosure'. Whether the *Spycatcher* allegations are true or false is beside the point. What is to the point is that they are now freely available to the public or, perhaps more accurately, to any member of the public who wants to read them. I deliberately refrain from using expressions such as 'the public domain' which may have technical overtones. The fact is that the intelligence and security services of any country in the world can buy the book *Spycatcher* and read what
d is in it. The fact is that any citizen of this country can buy the book in America and bring it home with him or order the book from America and receive a copy by post. Some enterprising small traders have apparently found it worth their while to import copies of the book and sell them by the roadside. It remains to be seen whether the Attorney General will institute proceedings for contempt of court against any public library which imports copies of *Spycatcher* and makes it available to borrowers. Counsel for the Attorney
e General had no instructions which enabled him to answer the question I asked about that.

If, as I have always thought, the interest of national security in protecting sensitive and classified information is to conceal it from those who might make improper use of it, it is manifestly now too late for the Millett injunctions to serve that interest. If the
f confidence of friendly countries in the ability of this country to protect its secrets has been undermined by the publication in the United States of America of *Spycatcher*, the maintenance of the Millett injunctions can do nothing to restore that confidence. So much, I believe, is obvious and incontrovertible.

I well understand the sense of indignation which all of us must feel that Mr Wright, to use the colloquialism, should have got away with it, worse still that he should make a
g profit from his breach of confidence. Perhaps his publishers come under the same condemnation. But the remedy for that wrong lies not in a futile injunction but in an action for an account of profits.

The legal basis for the Attorney General's claim to enjoin the newspapers is that any third party who comes into possession of information knowing that it originated from a
h breach of confidence owes the same duty to the original confider as that owed by the original confidant. If this proposition is held to be of universal application, no matter how widely the original confidential information has been disseminated before reaching the third party, it would seem to me to lead to absurd and unacceptable consequences. But I am prepared to assume for present purposes that the Attorney General is still in a position to assert a bare duty binding on the conscience of newspaper editors which is capable of surviving the publication of *Spycatcher* in America.

j The key question in the case, to my mind, is whether there is any remaining interest of national security which the Millett injunctions are capable of protecting and, if so, whether it is of sufficient weight to justify the massive encroachment on freedom of speech which the continuance of the Millett injunctions in present circumstances necessarily involves.

There is no fresh evidence from Sir Robert Armstrong or anyone else who can speak

for the security service about the security implications following the American publication of *Spycatcher*. Sir Robert's original affidavit was made in the radically different circumstances obtaining before that publication. So, in effect, the hapless counsel for the Attorney General was left to make bricks without straw (which of course he did with his usual skill) in seeking to persuade your Lordships that, despite the free availability of the book *Spycatcher* itself and despite the citations from it and discussion of its contents which have been and will continue to be available in foreign newspapers freely circulating in this country, a blanket ban on any repetition, citation or discussion of its contents in the British press was necessary in the interests of national security. If I have understood the argument, stripped of rhetorical embellishment, it amounts to this. First, unless enjoined Mr Wright may make yet further disclosures about the security service not already contained in *Spycatcher*. This may be true, but is entirely beside the point. If the Attorney General were prepared to modify the Millett injunctions so as to exclude from their ambit the *Spycatcher* allegations, in the same way that anything in Mr Chapman Pincher's book *Their Trade is Treachery* is excluded, there would be nothing left to argue about. What the newspapers seek is liberty to repeat and discuss the *Spycatcher* allegations: no more, no less. Second, counsel for the Attorney General takes material from Sir Robert's affidavit out of the context in which it was made and seeks to rely on it for the proposition that the Millett injunctions should be maintained in their full rigour to deter other officers of the intelligence or security services from following Mr Wright's deplorable example. The suggestion must be, I take it, that a future Mr Wright contemplating going into exile and publishing his memoirs in the United States and who would not be deterred by the prospect of having to account to Her Majesty's government for his profits would nevertheless be deterred by the knowledge he would be denied by injunction any more than a limited access for his story to the general reading public in this country. This seems to me a rather fanciful suggestion, but if there is anything in it, now that the original aim of preventing disclosure of secret material can no longer be attained, the deterrent argument can only carry minimal weight.

What of the other side of the coin and the encroachment on freedom of speech? Having no written constitution, we have no equivalent in our law to the First Amendment to the Constitution of the United States of America. Some think that puts freedom of speech on too lofty a pedestal. Perhaps they are right. We have not adopted as part of our law the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)) to which this country is a signatory. Many think that we should. I have hitherto not been of that persuasion, in large part because I have had confidence in the capacity of the common law to safeguard the fundamental freedoms essential to a free society including the right to freedom of speech which is specifically safeguarded by art 10 of the convention. My confidence is seriously undermined by your Lordships' decision. All the judges in the courts below in this case have been concerned not to impose any unnecessary fetter on freedom of speech. I suspect that what the Court of Appeal would have liked to achieve, and perhaps set out to achieve by its compromise solution, was to inhibit the Sunday Times from continuing the serialisation of *Spycatcher*, but to leave the press at large at liberty to discuss and comment on the *Spycatcher* allegations. If there were a method of achieving these results which could be sustained in law, I can see much to be said for it on the merits. But I can see nothing whatever, either in law or on the merits, to be said for the maintenance of a total ban on discussion in the press of this country of matters of undoubted public interest and concern which the rest of the world now knows all about and can discuss freely. Still less can I approve your Lordships' decision to throw in for good measure a restriction on reporting court proceedings in Australia which the Attorney General had never even asked for.

Freedom of speech is always the first casualty under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what the public may and what

a they may not know. The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road. The maintenance of the ban, as more and more copies of the book *Spycatcher* enter this country and circulate here, will seem more and more ridiculous. If the government are determined to fight to maintain the ban to the end, they will face inevitable condemnation and humiliation by the European Court of Human Rights in Strasbourg. Long before that they will have been condemned at the bar of public opinion

b in the free world.

But there is another alternative. The government will surely want to reappraise the whole *Spycatcher* situation in the light of the views expressed in the courts below and in this House. I dare to hope that they will bring to that reappraisal qualities of vision and of statesmanship sufficient to recognise that their wafer thin victory in this litigation has been gained at a price which no government committed to upholding the values of a

c free society can afford to pay.

I add a postscript to record that I have now had the opportunity to read first drafts of the opinions of my noble and learned friends Lord Templeman and Lord Ackner. I remain in profound disagreement with them.

d **LORD BRANDON OF OAKBROOK.** My Lords, the facts and circumstances leading up to these appeals and cross-appeals have been fully set out in the opinions of my noble and learned friends Lord Templeman and Lord Oliver. I adopt gratefully their accounts of these matters and do not think it necessary for me to give a separate account of them of my own.

e I was a party to the majority decision of this House given on 30 July 1987 that the injunctions in issue should not be discharged but should be continued until trial. My reasons for being a party to that decision can be summarised in nine propositions as follows. (1) The action brought by the Attorney General against the Guardian and the Observer has as its object the protection of an important public interest, namely the maintenance so far as possible of the secrecy of the British security service. (2) The

f injunctions in issue are interlocutory, that is to say temporary injunctions, having effect until the trial of the action only. (3) Before the publication of *Spycatcher* in America the Attorney General had a strong arguable case for obtaining at trial final injunctions in terms similar to those of the temporary injunctions. (4) While the publication of *Spycatcher* in America has much weakened that case, it remains an arguable one. (5) The only way in which it can justly be decided whether the Attorney General's case, being still arguable, should succeed or fail is by having the action tried. (6) On the hypothesis

g that the Attorney General's claim, if tried, will succeed, the effect of discharging the temporary injunctions now will be to deprive him, summarily and without a trial, of all opportunity of achieving that success. (7) On the alternative hypothesis that the Attorney General's claim, if tried, will fail, the effect of continuing the temporary injunctions until trial will be only to postpone, not to prevent, the exercise by the Guardian and the

h Observer of the rights to publish which it will in that event have been established that they have. (8) Having regard to (6) and (7) above, the discharge of the temporary injunctions now is capable of causing much greater injustice to the Attorney General than the continuation of them until trial is capable of causing to the Guardian and the Observer. (9) Continuation of the injunctions until trial is therefore preferable to their discharge. I have not dealt separately with the injunction against the Sunday Times

j because it is common ground that the fate of that injunction must follow the fate of the injunctions against the Guardian and the Observer. The nine propositions which I have set out in summary form above require amplification and comment.

1. *The public interest character of the Attorney General's claim*

It has been suggested that the right sought to be enforced by the Attorney General is a

private right only, and that, as such, it must necessarily be overridden by the public right of citizens of a democratic country such as the United Kingdom to freedom of expression in the press. In my view this is not correct. The Attorney General is suing, as the representative of the Crown, in order to protect the public interest in the maintenance of the secrecy of the British security service. The public right to freedom cannot, even in a democratic country such as the United Kingdom, be absolute. It is necessarily subject to certain exceptions, of which the protection of national security is one. This is expressly recognised in art 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmdn 8963), to which the United Kingdom has adhered although its provisions have not been incorporated into our domestic law.

2. *The temporary nature of the injunctions in issue*

The fact that the injunctions in issue are temporary only is, in my view, of the utmost importance. Continuation of them until trial does not in any way prejudice the decision which has to be made at trial on the validity of the Attorney General's claim to final injunctions. The purpose of such continuation is only to hold the ring until a just decision on the validity of that claim can be made.

3. *The arguability of the Attorney General's case before publication of Spycatcher in America*

The Attorney General's case is and always has been (i) that Mr Wright, as a former member of the British security service, owed to the Crown a life-long duty of confidence and non-disclosure extending to every aspect of his work in the service, (ii) that the publication by Mr Wright of *Spycatcher* would be a plain breach of that duty, (iii) that the Guardian and the Observer, having obtained access to the matters contained in *Spycatcher* with knowledge of Mr Wright's breach of duty in disclosing them, came under the same duty of confidence and non-disclosure as he was, (iv) that publication by the Guardian and the Observer of the matters contained in *Spycatcher*, whether true or false, would be a breach of their duty, (v) that publication by them of the matters contained in *Spycatcher* would do great harm to the British security service, (vi) that damages would not be an adequate or appropriate remedy for the breach of duty so committed, and (vii) that injunctions restraining the Guardian and the Observer from publishing the matters disclosed by Mr Wright in *Spycatcher* or elsewhere were therefore necessary in order to prevent the great harm to the British security service which would otherwise be done.

It is evident that Millett J, who granted the temporary injunctions originally, and the Court of Appeal, which upheld them with minor modifications (see *A-G v Observer Ltd* 136 NLJ 799), had no doubt that the Attorney General had a strong arguable case for obtaining at trial final injunctions in terms similar to those of the temporary injunctions. Although a further appeal by the Guardian and the Observer to this House against the decision of Millett J, as affirmed by the Court of Appeal, is still pending, its prosecution appears to have been overtaken by events. In any case, it seems to me that the view taken by Millett J and the Court of Appeal with regard to the strong arguability of the Attorney General's case at that stage is not really open to challenge.

4. *The arguability of the Attorney General's case following the publication of Spycatcher in America*

This is to my mind the key issue. Since the temporary injunctions were first granted, *Spycatcher* has been published in America, has been widely sold there and is likely to be even more widely sold there in the future. Under American law the British government could not have hoped to prevent such publication and sale, and so did not attempt to do so. A substantial number of copies of *Spycatcher* as published in America have found

a their way into the United Kingdom and have been available for reading to those having access to them. More copies are likely to find their way here and to be similarly available for reading in the future. The British government, although it has power in theory to prohibit the importation of copies of the book, accepts that it cannot in practice effectively exercise that power. It has therefore not attempted, nor does it intend to attempt, to impose any such prohibition.

b The three newspapers rely on these supervening events as constituting decisive grounds for discharging the temporary injunctions now. They put their case in two ways. First, they say that once the matters contained in *Spycatcher* have, by whatever means, become public knowledge in the United Kingdom, any duty of non-disclosure under which they may previously have been lapses and ceases to be binding on them. Second, they say that, in any case, in these new circumstances, continuation of the temporary injunctions any longer would be futile: all the damage to the British security service capable of resulting c from Mr Wright's breach of duty has already been done and there is no further damage which continuation of the injunctions can prevent.

In relation to both arguments it is, I think, putting the case too high to say that the matters contained in *Spycatcher* have become public knowledge in the United Kingdom. A limited section of the public, who feel a strong motivation to acquire knowledge of the matters concerned, can no doubt obtain access to a copy of the book published in d America and not prohibited from being imported here. But this does not mean that the matters concerned are already within the knowledge of the public as a whole. If they were, it is difficult to see why the newspapers should be so bent on publishing them, and so incensed at being restrained even temporarily from doing so.

The first argument raises a question of law, on which there is inconclusive guidance in existing authorities. It was further apparent that counsel had not come prepared to deal e with that question of law as fully as would be necessary for your Lordships to reach a final conclusion on it. If the argument is correct in relation to the newspapers, it appears that it must also be correct in relation to Mr Wright himself, with the consequence that his duty of non-disclosure has also lapsed and ceased to be binding on him, and he could return to the United Kingdom and publish his memoirs there without legal restraint. I f am not willing, on what is only an interlocutory appeal, and assisted only by incomplete argument, to reach such a startling, and indeed anarchic, conclusion.

The second argument seems to me to raise what is, in substance, a question of fact rather than of law. That is whether the publication of *Spycatcher* in America and its importation on a limited scale into the United Kingdom has exhausted the damage to the British security service which Mr Wright's breach of duty is capable of causing, so g that there is no further damage left to be done which continuation of the temporary injunctions could help to prevent.

In para 10 of his affidavit in the Australian proceedings, Sir Robert Armstrong deposed as follows:

h "The publication of any narrative prepared or contributed to by the Second Defendant [Mr Wright] which was based upon information available to him as a senior member of the British Security Service would be likely to cause unquantifiable damage by reason of the disclosure involved. Additionally, it will clearly damage the work of the British Security Service and thereby the national security of the United Kingdom in the following further respects:—(a) the intelligence and security services of friendly foreign countries with which the British Security Service is in liaison would be likely to lose confidence in its ability to protect classified i information (b) the British Security Service depends upon the confidence and co-operation of other organisations and persons. That confidence would suffer serious damage should the Second Defendant [Mr Wright] reveal information of the nature described above (c) there would be a risk that other persons who are or have been

employed in the British Security Service who have had access to similar information might seek to publish it.' a

There is no doubt that the major part of the damage which Sir Robert Armstrong said would be caused by the publication of *Spycatcher* has, in the events which have now occurred, already been done, and that nothing which the courts can do, by way of injunctions or otherwise, can undo it. It remains for consideration, however, whether the risk referred to in para 10(c) of Sir Robert Armstrong's affidavit, namely future repetitions by other members of the British secret service of Mr Wright's breach of duty, is so serious that the courts should do all that they can, including granting at trial final injunctions in terms similar to those of the temporary injunctions, in order not to eliminate this risk (for I do not see how it can be eliminated) but to minimise it as much as possible. b

The Vice-Chancellor discussed this consideration in his judgment. He said (p 331, ante): c

'There remains what counsel for the Attorney General urges is the persisting public interest, namely to prevent general dissemination of the contents of this book through the press within the United Kingdom. By discouraging general dissemination those who are tempted to follow Mr Wright's example in the future and write their memoirs hot from the security service will not find it such a satisfactory or profitable business. I think there is force in that. I think that the ability to restrain the unauthorised use of confidential memoirs by those who do not mind abusing their confidence, so as to discourage others from doing it, is a real point. I do not think it can just be swept aside. The United Kingdom is likely to be the best market for anybody writing these memoirs, and to discourage the use of that market by such people would be, I think, a discouragement.' d e

I agree with the Vice-Chancellor that this consideration is a real one which cannot be swept aside. It involves questions of the effect in the future on the morale and discipline of members of the British security service of the courts allowing the disclosure of confidential matters in breach of duty abroad to lead inevitably to general dissemination of such matters to the public as a whole by the press in the United Kingdom. Once it is accepted that the risk concerned is a real one and not such as to be swept aside, it follows, I think, that although the Attorney General's case for obtaining final injunctions at trial which he had earlier had been much weakened, it remains nevertheless an arguable case. The Vice-Chancellor so held and I agree with him. The damage to the British security service which has already been done cannot be undone. But it may be that the courts can still take useful steps to reduce materially the risk of similar damage being done again in the future. f g

5. *The only way to decide justly whether the Attorney General's case should succeed or fail is by having the action tried*

The Vice-Chancellor considered that the need to discourage repetitions of Mr Wright's breach of duty in the future did not justify the continuation of restrictions on the public right of freedom of expression in the press. As I indicated earlier, however, the public right to freedom of expression in the press is not the only public interest involved. Protection of the secrecy of the British security service is also a public interest and is also involved. Want of secrecy in the past has cost lives; that cannot now be remedied. Want of secrecy in the future may cost more lives; the risk of that can possibly be reduced. So there are two public interests involved; they have to be weighed against each other and a balance struck between them. h i

In order to enable a court to carry out properly this exercise of weighing and balancing, it is in my view essential that it should have adduced before it the best possible evidence on these crucial questions: in what way, for what reasons and to what extent, having

a regard to the publication of *Spycatcher* in America and its so far limited importation into the United Kingdom, general dissemination of its contents to the public by the press here would increase the risk of other members of the British security service acting in the same manner as Mr Wright in the future. These are not matters with regard to which a court can take judicial notice or rely on its own instincts. They are matters for oral evidence from persons such as Sir Robert Armstrong, or others with comparable expertise. That evidence will, of course, like any other oral evidence given at a trial, be subject to challenge by cross-examination. It is for these reasons that I consider that the only way in which it can be justly decided whether the Attorney General's claim for final injunctions should succeed or fail is by having the action tried.

b 6. *The effect of discharging the temporary injunctions now*

c If the temporary injunctions are discharged now, so that the newspapers are left free, subject to any questions of copyright, to disseminate generally the disclosures made by Mr Wright in *Spycatcher*, there will be no point in the Attorney General proceeding to trial. All possible damage to the British security service will indeed then have been done. His arguable case will have been completely destroyed, by summary process at an interlocutory stage and without his ever having had the opportunity of having it fairly tried on appropriate evidence.

d 7. *The effect of continuing the temporary injunctions until trial*

e If the temporary injunctions are continued until trial, and the Attorney General's claim to final injunctions then fails, the newspapers will be free to publish Mr Wright's disclosures as they please. They will certainly have been delayed in exercising rights, which will, in that event, have been vindicated. Mr Wright's disclosures, however, relate not to recent events but to events many years in the past. That being so, a further delay in the exercise of the newspapers' rights will in no way be equivalent to a complete denial of those which the Attorney General may have.

f 8, 9. *The potential injustice of the two available courses to either party and the choice between them*

For the reasons which I have given the choice lies between one course which may result in permanent and irrevocable damage to the cause of the Attorney General and another course which can only result in temporary and in no way irrevocable damage to the cause of the newspapers. In that situation it seems to me clear that the second of the two courses should, in the overall interests of justice, be preferred to the first.

g It was urged on your Lordships that Sir Nicolas Browne-Wilkinson V-C's decision, being a discretionary one, should not be interfered with by an appellate tribunal unless it was shown that he had erred in some way. With great respect to him I think that he did err in that he did not sufficiently regard the radical difference which I have stressed above between the kinds of injustice capable of being caused to the Attorney General if the temporary injunctions are discharged now and to the newspapers if they are continued until trial.

h Once a decision is taken in principle to continue the temporary injunctions until trial, it is essential that any loopholes in their present formulation, which might enable the purpose of that decision to be circumvented, should be eliminated. It was on that ground that I agreed with the alteration of proviso (2) to the injunctions proposed by my noble and learned friends Lord Templeman and Lord Ackner.

j I would end my opinion with certain firm disclaimers. My decision in this case is not based on my thinking that, when the action comes to be tried, the Attorney General's claim is in any way sure of succeeding. It may succeed or it may fail. The decision on that will be for the trial judge and, in the first place at any rate, for him alone. Nor did I reach my decision in this case because I do not strongly support, subject to well-recognised exceptions, the general principle of freedom of expression in the press. I do. I reached

my decision solely on the ground that the Attorney General has an arguable case for the protection of an important public interest, and that it would be unjust, by discharging the temporary injunctions now, to deprive him irrevocably of the opportunity of having that case fairly adjudicated on at a proper trial. a

For obvious reasons that trial should take place as soon as possible: it has already been delayed much too long.

LORD TEMPLEMAN. My Lords, on 30 July 1987 your Lordships by a majority decided to continue injunctions restraining the appellant newspapers from disclosing or publishing any information obtained by Peter Maurice Wright in his capacity as a member of the British security service. The principle affirmed by that decision was that the law will prevent the mass circulation in this country of confidential information which prejudices the public interest in the maintenance of an efficient and effective secret security service. Three defences were put forward by the appellant newspapers: first, that Mr Wright intended his treachery to be helpful to the British public, second, that damage to the security service arising from Mr Wright's treachery had already been fully inflicted and, third, that the public interest in receiving information entitled the press to publish treachery at home provided it had been published abroad. A majority of your Lordships rejected these defences. b c

The Secretary to the Cabinet, Sir Robert Armstrong, in an affidavit sworn in these proceedings, deposed as follows: d

'... the main function of the British Security Service is the defence of the realm as a whole, from external and internal dangers arising from attempts at espionage and sabotage, or from actions from persons and organisations whether directed from within or without the United Kingdom, which may be judged to be subversive of the State.' e

Mr Wright was employed by the British security service. On 1 September 1955 he signed a declaration that he understood the effect of s 2 of the Official Secrets Act 1911, which was set out in the declaration and renders liable to prosecution any person in possession of information— f

'which he has obtained or to which he has had access owing to his position as a person who holds or who has held office under His Majesty ... [and who] communicates the ... information to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in the interests of the State his duty to communicate it ...'

When Mr Wright left the security service he signed a further declaration, dated 30 January 1976, acknowledging, inter alia, that the provisions of the Official Secrets Acts applied to him after his appointment had ceased, that he was fully aware that serious consequences might follow any breach of the provisions of those Acts and that he understood— g

'that I am liable to be prosecuted if either in the United Kingdom or abroad I communicate, either orally or in writing, including publication in a speech, lecture, radio or television broadcast, or in the Press or in book form or otherwise, to any unauthorised person any information acquired by me as a result of my appointment (save such as has already officially been made public) unless I have previously obtained the official sanction in writing of the Department by which I was appointed.' h i

In addition to the obligations of secrecy expressly acknowledged by Mr Wright, he was also under an obligation arising out of his employment by the security service and enforceable in equity not to divulge any information which he obtained in the course of his employment. The obligation arises because of—

a 'the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it . . .'

(See *Seager v Copydex Ltd* [1967] 2 All ER 415 at 417, [1967] 1 WLR 923 at 931 per Lord Denning MR.)

b The same obligation attaches to the press and anyone else who receives confidential information knowing that it is confidential. It is unlawful to make further disclosure.

The Cabinet Secretary further deposed that the work of Mr Wright for the security service—

c 'involved him in frequent and close liaison with the intelligence and security services of friendly foreign countries and the exchange of information with those services. It was, and continues to be, essential to the effectiveness of all such liaison and exchanges that they are conducted upon a basis of mutual trust and confidence.'

The Cabinet Secretary also said that the effective functioning of the British security service requires that its affairs be kept secret. The Attorney General, who represents the public and who has brought these proceedings in their interest, could not, in the view of the Cabinet Secretary—

d 'particularise the damage that would be caused by specific disclosures of fact by [Mr Wright] without, himself, making further disclosures of material which is confidential, and undermining the efficacy of the duty of confidentiality which is also sought to be in force.'

e The Cabinet Secretary continued:

f ' . . . it is likely that any disclosures of facts relating to [the security service] by [Mr Wright] would not only be a breach of his contract and of his duty of confidence owed to the Service but would be likely to endanger the effective discharge by the Service of its current and future responsibilities and, as a consequence, be of value to a foreign power and highly detrimental to the public interest of the United Kingdom as well as causing harm to individual officers, former officers, their families and other persons who might be identified by or as a consequence of such disclosures. The dangers . . . could arise notwithstanding that the information disclosed was unclassified and is on its face, and in isolation, apparently innocuous. Such information may take on a wider significance if put together with other information in possession of other persons and thereby, for example, enable them to check the veracity of their sources of information. Furthermore information which appears to be innocuous at a particular date or to a particular officer may at a later date become significant.'

h It follows that Mr Wright could not publish his memoirs as an employee of the security service without committing flagrant breaches of the duty of secrecy and confidentiality which he owed to the public in the national interest. No publisher or newspaper in this country may lawfully publish Mr Wright's memoirs or disclose information obtained by Mr Wright in the course of his service concerning any aspect of the work of the security service. Mr Wright, apart from making money out of his memoirs, protests that his memoirs will be helpful to the British public. The press and others consider that his memoirs will be helpful in achieving the objects of an inquiry into the working of the security service, an amendment of the Official Secrets Acts and the enactment of freedom of information legislation. But these objects are unlikely to be attained so long as the British press is prepared to publish confidential information relating to the British security service without investigation or corroboration and in disregard of orders of the court designed to preserve the security service from harm.

Mr Wright could not, of course, hope to be allowed to publish his memoirs in England. He accordingly entered into arrangements with an Australian company in New South Wales, Heinemann Publishers Australia Pty Ltd, which is a subsidiary of the English Heinemann Publishers. In September 1985 the Crown began proceedings in New South Wales to restrain such publication. Interim relief obtained in New South Wales apparently did not prevent Mr Wright and the Australian Heinemanns from publishing outside Australia. Seizing on this loophole the Australian Heinemann company granted the American rights in Mr Wright's memoirs to Viking Penguin Inc. This is an American subsidiary of the English Pearson Group. In the United States of America an injunction might have been obtained against Mr Wright if he had been within the jurisdiction but under the law of the United States one could not be obtained against Viking Penguin Inc or anyone else in the United States. Mr Wright's memoirs were written by him or written for him either in Australia or in the United States and were given the name *Spycatcher*. On 22 and 23 June 1986 respectively the Observer and the Guardian published in their newspapers in this country, an outline of Mr Wright's allegations. The Observer stated that it:

'... has obtained details of what is disclosed in the manuscript written by retired senior MI5 officer, Peter Wright, who lives in Tasmania.'

The Observer subsequently explained that it had not seen the manuscript or extracts from it.

The publication of the Observer and the Guardian articles was unlawful and on 11 July 1986 Millett J granted injunctions (the Millett injunctions) against the Observer and the Guardian restraining them from disclosing or publishing any information obtained by Mr Wright in his capacity as a member of the British security service and which they know or have reasonable grounds to believe to have come or been obtained directly or indirectly from Mr Wright. The order had two provisos. The first proviso allowed the newspapers to reproduce attributions to Mr Wright already made by Mr Chapman Pincher's published works or in a television programme or programmes broadcast by Granada Television. The second proviso allowed disclosure of any material disclosed in open court in the Supreme Court of New South Wales unless prohibited by the judge there sitting or which, after the trial there in action no 4382 of 1985, is not prohibited from publication. Millett J delivered a lucid and convincing judgment explaining his reasons for coming to the conclusion that it would be against the public interest for newspapers in this country to publish information derived from Mr Wright. On 25 July 1986 the Court of Appeal dismissed an appeal from the judgment of Millett J subject to certain minor modifications.

Between 27 April and 14 July 1987 the following events took place. (1) On 27 April 1987 the Independent stated that a copy of the manuscript of *Spycatcher* had been 'passed unsolicited' to the Independent. The newspaper quoted extracts from the book but added that 'The Independent has destroyed all copies of the manuscript in its possession'. On the same day the London Evening Standard and the London Daily News followed suit and published information which could only have been derived from Mr Wright in the final analysis. The Attorney General applied to commit the three newspapers for contempt since they were clearly acting in breach of the object of the Millett injunctions. (2) Shortly after 27 April 1987 the Guardian and the Observer applied to the court to discharge the Millett injunctions on the grounds of changed circumstances including the articles in the Independent and the other two London evening papers on 27 April. (3) On 28 April 1987 Australian newspapers published articles about *Spycatcher*. (4) On 3 May 1987 the Washington Post announced that it had 'obtained' a manuscript copy of *Spycatcher* and published extracts and comments. (5) On 12 July 1987 the Sunday Times published 'major extracts from the book "Spycatcher" by Peter Wright the former MI5 officer. Its serialisation has been timed to coincide with the publication of the book in the United States'. (6) On 15 July 1987 the Court of Appeal, which heard argument

before and after 12 July, declared that the Independent, the London Daily News and the London Evening Standard—

a 'could indeed have been in contempt of court. So could the Sunday Times and any other newspaper which published information attributed to Mr Wright. We say "could be" in contempt of court and not "were" in contempt of court because none has as yet had an opportunity of putting forward a defence.'

b (See *A-G v Newspaper Publishing plc* [1987] 3 All ER 276 at 290.)

Contempt proceedings had been or were then instituted against the Sunday Times. All the newspaper articles were bound to put pressure on the court to allow publication of *Spycatcher* in this country regardless of any damage to the security service and despite the reasoned judgment of Millett J that the disclosure of any relevant information derived from Mr Wright would be contrary to the public interest and ought to be restrained. On 22 July 1987 the Vice-Chancellor discharged the orders made by Millett J but this decision was reversed by the Court of Appeal on 24 July 1987, hence the appeal to this House.

c My Lords, this appeal involves a conflict between the right of the public to be protected by the security service and the right of the public to be supplied with full information by the press. This appeal therefore involves consideration of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)) to which the British government adheres. Article 10 of the convention is in these terms:

d '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . .

e 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

f In *Sunday Times v UK* (1979) 2 EHRR 245 the European Court of Human Rights decided by a majority of 11 to 9 that there had been a violation of the convention by reason of the judgment of this House which restrained the Sunday Times from publishing—

g 'Any article which prejudices the issues of negligence, breach of contract or breach of duty or deals with the evidence relating to any of the said issues arising in any actions pending or imminent against Distillers . . . in respect of the development, distribution or use of the drug Thalidomide.'

h The European Court pointed out that this House applying domestic law had balanced the public interest in freedom of expression and the public interest in the due administration of justice. But the European Court—

i 'is faced not with the choice between two conflicting principles but with a principle of freedom of expression which is subject to a number of exceptions which must be narrowly interpreted . . . It is not sufficient that the interference involved belongs to that class of exceptions listed in Article 10 which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms; the Court has to be satisfied that the interference was necessary

having regard to the facts and circumstances prevailing in the specific case before it.'

(See 2 EHRR 245 at 281, para 65.)

The question is therefore whether the interference with freedom of expression constituted by the Millett injunctions was, on 30 July 1987 when they were continued by this House, necessary in a democratic society in the interests of national security, for protecting the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary having regard to the facts and circumstances prevailing on 30 July 1987 and in the light of the events which had happened. The continuance of the Millett injunctions appears to me to be necessary for all these purposes.

My Lords, in my opinion a democracy is entitled to take the view that a public servant who is employed in the security service must be restrained from making any disclosures concerning the security service and that similar restraints must be imposed on anybody who receives those disclosures knowing that they are confidential.

There are safeguards. No member of the secret service is immune from criminal prosecution or civil suit in respect of his actions. Instructions from superior officers are no defence. In addition, anyone, whether public servant, newspaper editor or journalist, who is aware that a crime has been committed or is dissatisfied with the activities of the secret service is free to report to the police in relation to crime and in other matters is free to report to the Prime Minister, who is charged with the responsibility of the security services, and to the Security Commission, which advises the Prime Minister. The security services are not above the law. In the present case there is not the slightest evidence that these safeguards have failed. Furthermore, there is nothing to prevent the press investigating all the allegations made by Mr Wright and reporting the results of their investigations to the public. It is only unlawful for the press to publish information unlawfully disclosed by Mr Wright and which may or may not be true.

In the terms of the convention there are three reasons why in the present case restraints are necessary to prevent the press publishing information disclosed by Mr Wright.

Any person who joins the security service accepts that he cannot defend himself or the security service against false accusations and cannot give any explanation for his actions or for the activities of the security service, without himself thereby endangering the secrecy of the security service, which is of paramount importance. Any person who joins the security service knows that no official defence or explanation can be given. He accepts that accusations may be made and circulated abroad and that rumours may reach individuals in this country. But he relies on the Attorney General, acting in the public interest, to seek to prevent the mass circulation of accusations and attributions and insinuations in this country and to prevent so far as possible the revelation of security service activities. And he relies on the courts acting within their jurisdiction to prevent mass circulation of secret and confidential information in this country if the courts consider that such protection is necessary. The hundreds of pages of *Spycatcher* which embellish but cannot improve the general allegations already known to have been made by Mr Wright may include accusations, purported conversations, and unfair criticisms which no individual member of the secret service can wish to be made the subject of sensational newspaper headlines or delivered up to the newspaper reading public. So long as there are in this country only odd copies of *Spycatcher*, members of the security service are substantially free from harassment. But once mass circulation takes place in newspapers, and particularly once the Sunday Times publishes *Spycatcher* in serial form, then members of the security service will be liable to be harassed with accusations to which they cannot respond. The publication in this country of *Spycatcher* will thus cause grievous harm to individuals and deal a blow to the morale of the security service. The British public will lose confidence in the security service. Our friends will be dismayed and our enemies will rejoice at the failure of the British to protect the security service from calumny reported in the British press. Whatever may happen abroad it must be harmful to the security service and contrary to the public interest for Mr Wright to be

a allowed to attack the security service in this country by revealing or pretending to reveal information which he is forbidden to reveal by law and loyalty. There is a great difference between the power of the press operating through mass circulation and the power of Mr Wright confined to the export to this country of individual copies of *Spycatcher*.

b I reject the argument that the law will appear ridiculous if it imposes a restriction on mass circulation when any individual member of the public may obtain a copy of *Spycatcher* from abroad. The court cannot exceed its territorial jurisdiction but the court can prevent the harm which will result from mass circulation within its own jurisdiction and can prevent Mr Wright and British newspapers from profiting from the unlawful conduct of Mr Wright. It is said that the same result could be achieved by an order on Mr Wright and the newspapers to account to the Attorney General for any profits they will make from *Spycatcher*. The public interest does not lie in making profits but in preventing profits being made in this country from treachery to this country.

c In my opinion, therefore, the injunctions are necessary in terms of the convention because harm will be caused to the security service if the press insist on disclosing to their readers not the general nature of Mr Wright's uncorroborated allegations but the mass circumstantial hearsay contained in *Spycatcher* relating to the security service and its activities.

d The second reason which makes it necessary to continue restrictions on the press lies in the fact that if the injunctions are discharged in the present case an immutable precedent will have been created. If the injunctions are discharged it must follow that any disgruntled public servant or holder of secret or confidential information relating to the security service can achieve mass circulation in this country of damaging truths and falsehoods by the device of prior publication anywhere else abroad. Nothing will ever again be confidential save the identity of a source whom a newspaper wishes to conceal.

e If the Millett injunctions were discharged, Mr Wright could write to the Washington Post making a serious new allegation or bolstering up old allegations citing names and actions and purporting to give chapter and verse. Once the Washington Post had entertained an American audience with these revelations, then the products of Mr Wright's recollections and imaginations could be plastered across the British press. I

f reject the allegation that the press are being gagged or censored or submitted to Soviet discipline. The Millett injunctions were not imposed by the government: the injunctions were imposed and are being continued by independent and impartial judges because they consider that despite the importance of the right of freedom of expression it is necessary in the national interest to prevent the security service being harmed now and in the future. The imposition of restraints on the press in the exercise of a judicial discretion in conformity with the convention is an expression and not a negation of democracy in action.

g There is a third and final reason why the restraints imposed in the present case satisfy the tests of the convention. All the newspapers reports between 27 April and 14 July 1987 were contrary to the object and purpose of the Millett injunctions. Those reports originated with Mr Wright and his publishers abroad and were intended to bring pressure on the English courts to allow *Spycatcher* to be published here. The Millett injunctions cannot now be discharged without surrendering to the press an untrammelled, arbitrary and irresponsible power to evade an order of the court designed for the safety of the realm to protect the confidentiality of information obtained by a member of the secret service.

j Finally, I must refer to one proviso to the Millett injunctions which was deleted by the order of your Lordships' House on 30 July. The proviso was in these terms:

'(2) no breach of this Order shall be constituted by the disclosure or publication of any material disclosed in Open Court in the Supreme Court of New South Wales unless prohibited by the Judge there sitting or which, after the trial in action no 4382 of 1985 is not prohibited from publication.'

When Millett J made that proviso in the interests of the Guardian and the Observer it would not have occurred to him that other newspapers would subsequently publish extracts from *Spycatcher*. It is very likely that in the course of the proceedings in New South Wales long extracts from *Spycatcher* have been read in open court. The Sunday Times has demonstrated that it is prepared to go to any lengths to publish extracts from *Spycatcher*. The order of this House prohibiting, inter alia, the publication of extracts from *Spycatcher* in this country was made on Thursday, 30 July. It was quite possible that if the proviso had not been deleted then on Sunday, 2 August the Sunday Times would have published long extracts from *Spycatcher* explaining that these had been read in open court in New South Wales. Indeed, when deletion of the proviso was discussed, counsel for the Sunday Times very properly and prudently asked whether, if the proviso were deleted, the Sunday Times would be forbidden from publishing extracts from *Spycatcher* which had been read out in open court, and he was informed that such was the object and intent of the order proposed and made by this House.

At the conclusion of the hearing of this appeal I was satisfied that it was the duty of this House in its judicial capacity to stand firm in order to prevent harm to the security service, to preserve the right and duty of the court to uphold within the jurisdiction the secrecy of the security service when necessary and to ensure that the object and intent of orders made by the court are not flouted.

Since writing this speech I have read in draft the speeches to be delivered by my colleagues. I agree with the observations of Lord Brandon and Lord Ackner. I agree with Lord Oliver that this is a uniquely difficult case but for the reasons I have set out I am unable to agree with the conclusions reached by my noble and learned friends Lord Bridge and Lord Oliver.

LORD ACKNER. My Lords, at the conclusion of his able address on behalf of the Sunday Times, counsel said: 'This case cries out for a sense of proportion.' It became sadly apparent immediately after the announcement of the decision of your Lordships' House on 30 July that this most sensible *crie de coeur* went totally unheeded by the entire media. This despite the fact that it was clearly announced that the reasons for the decision would be given, but not immediately, because some of your Lordships have long-standing commitments overseas.

The first step towards a balanced appreciation of the problem which your Lordships are asked to solve is to set out those facts and propositions which either are not in dispute or are indisputable, so that there may be built on common ground a firm foundation on which valid contentions and arguments can be constructed. I hope that but a tithe of the publicity given to the ill-informed criticisms of the majority decision of your Lordships' House is now accorded to the basis and the reasons given for that decision. If so, I believe that it will then be readily appreciated by the public that the *temporary*, and I stress 'temporary', remedy given to safeguard the efficiency of our national security service was, after paying all proper regard to safeguarding freedom of speech, rightly preferred to satisfying immediately the desire of the newspaper appellants to increase their circulation by publishing on a massive scale material emanating from Mr Wright in flagrant breach of his obligations as a former senior officer in the British security service.

First I shall state under appropriate headings that which for all practical purposes is not in dispute. I apologise for the frequent emphasis but emphasis sometimes helps to clear up misunderstandings. Significantly, the most important of the factors to which I will refer are to be found recorded with characteristic clarity in the judgment of Sir Nicolas Browne-Wilkinson V-C given on 15 July 1987. For it is on *this very judgment* that the appellant newspapers place such a total and uncritical reliance.

1. *Mr Wright's employment and his fundamental obligation owed to the Crown not to disclose confidential information*

a Mr Wright was employed for many years in a senior capacity by the British security service. During the course of his employment he had access to highly classified information. That employment imposed an absolutely crucial obligation on Mr Wright to keep that information confidential and not to publish it in any manner without the authority of the Crown. This is beyond dispute. The proceedings brought by the Crown in Australia, to which I will make but brief reference hereafter, were based on breaches of this duty of confidentiality. That such a duty of confidentiality existed has been b admitted at all times by all concerned (see the Vice-Chancellor's judgment, p 320, ante).

2. *Mr Wright's breach of duty*

c Mr Wright retired on 31 January 1976. After his retirement he publicly announced that he had submitted a memorandum to the chairman of a select committee of the House of Commons alleging penetration of the security service by foreign agents and calling for an inquiry. Being dissatisfied that no inquiry was held he decided, so he alleges, to disclose the relevant material in his memoirs, together with allegations of unlawful conduct on the part of members of the security service over the years. It was accepted by the Vice-Chancellor, and at no stage has the contrary been suggested to your Lordships, that Mr Wright has committed a most serious breach of his duty of d confidentiality (see the Vice-Chancellor's judgment, p 319, ante). It has, therefore, at all times been conceded that if Mr Wright, instead of emigrating to Australia, had sought to publish his book in this country both he and his publishers would immediately have been restrained by injunctions. Furthermore, Mr Wright would, prima facie, have committed serious breaches of the Official Secrets Acts 1911 to 1939 and the reasonable assumption is that he would have been prosecuted.

e 3. *The Australian proceedings*

f The British courts do not have jurisdiction beyond their shores. Every sovereign nation jealously guards its own jurisdiction. The inability of the English courts to supply a remedy by granting an injunction or other relief against Mr Wright is not a weakness for which the courts can be blamed. Accordingly, when Mr Wright emigrated to Australia and sought to publish his book, all that the Crown could do was to seek an injunction in the courts of Australia, in particular in the courts of New South Wales. As the Vice-Chancellor pointed out, it was no fault of the Crown that Mr Wright's book came into the public domain (I would prefer the phrase 'received the publicity') in Australia to the extent it has (see p 330, ante). The Vice-Chancellor accepted that the Crown had done everything that it thought itself able to do to stop publication worldwide g of the memoirs (see p 330, ante). Indeed, at the conclusion of his judgment the Vice-Chancellor said (p 333, ante):

'I do not in any sense criticise, even if it were my job, the seriousness with which the government has pursued this case.'

h 4. *The arguable point of law*

i The Vice-Chancellor, having considered at some length the authorities, concluded that there was an arguable point of law available to the Attorney General, 'a novel and difficult point of law' as he described it, to justify a claim for a permanent injunction at trial, notwithstanding the publication of *Spycatcher* in America. The Attorney General had submitted to the Vice-Chancellor that where information has been impressed with a duty of confidentiality, and somebody acquires such information knowing that it was so communicated originally, then the person acquiring that information with that knowledge himself comes under a duty not to disclose it further. That duty exists whether or not the information is otherwise in the public sphere. This view had the clear support of the Court of Appeal in *A-G v Observer Ltd* (1986) 136 NLJ 799, including in

particular that of Nourse LJ with his special knowledge of the courts' equitable jurisdiction (see [1896] CA Transcript 696). Significantly, the Law Commission in their report *Breach of Confidence* in 1981 (Law Com no 110) para 4.11, in stating their understanding of the existing law, said:

'The third party is liable to be restrained from disclosing or using information which he knows or, it would seem, he ought to know was subject to an obligation of confidence.'

It is, of course, incontrovertible that the entire media, including in particular the appellant newspapers, well know that Mr Wright's information, which they are so anxious to publish, is confidential information and that his publication of it has been a flagrant breach of his obligation of confidentiality. Counsel for the Observer, to whose excellent address I would wish to pay tribute, without in any way conceding that the Attorney General would ultimately succeed in establishing a good cause of action, accepted that the Attorney General had a good arguable point of law in his favour and indeed this had been accepted in the Court of Appeal. I understood and still understand all your Lordships are prepared to accept the Vice-Chancellor's conclusion on this point. It would, in my opinion, be quite wrong to seek finally to decide the validity of this point on a 48-hour-notice emergency interlocutory appeal to your Lordships' House, where it was never contemplated that the contrary would be argued and where we have not had the benefit of the opinions of the Court of Appeal.

5. *The remedy available to the Crown*

It has throughout these proceedings been accepted, and the Vice-Chancellor so stated in terms, that an award of damages would be an ineffective and inappropriate remedy for the Attorney General. An injunction is the only thing that is any good to him (see p 329, ante). This is so crystal clear that the proposition requires no further exposition. However, as I will shortly seek to show, this agreed fact is of such fundamental importance and the public has been subjected to such confused reporting that I feel obliged to stress it. If the *mass publication* which is now sought is permitted *before* the trial of the action in which the validity of the Attorney General's case is to be put to the test, then there would be no point or purpose in such a trial. The Attorney General would have lost his remedy *before* the court was able to hear his case.

6. *The Crown's claim is for an interlocutory injunction*

While it is accepted that the *refusal now* to grant to the Crown an injunction pending trial will render it totally futile for the Crown thereafter to seek to establish that it has a claim in law for a permanent injunction, the *grant* to the Crown of an injunction pending the trial will not render futile the newspapers' continued claim to publish. This was accepted by the Vice-Chancellor, who said (p 330, ante):

'... it is right to bear in mind that the allegations made by Mr Wright in *Spycatcher* are in a number of respects "old hat". They have been bandied around, some would think ad nauseam, in Mr Chapman Pincher's book and in subsequent articles. There is nothing very new about them. There is nothing urgent about them, in the sense that they concern recent events.'

Whether the Crown has valid cause of action raises essentially a question of law, which can be (and indeed could have been) determined by a speedy trial at first instance, and then in the appellate courts, if the initial decision is not accepted. If the Crown fails to establish a good cause of action, the time thus spent will add little to the existing staleness which by now characterises Mr Wright's assertions. The right of the press to publish and the public to know, on that hypothesis, will not have been totally frustrated, but only delayed. The cause of free speech will not have suffered. It will, on this assumption, have triumphed.

7. *The public interest factor*

- a* This case involves an entirely new and highly significant factor which is of the greatest relevance to the exercise of the court's discretion in considering whether to grant or refuse an injunction pending trial. Both Millett J, in granting the original injunction, and the Vice-Chancellor, in discharging it, proceeded on the same principle, which I understand your Lordships accept, that when there is a conflict between the public interest of preserving confidentiality and some other public interest, then the court
- b* should favour the preservation of confidentiality, unless that other public interest outweighs it. But in this case there is more than the public interest of preserving confidentiality. Here, unlike the not infrequent case where a company wishes to prevent, to its financial detriment, the publication of its trade secrets, there is the following additional public interest factor accepted by the Vice-Chancellor and stated in these words (p 331, ante):

- c* 'There remains what counsel for the Attorney General urges is the persisting public interest, namely to prevent general dissemination of the contents of this book through the press within the United Kingdom. By discouraging general dissemination those who are tempted to follow Mr Wright's example in the future and write their memoirs hot from the security service will not find it such a satisfactory or profitable business.'
- d*

The Vice-Chancellor then gave his assessment of the significance of this public interest. He said (p 331, ante):

- e* 'I think there is force in that. I think that the ability to restrain the unauthorised use of confidential memoirs by those who do not mind abusing their confidence, so as to discourage others from doing it, is a real point. *I do not think it can be just swept aside.*' (My emphasis.)

The Vice-Chancellor then accepted that the United Kingdom is likely to be the best market for anybody writing these memoirs and to discourage the use of *that market* would be a discouragement indeed.

- f* Again, I must emphasise, that the existence of this public interest factor, as accepted by the Vice-Chancellor and which I shall further particularise, is not challenged by the newspapers and its existence is, I understand, fully accepted by all your Lordships.

8. *The basis of the Vice-Chancellor's decision*

- g* The Vice-Chancellor accepted in terms that to permit publication would be to admit that our courts were unable to safeguard secrets of great public importance. He added (pp 330–331, ante):

- h* 'And let nobody underestimate how important these secrets are. There seems to have been a temptation to treat this case as an unreasonable pursuit by the government of unreasonable ends. That is not a view I share. The revelation of secrets of a security agent, it seems to me, is highly undesirable. I, therefore, think it is most regrettable, if it proves to be the case, that there is no way in which the court can preserve that confidentiality.'

- j* This, no doubt, accounted for the Vice-Chancellor reaching his decision with 'considerable hesitation', adding that he believed 'the matter to be quite nicely weighted and in no sense obvious' (see p 332, ante).

The basis of the Vice-Chancellor's reluctant decision can be simply stated. He accepted, and the contrary has not been argued before us, that Millett J's order granting the original injunction in July 1986 later upheld by the Court of Appeal was correct, but he considered that there had been a material change in the circumstances and that this change rendered it futile to continue the injunction. In his opinion to continue the restraint on publication

would serve no useful purpose and make the law look ridiculous. In a sentence, as a result of the publication of the book *in America*, and the accepted impracticability of preventing the importation of the book into this country, Mr Wright had 'got away with it' altogether, with the result that the courts are now impotent even to limit the damage which he has done. a

Having set out in some detail what is or must be treated as common ground, I can, on the conventional approach to this appeal, state my reasons quite shortly, since, as I understand it, all your Lordships accept: (1) that the Attorney General has an arguable case for a permanent injunction; (2) that damages are a worthless remedy for the Crown and, if the interlocutory injunction is not continued, the Crown loses here, now and forever the prospect of achieving a permanent injunction, which it might well obtain if a trial were to take place; (3) that by contrast to (2) above, the continuance of the interlocutory injunction is not, as the Vice-Chancellor accepted, 'a final order locking out the press' (see p 330, ante). If successful in the action, the press will then be able to publish the material which has no present urgency; (4) that there is, as described by the Vice-Chancellor, a real public interest concerned with the efficient functioning of the security service and that interest requires protection. b
c

It must then follow that it would be a *denial of justice* to refuse to allow the injunction to be continued *until the action is heard*. To refuse to continue the interlocutory injunction would bring about the very result that the Vice-Chancellor said should be avoided, namely the 'sweeping aside' of the public interest factor *without any trial*. The Attorney General would thus have been prematurely and permanently denied any protection from the courts. It would be established without trial and for all time, that by the simple expedient of going abroad, arranging for publication in the press in a country, such as the United States, where there is no remedy by way of injunction, the courts in this country then become incapable of exercising their well-established jurisdiction. Your Lordships would have established a 'charter for traitors' to publish on the most massive scale in England whatever they have managed to publish abroad. d
e

Accordingly, with every respect to the Vice-Chancellor, his conclusion, after carrying out the so-called 'balancing operation', cannot be justified. Counsel for the Attorney General was fully entitled to submit that there was a fatal inconsistency in the manner in which he weighed the scales. f

That is the short and simple answer to these appeals. However, it is so short and so simple that it has been suppressed by, and submerged in, the press hysteria which has greeted the announcement of your Lordships' orders. Although the press have transcripts of the judgment of the Vice-Chancellor, the very foundation on which these appeals were based, there has been virtually no reference to it. The press do not wish the public to exercise a sense of proportion. The case has therefore to be presented as open and shut, admitting of no possible argument, and of only one decision: that favourable to the press. This one-sided reporting is an abuse of power and a depressing reflection of falling standards and values. g

I do not share the Vice-Chancellor's 'considerable hesitation' nor do I consider the case 'nicely weighted'. If the Vice-Chancellor had appreciated that the public interest factor, which he accepted had force, was a 'real point' and 'cannot be swept aside', went much further than he realised, I do not believe he would have reached his reluctant decision. The so-called 'deterrent effect', of preventing mass publication, is by no means as limited as he describes. Firstly, what of Mr Wright, if your Lordships refused to continue these injunctions pending trial? Counsel for the Sunday Times, with characteristic frankness, suggested that if Mr Wright, whom he aptly described as an 'information thief', now attempted to publish his book here, *no injunction* would lie against him or his English publishers since, so he submitted, it could after the publication in America serve no useful purpose. But 'the appetite grows with what it feeds on'. Mr Wright's appetite may not be the exception. For all your Lordships know, Mr Wright may have produced to h
j

- date only *Spycatcher Mk I*, and there may be further instalments still to come. Secondly,
- a quite apart from deterring Mr Wright and other members of the security service, who may in the future suffer from the same lack of loyalty, what of the loyal members of the service whom they leave behind? Are they, or their families, to be totally unprotected by the Crown and left, in so far as they still survive the attack, to the highly expensive (there is no legal aid available) and uncertain remedy of a libel action, which the media not only can but may positively welcome defending? What material, if any, can they legitimately
- b use in their own defence, without further undermining the efficiency of the very service to which they wish to remain loyal?

- The function of the British security service is the defence of the realm from dangers arising from acts of or attempts at espionage, sabotage or subversion. It is axiomatic that the efficiency of that service is crucial. If your Lordships were to permit, without there being any trial of this important matter, the widest possible publication of the contents
- c of this book within your jurisdiction, where the best market is to be found, the prejudicial effect on the morale of the service is bound to be considerable. But there is yet a further and important additional prejudicial consequence. It would be utterly unrealistic not to accept that this would cause yet further loss of confidence of friendly countries in the efficiency of our service. All this is fully supported by the affidavits of Sir Robert Armstrong and is indeed obvious. To quote Millett J in his judgment last year:

- d 'It is difficult to believe that a security service whose senior members were free to write their memoirs would be taken seriously by other secret services or that security services of friendly countries would willingly co-operate or share sensitive information with such a service.'

- e And I would add 'and the more so if the courts of the disloyal member stand idly by, wringing their hands, and doing nothing within their own jurisdiction to stop mass circulation, even pending trial'.

- My Lords, English justice will have come to a pretty pass if our liability to control what happens beyond our shores is to result in total incapacity to control what happens within our very own jurisdiction. Some 60 years ago, Sankey LJ in a lecture entitled
- f 'Principle and Practice of the law today' said (see (1928) 165 LT Jo 241 and 242):

'Amid the shifting sands and cross-currents of public life the law is like a great rock on which men may set their feet and be safe.'

For the word 'rock' the appellants would have your Lordships now read 'jellyfish'!

- g If the publication of this book in America is to have, for all practical purposes, the effect of nullifying the jurisdiction of the English courts to enforce compliance with the duty of confidence both by interlocutory and by permanent injunction, then, as counsel for the Attorney General ruefully observed, English law would have surrendered to the American Constitution. There the courts, by virtue of the First Amendment, are, I understand, powerless to control the press. Fortunately, the press in this country is, as yet, not above the law, although like some other powerful organisations they would like
- h that to be so, that is until they require the law's protection.

- My noble and learned friend Lord Bridge, in the course of argument, asked the question, which he considered to be crucial, 'Is there any irreparable harm that Mr Wright has not done yet?' I would answer that question with an emphatic Yes. The appellants' arguments proceed on the basis of an obvious fallacy. They submit that, as a result of the publication of the book in America, the existing injunctions can no longer
- i serve any useful purpose. It is, of course, abundantly clear that the injunctions are no longer effective to safeguard any national secrets that the book might contain. They are indeed 'out of the bag', but from that it does not follow that the function of the injunctions is spent. The recent crescendo of protestations in the press proves that there is all the difference in the world between tolerating the importation of casual copies, as

opposed to the mass circulation of the material contained in the book, which the newspapers and the media are so bent on achieving.

There remain three other points with which I should deal. These are as follows.

(1) *The European Convention on Human Rights*

Counsel for the Sunday Times laid great emphasis on the provisions of art 10 of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)), dealing with the freedom of expression. Article 10(2) provides qualifications and exceptions to which the exercise of free expression may be made subject. They include such conditions—

‘as are prescribed by Law and are necessary in a democratic society in the interests of National Security . . . for the protection of the . . . rights of others, for preventing the disclosure of information received in confidence . . .’

Given that it is accepted that the Crown has an arguable case for a permanent injunction, that damages are a useless remedy, that there exists a significant public interest factor and that your Lordships are concerned only with a pre-trial restraint on publication, I see no prospect of the convention availing the appellants. Indeed, I adopt all my learned and noble friend Lord Templeman has said in his closely reasoned judgment as to the relevance and applicability of art 10, and I fully support the conclusion at which he, unlike my noble and learned friend Lord Bridge, arrives.

(2) *The financial remedy*

The suggestion has been made that the only true remedy in a situation such as Mr Wright's is, to quote a phrase used in the judgment of the American case of *Snepp v US* (1980) 444 US 507 at 515, that Mr Wright (and I assume also his publishers) should be required ‘to disgorge the benefits of his faithlessness’. Translated into more conventional forensic language, I understand this to mean that there should be an action for an account of the profits which he and his publishers have made, payment thereof to the Crown, together with exemplary damages on some undefined basis. There are at least three answers to the suggestion that this would be an adequate remedy. Firstly, your Lordships know not whether such a remedy can be obtained in Australia or Canada or elsewhere where this book may be published, with the possible exception of America. Secondly, the practical problems of enforceability may indeed be very great, particularly in cases where the author has spent his profits and the publishers have disposed of them in some way or another. However, most important of all, *profit* may not have been the motivation for the publication. An ex-employee of the service may be embittered or unbalanced, may publish his memoirs out of spite, to embarrass his superiors; to mount some eccentric campaign or publish for any number of other reasons. With all respect to the ingenuity behind the argument of a financial remedy, I must confess that it left me quite unimpressed.

(3) *The removal of the proviso in Millett J's order relative to material disclosed in the Australian courts*

This proviso read as follows:

‘(2) no breach of this Order shall be constituted by the disclosure of publication of any material disclosed in Open Court in the Supreme Court of New South Wales unless prohibited by the Judge there sitting or which, after the trial there in action no 4382 of 1985 is not prohibited by publication.’

When the matter came before the Court of Appeal last month as a result of the Vice-Chancellor discharging the injunctions, the Court of Appeal, of its own motion, deleted

a the second half of that proviso, that is to say the words 'or which after the trial there in action no 4382 of 1985 is not prohibited from publication'.

Sir John Donaldson MR, in giving his judgment, said (p 339, ante):

b 'If it be held that the law of Australia does not prevent publication by or on behalf of Mr Wright in that commonwealth, the position there will be the same as it appears to be in the United States and it is not clear to me why such a conclusion should be treated as decisive of a quite different issue, namely whether as a matter of English law Mr Wright, or anyone else within the jurisdiction, should be permitted to profit from the exploitation of the United Kingdom market for Wright material. Certainly this should not be an automatic consequence and the newspapers and anyone else affected by the injunction should be free to apply to the court for a modification of the injunction after the Australian proceedings are concluded, if they consider the result of those proceedings to be material.'

c I entirely agree with those observations. Counsel for the Attorney General initially in the course of the hearing of these appeals did not seek to support that part of the order of the Court of Appeal. However, when it was pointed out to him that, if your Lordships were minded to approve the continuation of the injunctions pending trial, such orders could be automatically frustrated if the Crown failed before the Court of Appeal of New South Wales, and failed to obtain any prohibition on publication in Australia pending appeal to the High Court, counsel then sought to support its deletion. Counsel for the Observer and counsel for the Sunday Times fairly conceded the logic of Sir John Donaldson MR and I need spend no further time on that part of the proviso.

d However, when your Lordships were considering the orders which should be made in the event of the appeals being dismissed, it occurred to the majority of your Lordships that the first half of the proviso should also be deleted. As my noble and learned friend Lord Templeman has demonstrated by his detailed references to the dates of the relevant events, there has been an orchestrated and sustained attempt to achieve a situation from which the courts would be powerless to exercise their undoubted jurisdiction to prevent or even limit these serious breaches of confidentiality and the resultant prejudice to the efficiency of the British security service.

f It has required no imagination to anticipate the resentment which the newspapers, and, indeed, the entire media, would feel and vociferously express if we ultimately imposed a restraint on publication, albeit a temporary restraint. Moreover, it is a fact of life, however regrettable, that there are elements in the press as a whole which lack not only responsibility but integrity. A very recent civil action has provided a glaring example. It would have been absurd and naive of your Lordships not to have appreciated that every attempt would inevitably have been made to frustrate your Lordships' orders. The 'antic disposition' of the press and the media following the announcement of the orders establishes this fully. The first part of the proviso supplied a potential loophole which might somehow, by hook or by crook, have been used by such elements to nullify the temporary damage limitation operation which the majority of us thought essential.

g This risk fully justified our taking this most unusual course in this wholly unique situation.

Conclusion

j (1) Your Lordships indisputably have the power to continue these temporary restraining orders. (2) The public interest in maintaining the efficiency of the national security service, on which the safety of this realm is dependent, requires your Lordships to exercise that jurisdiction. (3) To abdicate that responsibility in the face of pressure from the press and media would be a serious defeat both for the independence of the judiciary and for the rule of law.

LORD OLIVER OF AYMERTON. My Lords, prior to his finally leaving the service of the Crown in 1976 Mr Peter Wright occupied a number of senior positions in the counter-espionage branch of the British security service. His appointment to those positions involved, beyond argument, an obligation to preserve the secrecy and confidentiality of information coming to his knowledge in the course of his duties. For motives which have not been explored and which are, in any event, immaterial, Mr Wright, having retired and taken up residence in Australia, set about writing and arranging for the publication of his memoirs. He has written a book in which he deploys a great deal of information about the operation of the service to which he formerly belonged. It may be that some or all of it is speculative or imaginary. I do not know. But we must, for present purposes, accept his own assessment of it and the book purports to be his truthful recollection of events in which he participated in the course of his duties or which came to his knowledge by virtue of his confidential position. There could hardly be a clearer or more flagrant breach of Mr Wright's obligation of confidentiality.

In September 1985 Her Majesty's Attorney General caused proceedings to be instituted in the Supreme Court of New South Wales against both Mr Wright and the company, Heinemann Publishers Australia Pty Ltd, which was proposing to publish his manuscript, claiming an injunction against the disclosure and publication of confidential material. Those proceedings, which culminated in a trial at which the Attorney General's claim was dismissed, received considerable publicity both in Australia and in the United Kingdom. An appeal against the decision of the trial judge is currently being heard and undertakings by the defendants not to publish the memoirs in Australia have been given to preserve the position pending the hearing of the appeal.

In June 1986 the Observer and the Guardian newspapers published an outline of some allegations contained in the memoirs which, so it was said, were going to be canvassed in the Australian proceedings. On 27 June the Attorney General commenced proceedings against both newspapers and obtained *ex parte* injunctions against further publication of information derived from Mr Wright in his capacity as a member of the security service or information in or excerpts from his as yet unpublished memoirs. Applications to vary or discharge those injunctions were heard by Millett J on 11 July, when the injunctions were continued until trial or further order in a modified form. The newspapers appealed to the Court of Appeal, which, on 25 July affirmed the order of Millett J with the addition of a proviso preserving the right of the defendants to publish fair and accurate reports of proceedings in Parliament or in a court in the United Kingdom sitting in public.

Millet J's order was, so far as material, in the following terms: it restrained the defendants until judgment in the action or further order in the mean time from—

'(1) disclosing or publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service and which they know, or have reasonable grounds to believe to have come or have been obtained whether directly or indirectly from the said Peter Maurice Wright

(2) attributing in any disclosure or publication made by them to any person any information concerning the British Security Service to the said Peter Maurice Wright whether by name or otherwise
Provided that

(1) this Order shall not prohibit direct quotation of attributions to Peter Maurice Wright already made by Mr. Chapman Pincher in published works or in a television programme or programmes broadcast by Granada Television

(2) no breach of this Order shall be constituted by the disclosure or publication of any material disclosed in Open Court in the Supreme Court of New South Wales unless prohibited by the Judge there sitting or which, after the trial there in action no 4582 of 1985 is not prohibited from publication.'

The order reserved liberty to apply to vary or discharge on 24 hours' notice.

- a* The issues and the circumstances in which they arose were fully analysed by Millett J in the course of a careful and admirable judgment. At that time, although many of the allegations which, it was understood, Mr Wright was making had been publicly ventilated before in the press, on television and in books published by others (in one of which Mr Wright was said to have collaborated), the full part played or said to have been played by him had not been publicly proclaimed. It was known that he had been a member of the
- b* security service and it was known that he was, regrettably, seeking to publish his memoirs in breach of his duty. What was not publicly known was the extent to which Mr Wright was proposing to flesh out the skeleton of what was already public knowledge or to corroborate previously canvassed allegations from his own personal experience and knowledge. As Millett J expressed it: 'The objection is not to the allegations themselves, but to Mr Wright's input. The concern is not with what Mr Wright says, but with the fact that it is a former senior officer of the security service who says it.' What was new
- c* about Mr Wright was, first, that here was a former member of the security service seeking to publish his memoirs without prior authority and, second, that the insight which that publication would give into the working of the service would, because of his position, carry a spurious stamp of authenticity. Although it was said that Mr Wright had had access to classified information of the highest sensitivity it was not suggested
- d* that such information was disclosed by the proposed book. But, as was pointed out by Sir Robert Armstrong in his second affidavit sworn in the Australian action, even unclassified and, on its face, innocuous information may take on a wider significance when combined with other information in the possession of those whose interests are inimical to those of this country. The damage likely to flow from the publication of the memoirs was summarised by Sir Robert in para 10 of his first affidavit sworn in those proceedings as
- e* follows:

'The publication of any narrative prepared or contributed to by the Second Defendant [Mr Wright] which is based upon information available to him as a senior member of the British Security Service would be likely to cause unquantifiable damage by reason of the disclosures involved. Additionally, it will clearly damage the work of the British Security Service and thereby the national security of the United Kingdom in the following further respects—(a) the intelligence and security services of friendly foreign countries with which the British Security Service is in liaison would be likely to lose confidence in its ability to protect classified information (b) the British Security Service depends upon the confidence and co-operation of other organisations and persons. That confidence would suffer serious damage should the Second Defendant [Mr Wright] reveal information of the nature described above (c) there would be a risk that other persons who are or have been employed in the British Security Service who have had access to similar information might seek to publish it.'

- h* It was substantially on this evidence that Millett J relied in reaching the conclusion that he ought to continue the ex parte injunction granted against the defendants, albeit in a somewhat modified form. It was a conclusion which he reached after a most careful balancing of the interests both of the plaintiff and of the public in preserving confidentiality and those of the defendants in the free dissemination of information and comment on matters which were, quite clearly, of grave public concern. One
- j* consideration which clearly weighed heavily in the Attorney General's favour was, to quote the judge's words, that—

'The refusal of injunctive relief would permit indirect publication and effectively and permanently deprive the Attorney General of his rights in advance of trial.'

At the same time, Millett J was careful to ensure that the injunction should not go beyond the strict requirements of the interests which they were designed to safeguard; in particular he added the proviso as regards publication in Australia which has formed the subject matter of debate before your Lordships. He did so in these terms: a

‘I should also add a proviso so that the defendants may be at liberty to publish matters disclosed in open court in the proceedings in Australia, or which after the trial there are not prohibited from publication. This is not because I consider that the court should simply follow what is decided in Australia, but because I see no reason why these defendants should be discriminated against by being denied the right to publish information which, in the circumstances, every other newspaper in the world will be free to publish, including English newspapers and foreign newspapers circulating in England. [Counsel for the Attorney General] submitted that this was a future matter which could properly be dealt with under the liberty to apply. I disagree. In the newspaper world time is of the essence, and, should the Crown’s attempts to safeguard what it conceives to be the legitimate interests of the security service fail, the court should not uselessly put the defendants at a disadvantage when compared with their competitors.’ b
c

My Lords, in common with all your Lordships, I entertain no doubt whatever that Millett J’s order, in the circumstances which existed at that time, was entirely correct. But it is, in the light of the arguments ventilated before your Lordships on this appeal, essential to bear in mind the circumstances in which it was made, the purpose for which it was made and the limitations which the judge thought it right to impose on its operation. Mr Wright’s allegations had not then been published in any part of the world and their publication was inhibited pending trial in the only country in which publication was then threatened. The damage apprehended by the Attorney General was, therefore, capable of being contained, at least temporarily, so long as general publication could be prevented. d
e

A little over a year has passed since those injunctions were granted. During that time, the action in Australia has been tried and has received wide and perfectly proper publicity both in this country and elsewhere. Such of the allegations of Mr Wright as have emerged in the course of proceedings in open court in New South Wales and the fact that at least some of the material dealt with in the memoirs has already been permitted to be published without objection or hindrance and the reason why that has occurred have been, again quite properly, the subject matter of public interest and debate. In April 1987 an English newspaper, the Independent, which was not directly inhibited by any order of the court, published a summary of the allegations made by Mr Wright including a number of what purported at any rate to be the verbatim quotations from the manuscript text of the proposed book (by that time referred to by the name *Spycatcher*, under which it has subsequently been published.) Parts of the Independent report were, on the same day, published by the London Evening Standard and the London Daily News and were referred to in television and radio news bulletins. Almost immediately afterwards further disclosure of the material in *Spycatcher* was displayed in articles in the Melbourne Age and the Canberra Times in Australia. On 3 May 1987 the Washington Post, which enjoys no doubt a very limited circulation in the United Kingdom but which is obtainable at some newsagents in London and, I imagine, in other major cities and airports, published a major article regarding the contents of *Spycatcher*. f
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h

In the light of the fact that many, if not all, of Mr Wright’s allegations had, for good or ill, achieved a notoriety far beyond anything that existed at the date of the original injunctions against the appellants, they moved the court for an order to vary or discharge the injunctions and that came before the Vice-Chancellor on 7 May 1987. In the mean time, however, the Attorney General had moved to commit the editor of the Independent and to sequester that newspaper’s assets for contempt of court in publishing the j

a summary of the contents of *Spycatcher* in its article on 27 April. Accordingly, the hearing of the appellants' application to discharge was stood over until after the hearing of the contempt motion. Judgment on that motion was given by the Vice-Chancellor on 2 June, when he dismissed the motion. The Attorney General immediately appealed to the Court of Appeal and the appellants' restored application for discharge was further stood over until after the hearing of that appeal. In the mean time three events occurred. First, on 14 May an American publisher, Viking Penguin Inc, a subsidiary of an English company, announced that it was proposing to publish *Spycatcher* in the United States. It is and was clear that any proceedings by the Attorney General to prevent publication in the courts of the United States were foredoomed to failure as a matter of law and the English parent company was resistant to suggestions that it should seek to prevent its United States subsidiary from proceeding with the publication. Second, on 12 July, the Sunday Times, which was, like the Independent, not then directly enjoined from publication, published the first of what were intended to be several instalments of the serialisation of extensive extracts from the book itself. That publication was timed to coincide with the third event, that is to say the first publication of the book in the United States, which took place on 14 July. On that day, with extensive publicity, the book was put on sale in major bookshops throughout the United States, including, perhaps not surprisingly, bookstalls at John F Kennedy Airport. The evidence is that it has moved into the bestseller class and is being reprinted. It is now notorious that not wholly insubstantial quantities have been and are being imported into the United Kingdom and are on sale here, though not, I think, through the normal book distribution network. It has been announced that the government has decided not to take steps to prevent such imports, on the ground that to do so would be unworkable and ineffective. The books can thus be freely obtained here or can be ordered by telephone from the United States by any member of the public sufficiently interested to do so.

e On 15 July the Court of Appeal allowed the appeal against the Vice-Chancellor's dismissal of the contempt motion against the Independent, holding (in reasons given two days later) that, without deciding that the publication complained of actually constituted a contempt, it was capable of doing so if the necessary intent could be proved (see *A-G v Newspaper Publishing plc* [1987] 3 All ER 276). On 16 July the Vice-Chancellor granted an injunction restraining the Sunday Times from publishing the remaining instalments of its threatened serialisation.

f It was against this background that the substantive hearing of the newspapers' application for the discharge of the original injunctions against them took place on 15 July. In a long and careful extempore judgment, the Vice-Chancellor, having reviewed the facts and the authorities, concluded that there had been a most material change of circumstances since the grant of the original injunctions but that he ought still to assume that there remained an arguable case in favour of the grant of permanent injunctions at trial. Accordingly, he approached the case as one to which the ordinary *American Cyanamid* principles applied (see *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396). Having most carefully balanced the factors for and against continuing the injunctions he reached the conclusion that the balance lay in favour of the appellants and accordingly ordered that the injunctions be discharged. From that decision the Attorney General appealed to the Court of Appeal, which, on 24 July, reversed the Vice-Chancellor but substituted for the original injunctions new injunctions prohibiting the publication of any extract from *Spycatcher* or of any statement by Mr Wright concerning the British or any other security service but with a proviso that the order should not prevent 'the publication of a summary in very general terms of the allegations made by Mr Wright'. This was something for which neither side had asked and neither side has sought to support it before your Lordships. It is, if I may say so with respect to the Court of Appeal, manifestly unsatisfactory. What the Attorney General seeks to restrain are not the ipsissima verba of Mr Wright, as if these were actions for infringement of copyright, but the substance of the allegations which he has made in breach of his duty of confidence

and against which the substituted injunctions provide substantially no protection. What the appellants wish to be free to do is to publicise and comment on those allegations and a liberty to do so only in 'very general terms' would be calculated to leave any newspaper editor in a state of bewilderment with no certain guide as to what are 'general terms' and how general is 'very general'. It is clear that the Court of Appeal, faced with the stark choice of all or nothing, a choice which has been reiterated before your Lordships, conceived this formula as a *via media* and that it regarded the Vice-Chancellor as having erred in perceiving that all or nothing was the only choice with which he was faced. Ralph Gibson LJ indeed indicated that, faced with that choice, he would have upheld the conclusion that the injunctions must be discharged. I mention this because it seems to me to dispose of any suggestion that, in reaching the conclusion that he did, the Vice-Chancellor was so plainly wrong that an appellate court is at liberty without more to substitute its own discretion. There must be borne in mind always the limited function of an appellate tribunal in an appeal against the exercise of a judicial discretion and I remind myself of the cautionary words of Lord Diplock in *Hadmor Productions Ltd v Hamilton* [1982] 1 All ER 1042 at 1046, [1983] 1 AC 191 at 220:

'An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own.'

It was said in the Court of Appeal that the Vice-Chancellor had erred in principle in two respects. First it was said that he approached the case on the footing that he had to consider not whether the altered circumstances warranted the discharge of the injunctions but whether, in the altered circumstances, injunctions should be granted *de novo*. For my part, I think this is a distinction without a difference. Essentially the questions posed are the same and I can see no error in the Vice-Chancellor's approach. Then it was said that he erred in principle in not perceiving and considering the *via media* which the court propounded. Neither side seeks now to suggest that he was in error in that respect. What is now said is that he erred in not seeing an inconsistency between his assumption that the Attorney General still had an arguable case for an injunction at trial and an order discharging the existing injunction which would, in effect, decide the issue by rendering futile the further prosecution of the claim. But that is a choice which sometimes the

court is compelled to make. The mere fact of an arguable case (and it is clear that the

a Vice-Chancellor considered it less than strongly arguable) does not automatically entitle the plaintiff to an injunction pending trial, particularly in a case where it is common ground that damages would not be an adequate or appropriate compensation for an injunction subsequently vacated. It was a matter which the Vice-Chancellor had clearly in mind and which he took into consideration in the careful balancing exercise in which he engaged. The majority of your Lordships take the view that he got the balance wrong

b but, for my part, I detect no error in his approach and I would be content to decide this appeal on the simple ground that the conclusion at which he arrived was a proper exercise of the discretion with which he, as the judge of first instance, was invested and one with which an appellate court ought not to interfere. But this is an unique case: unique, as I very much hope, in its facts and unique in its importance. It is right, therefore, that I should state the reasons which have led me to agree with the Vice-Chancellor, more

c particularly because the majority of your Lordships consider not only that his decision was wrong in principle but, indeed, that the injunctions should be strengthened even beyond the terms in which they were originally granted by Millett J and beyond the terms for which the Attorney General has asked. At the outset, there has to be borne in mind a factor which is, in my judgment, of critical importance. The appellants before

d your Lordships are the Observer and the Guardian newspapers. The Sunday Times, which is affected by the injunctions as a result of contempt proceedings, has appeared and argued in support of their appeals. It may (I do not know) be in some special position as a result of the purchase, in circumstances of which we know nothing, of some rights in Mr Wright's or his publishers' copyright in the book. But the injunctions, whilst they no doubt, as matters stand, affect other newspapers and other organs of the news media,

e are injunctions against the appellants and it is with their position that your Lordships are primarily concerned. It must therefore be kept clearly in mind that the appellants have done and are proposing to do nothing which is not normally involved in the proper conduct of their legitimate business of collecting, disseminating and commenting on news which they regard as of interest to their reading public. It so happens that, most regrettably, a former servant of the Crown has chosen to publicise that which was

f confided to him under an obligation of secrecy but the appellants have not themselves been party to the revelation of the confidential information to the public. I quote from the judgment of the Vice-Chancellor (p 327, ante):

'So, in the present case, it is not suggested, nor could it be, that the Guardian and the Observer have in any sense been involved in any activity with Mr Wright leading to the publication of his book. Anything they would wish to publish in the

g future would be obtainable from the public domain from *Spycatcher* itself. They have not aided and abetted Mr Wright in his breach of duty. That seems to me to be a new case not covered by authority.'

I echo that, for I have not been able to find, nor have your Lordships been referred to, any previously reported decision which could be said to be even remotely parallel to the

h instant case.

My Lords, a visitor to this jurisdiction (carrying, perhaps, copies of *Spycatcher* and the Washington Post in his hand) might, I think pardonably, be surprised at the situation with which he is confronted on his arrival in the land which many regard as the cradle of democratic liberty. Outside these shores he and every other member of the public can read newspaper reports of and comments on Mr Wright's memoirs. He can listen to

j them, perhaps listen to them ad nauseam, on radio and television. Those reports and comments can be acquired and read throughout Europe. They can be acquired and read from newspapers published from Trondheim to Taranto and from newspapers freely imported from the United States, Canada, the Antipodes and the Irish Republic. They can even, or could at the date of the hearing before your Lordships, be published and

broadcast as close to home as Scotland, Northern Ireland and the Channel Islands. It is a no doubt regrettable but inescapable fact of life that Mr Wright's allegations are available to the news media for public ventilation everywhere except in England. Even in Australia, where the principal action is proceeding, the only parties enjoined from publication, so far as I am aware, are Mr Wright and his publishers. Yet the Guardian and the Observer newspapers, and effectively the entire English press and other news media, remain prohibited from reproducing or commenting on matter contained in a book which can be and is being obtained freely by members of the public here and which can on occasions be seen being read, with what attention or enjoyment I know not, by travellers on the London Underground. a
b

This is a situation which, I venture to think, none of your Lordships regards as anything but extremely regrettable. Where I differ from the majority of your Lordships is in the assessment of whether the continuation of the injunctions, perfectly rational and explicable in their origins, can now any longer be justified and whether, constitutionally and in the public interest in a free society, they ought to be permitted to continue even temporarily pending a full trial, possibly a year or more hence, of the issues raised on the pleadings in this case. In saying this I do not underestimate the obvious importance of the public interest in protecting the security service. What I question is both the effectiveness and the appropriateness, in the circumstances as they now exist, of seeking to do so by continuing against these appellants a fetter on disclosure of information which, for good or ill, is now freely obtainable and disclosable by other members of the public. c
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In substance, the arguments in favour of the continuation of interlocutory injunctive relief, notwithstanding the existing and almost certainly increasing availability of the information on which comment is restrained, are threefold. First, it is said that the continuation of the injunctions will serve the purpose of sustaining the morale of the security service. I put it that way although it has been negatively expressed by counsel for the Attorney General in his able and persuasive argument. As he has put it, the discharge of the injunction will be damaging to morale, and it will be so in two ways. First, and this arises rather from argument than from any evidence which has been filed in the proceedings, it may be disconcerting to existing members of the service if they feel that they may, in the future, figure in the memoirs of some fellow member without effective interference by the court. Equally, existing members of the service who may be disgruntled or avaricious may be encouraged to write their memoirs if Mr Wright is seen to 'get away with it' by gaining even wider currency for his allegations than exists already. Second, it is said that although the information publication of which is sought to be restrained has become public, publicised, notorious and available virtually everywhere in the world outside England, and although it is available here to anyone sufficiently interested to seek it by buying or borrowing a copy of *Spycatcher* that situation has been brought about by the machinations of the wrongdoers whom it is sought to restrain in the Australian action. An English court, it is submitted, ought to be reluctant to permit its orders to be set at naught by the very people whose wrongful action gave rise to the action in which the orders were made. Third, it is argued, the injunctions sought by the Attorney General are interlocutory only. None of the information the publication of which it is sought to restrain can be said to be of vital immediate moment. All of it relates to events which occurred, if they did occur, 12 or more years ago. What real harm, it is argued, when the public has been deprived of this information for 12 years, can there be in holding up further distribution of it for a further year or two years until the action has been brought to trial and it can be determined definitively whether the Attorney General is or is not entitled to an injunction to restrain its dissemination for all time? The Vice-Chancellor having accepted, so it is argued, that the Attorney General has still an arguable case for an injunction at trial, to determine the present application against him would, in effect, be to render a trial otiose, for even total victory would be e
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a certain to be barren. On the other hand, to continue the restraint against the appellants, even if they are totally in the right, would merely be to postpone for a period the publication of what is pretty stale news anyway.

b My Lords, this case is, as I have said, an unique case. For my part, I have found it also uniquely difficult because of the cogency of the arguments on both sides and of the very finely balanced considerations which, partly as a matter of convenience and partly as a matter of policy, require to be taken into account. There was a point during the argument when the skill of the advocacy of counsel for the Attorney General almost persuaded me to take the same view as the majority of your Lordships. Further reflection impelled me to an opposite conclusion, but I mention it lest, in the predictable clamour aroused when your Lordship's decision was announced, it should be thought that the solution of the very difficult problems posed came easily or obviously to any member of your Lordships' House. In the end I have been persuaded to a conclusion opposed to that of the majority of your Lordships but, like the Vice-Chancellor whose decision I would uphold, with a degree of hesitation.

c Taking the arguments which have been deployed in turn, that which seeks to justify the continuation of the injunctions on what I may call the Admiral Byng principle, 'pour encourager les autres', I find less than persuasive as a matter of fact, but more importantly, it involves, I believe, a misuse of the injunctive remedy against these appellants. The morale effect within the service is, as I see it, the only aspect of the damage to the service envisaged in the evidence before Millett J which can still have any relevance. In so far as the publication of Mr Wright's memoirs involves disclosure of material of interest to an inimical foreign power or decreases the confidence of other friendly security services in the secrecy of the United Kingdom's security service, that damage must already have been irrevocably done whether or not the appellants are permitted to give further currency to the memoirs or to comment on them. The only remaining question is how far the continuation of the injunctions serves to maintain the efficiency of the service. So far as an injunction against the English press, whether permanent or temporary, might act as a deterrent to other members of the service, it seems to me that its frailty is demonstrable and has already been demonstrated by the obvious ease with which publication may be brought about in other parts of the world. It is accepted that it cannot be restrained in the United States and that route remains open whether or not publication is permitted here. It is at least questionable how far, if publication took place within the Common Market, importation could be effectively restricted in the absence of compelling reasons of national security. Moreover, the deterrent effect of proceedings for an account of profits remains and the determination with which the present claim has been and is being pursued against Mr Wright should be ample demonstration that the path of the would-be publisher of confidences would not be easy. As to the insecurity which may be felt by existing members of the service, the fact is that, whether or not the news media here can be restrained from publishing allegations by their fellow members, the free availability of the book in this country demonstrates the continued existence of that risk. The suggestion is that the fears of members of the service will be allayed by the knowledge that the readiest market for news of this sort and the section of the world public most likely to be interested will be cut off from publication. I could see the force of this if the information had indeed been effectively cut off, but when one considers the degree of publicity that has already occurred, and occurred without any impropriety on the part of the appellants, the contention loses much, if not all, of its impact. When allegations, however unfair and possibly untrue, have already been made the subject matter of extensive public discussion and are freely current worldwide in book form and in foreign newspapers circulating both here and abroad, further restraint on public discussion can, I should have thought, provide little reassurance. But, even allowing that there remains any substance in this argument, I question whether the imposition of an injunction on A simply in order to punish B and to provide an example to C is a correct

or permissible use of an injunctive remedy. The injunction was originally imposed in order to preserve the confidentiality of the then unpublished allegations. That confidentiality has now, without fault on the part of the appellants, been irrevocably destroyed and, no doubt, destroyed as a result of a calculated policy adopted by Mr Wright and those associated with him. I am as reluctant as any of your Lordships to acknowledge that the intention of the court has been effectively flouted by a public dissemination which the courts in this jurisdiction are powerless to prevent. But, once that has occurred and the proscribed material is available for public ventilation and discussion by everybody except those subject to the existing restraint, I question whether it can be right to continue that restraint against parties in no way concerned with flouting the court's orders and to interfere with their legitimate business of publishing and commenting on matters already in the public domain for the purpose, not of preventing that which can no longer be prevented, but of punishing Mr Wright and providing an example to others. I can well see, and this equally applies to the second argument to which I have referred, that the denial to Mr Wright of the audience that he most desires to reach may provide a cogent reason why the Attorney General may wish to maintain the injunctions, but I am not persuaded that, as against these appellants, it constitutes a proper justification for them. It does so only if, in seeking further to publish what is already public, they can properly be said to be threatening some invasion of private law right of the Crown.

It is the third argument on behalf of the Attorney General which has given me the greatest concern, for although it results in a situation which cannot, as I think, do anything but engender disrespect for the law, it has an appealing logic given the major premise on which it is based, that is to say that there remains an arguable case for the grant of permanent injunctions against these appellants at the trial. In the events which have happened I question that premise, although the appellants have, I sense somewhat reluctantly, presented their arguments on that footing. The judgment of the Vice-Chancellor contains a penetrating analysis of the applicable principles of law and of the process of reasoning which led him to the conclusion that the appellants, in acquiring information from the book which is now on public sale, albeit in limited numbers, could not properly be restrained from republication of facts or allegations which are already public property. No useful purpose would be served in repeating that analysis and I am content to accept and adopt it. I accept, of course, that it is no necessary impediment to the claim of a plaintiff in an action for breach of confidence that the information the publication of which is complained of is capable of being discovered or assembled from sources available to the public. I accept too, for present purposes, that, even where the very information sought to be used has previously been made public, there may be circumstances in which the recipient, by contract or conduct, comes under a fiduciary obligation to refrain from unauthorised republication. *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 All ER 321, [1982] QB 1 was such a case, although it has not been without its critics (see the Law Commission's report 'Breach of Confidence' (Law Com (no 110) (1981) para 6.67). That case is, however, in my judgment, clearly distinguishable from the instant case, for there the defendants were the original recipient of the information (who was, arguably, himself bound by contract to keep the information confidential and certainly had accepted the obligation to do so as one of the terms on which he was afforded facilities by the plaintiffs) and a television company which was directly involved in assisting him, with knowledge of the circumstances, in breaching his obligation. In so far as the majority judgments suggest that, apart from direct obligation or complicity in the breach of a direct obligation, information in the public domain can be the subject matter of a claim for breach of confidence, I would, for my part, prefer the powerful dissenting judgment of Lord Denning MR. Again, I accept that the confidant who has himself made public the information confided to him cannot rely on the publicity which he himself has generated so as to destroy the confidentiality. That equally must apply to

anyone who knowingly aids and abets him in his unauthorised disclosure. But, as was pointed out by the Vice-Chancellor, the salient feature of the instant case and one which distinguishes all previous authorities, is that the persons against whom relief is sought are persons who have come on the information sought to be protected without having been involved in any way in its wrongful publication. The justification for the imposition of a restraint on republication by such a person must, in my judgment, rest on the premise that, once he knows that the information was confidential and has been disclosed in breach of confidence, it would be unconscionable for him to make use of it. Once, however, that information has been so widely disseminated that it can properly be said to be in the public domain then it ceases to be any longer confidential information. There cannot be an injunction against use or republication by the general public and it cannot, in my judgment, any longer be said to be unconscionable for a person untainted with complicity in its original publication to make use of that which is available to be made use of by everyone else, save possibly the original confidant and those who have aided and abetted him. So far as they are concerned, I do not for my part accept that continued availability of injunctive relief against them stands or falls with the continuation of the injunctions against these appellants. *Schering Chemicals Ltd v Falkman Ltd* indicates quite otherwise. The Vice-Chancellor was led to assume that there still remained an arguable case because the point of law involved was a difficult and novel one. So it is, but, as was pointed out in the course of the argument, the case of the Attorney General is unlikely to improve between now and the trial and your Lordships have, as it seems to me, all the material required to determine the point. I fully appreciate the point which is forcefully made in the speeches of the majority of your Lordships that the question should not now be determined without a further argument for which the trial would provide an occasion, but, for my part, I find it difficult to see how, once the information has achieved such a degree of public availability and notoriety that any member of the public may legitimately possess himself of it, read it, discuss it and pass it on to others, it can be right to regard it as otherwise than in the public domain. If that is right then I find it even more difficult to see how it could be successfully argued that the appellants should be permanently enjoined from 'disclosing to any person' (including presumably their own employees) information which has been and is being freely disclosed by members of the public to one another by selling or lending a book which is in free and open circulation.

All other considerations apart, I find difficulty in seeing how a permanent injunction at trial would be other than brutum fulmen. In the action the appellants raise the defences of public interest and iniquity, issues which, I should have thought, cannot possibly be tried without an investigation of the very allegations which it is sought to restrain. Are we to be presented with the unedifying spectacle of a court trying the action or a substantial part of it in camera, not for the purpose of preserving secrets of the state or anything of that nature, but simply in order to prevent the public from learning and commenting on allegations which are contained in a book which any member of the public is at liberty to go out and buy in the market place? If the injunction sought at trial is not to be rendered otiose in the very process of obtaining it, that would seem to be a necessary consequence, but it involves making a serious and entirely novel intrusion on the principle that legal proceedings should be conducted in public and it cannot, I should have thought, do otherwise than bring the law into disrespect.

It is said that there is a public interest in ensuring that confidentiality of information should be preserved and that, even though it may be available generally, the appellants, in contradistinction to others not concerned in the business of disseminating news, ought to be restrained because of the width of their potential circulation. But that, as the Vice-Chancellor remarked, is the negation of freedom of the press. He said (p 332, ante): 'If the press is precluded from saying things that other people are not precluded from, that seems to be not a freedom of the press but an additional fetter on it.' We do not have a

First Amendment but, as Blackstone observed, the liberty of the press is essential to the nature of a free state. The price that we pay is that that liberty may be and sometimes is a harnessed to the carriage of liars or charlatans, but that cannot be avoided if the liberty is to be preserved. No one contends that the liberty is absolute, and there are occasions b when it must yield to national emergency, to considerations of national security and, on occasion, to private law rights of confidentiality where they are not overborne by some countervailing public interest. I do not for a moment dispute that there are occasions when the strength of the public interest in the preservation of confidentiality outweighs b even the importance of the free exercise of the essential privileges which lie at the roots of our society. But, if those privileges are to be overborne, then they must be overborne to some purpose. The argument is not perhaps much assisted by homely metaphors about empty stables or escaping cats, but I cannot help but feel that your Lordships are being asked in the light of what has now occurred to beat the air and to interfere with an essential freedom for the preservation of a confidentiality that has already been lost c beyond recall. It was recognised by Millett J when the injunctions were granted by him that indirect publication elsewhere would largely stultify the Attorney General's claim. The same recognition of reality is to be found in the judgment of the Court of Appeal in the contempt motion against the Independent. That indeed, was the *raison d'être* of the injunctions. It is a matter for regret that that has now in fact occurred, but the reality has d to be faced. Once information has travelled into the public domain by whatever means and is the subject matter of public discussion in the press and other public media abroad, I emphasise again without fault on the part of the appellants, I find it unacceptable that publication and discussion in the press in this country should be further restrained. In practical terms I cannot see how the appellants can, at the trial, properly be restrained by permanent injunction for making use of information of which every other newspaper e and the news media generally throughout the western hemisphere are free to make use. Ideas, however unpopular or unpalatable, once released and however released into the open air of free discussion and circulation, cannot for ever be effectively proscribed as if they were a virulent disease. *Facilis est descensus Averno*¹ and to attempt, even temporarily, to create a sort of judicial cordon sanitaire against the infection from abroad of public comment and discussion is not only, as I believe, certain to be ineffective but f involves taking the first steps on a very perilous path.

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge, and I share the concern which he there expresses. However regrettable it may be, I do not think that any arguable case for a permanent injunction at the trial now remains and I would accordingly allow the appeal and restore the order of the Vice-Chancellor. g

Appeals dismissed. Cross-appeals allowed. Injunction varied. Cause remitted to Chancery Division.

Solicitors: Lovell White & King (for the Guardian); Turner Kenneth Brown (for the Observer); Theodore Goddard (for the Sunday Times); Treasury Solicitor.

Mary Rose Plummer Barrister.

¹ See Virgil *Aeneid* vi. 126

Note

A Co v K Ltd

COURT OF APPEAL, CIVIL DIVISION

SIR JOHN DONALDSON MR

8 JULY 1987

Costs – Security for costs – Appeal – Application for security for costs of appeal – Late application – Lateness of application itself a ground for refusing application.

Notes

For orders for security for costs of appeals, see 37 Halsbury's Laws (4th edn) para 698, and for cases on the subject, see 37(3) Digest (Reissue) 205–209, 4090–4117.

Appeal

The plaintiffs in an action appealed against a decision of Mr Registrar Adams refusing, solely on the grounds of its lateness, their application on 2 July 1987 for security for costs in the sum of £19,960 in an appeal by the defendants against a judgment of the Queen's Bench Division in 1986 awarding the plaintiffs a sum of the order of \$US2.6m against the first defendants, a foreign corporation. The defendants' appeal had been set down on 8 May 1986 and added to the list of forthcoming appeals on 16 June and to the warned list on 28 August; on 22 December a hearing date had been fixed for 22 July 1987. The appeal was heard and judgment was given in chambers. The case is reported by permission of Sir John Donaldson MR.

SIR JOHN DONALDSON MR outlined the facts of the case and continued: We therefore have the position that this appeal has been on the stocks for 14 months or thereabouts and it is only now, within 14 days of the hearing, that an application is made for security for costs. I appreciate that in the trial divisions it is possible to make applications for security at a comparatively late stage. The Registrar of Civil Appeals held, and I think he held rightly, that the same principles do not apply in relation to appeals. Every citizen is entitled to have his day or days in court in having his dispute resolved. When it comes to the appellate process the position is different. The duty of the Court of Appeal is in a sense a supervisory duty. It has to ensure that the trials are conducted correctly and that the result is in accordance with law. But it is a jurisdiction which has to be exercised with the maximum possible expedition, as otherwise successful plaintiffs, like the applicants in this case, might well be deprived of the fruits of their judgments. Therefore this court has always taken the line that there must be strict compliance with timetables laid down, in stark contrast to the attitude taken by the trial courts. Again, in deciding whether to strike out appeals on account of delay this court has not had regard to whether the respondent has been prejudiced. It has simply said that the timetables laid down are to be strictly complied with in the interests of all who resort to the Court of Appeal.

What is said here by counsel for the applicants is that there would be no prejudice to the respondents if security were granted at this stage. Quite apart from the answer that this is not a matter of prejudice but a question of strict compliance with timetables and that it is well known that the proper time to apply for security is at an early stage, there must be prejudice. An appellant has to decide whether he is going to appeal. At that stage he is entitled to know whether an application is going to be made requiring him not only to pay his own costs of the appeal but to give security for the other side's costs. An appellant is entitled to know what his position is. He already knows whether he has to get leave to appeal. He is entitled to know at an early stage whether he is going to have

to give security for the other side's costs. Quite apart from that, within 14 days of the hearing of the appeal, the appellant is deeply involved in preparation. He has already either paid or secured his solicitors' costs, or at any rate his solicitors were very ill-advised if he has not been required to do so. He is suddenly told, 'Abandon all this or put up security for costs,' an entirely uncovenanted and probably unexpected piece of expenditure. I think that is very real prejudice and, indeed, potential injustice. a

Of course counsel's great point is that if, as he alleges, the appellants are effectively judgment-proof as a foreign company, he says without assets (although I have no evidence about that one way or the other), they can have what amounts to a free appeal in terms of liability for the respondents' costs, because the only asset which can meet those costs is the sum of \$US830,000 which is already the subject matter of the judge's order that it be paid to the respondents. b

I see the force of that, but I think it is outweighed by the other considerations that I have mentioned and also the consideration which I might describe as proportionality. c One cannot blink the fact that what is at stake here is \$2.6m. The real grievance of the respondents, as I suspect it to be, is that, even if the appeal fails, they will not get their \$2.6m. The most they can expect to get is the £830,000 which is in court. The prejudice to them is that the shortfall may be increased by £20,000 of costs. Proportionately that is a quite tiny sum, although I agree that £20,000 is £20,000, and it is another £20,000. d

For those reasons, which are substantially the same reasons as appealed to the Registrar of Civil Appeals and turn on the fact that time is of the essence in the Court of Appeal in all respects, whether we are talking about applications by appellants or respondents, I feel that this application has to be dismissed.

Application dismissed.

Diana Procter Barrister.

a Stephens v Anglian Water Authority

COURT OF APPEAL, CIVIL DIVISION

SLADE, STEPHEN BROWN LJ AND SIR JOHN MEGAW

9, 13, 17 JULY 1987

b *Water and watercourses – Underground water – Abstraction – Negligence – Abstraction causing subsidence of neighbouring land – Whether landowner having unrestricted right to abstract underground water from his land – Whether landowner owing duty of care not to cause subsidence of neighbouring land by abstraction of water.*

c The defendants were a water authority which abstracted water percolating under land in close proximity to the plaintiff's land in such volume that the plaintiff's land subsided, causing damage to her house. The plaintiff brought an action for damages against the defendants, alleging that they had been negligent in carrying out the water extraction despite warnings that it was likely to result in the collapse of neighbouring land. The claim was framed in negligence alone and not in nuisance and the statement of claim did not allege that the plaintiff was entitled to an easement, either of support or otherwise, or that there had been a derogation from any grant. The registrar struck out the claim as disclosing no cause of action and on appeal his order was affirmed by the judge. The plaintiff appealed to the Court of Appeal, contending that the defendants owed her a duty to exercise reasonable care in abstracting water from neighbouring land.

e **Held** – A landowner was entitled to exercise his right to abstract subterranean water flowing in undefined channels under his land regardless of the consequences, whether physical or pecuniary, to his neighbours and regardless of his motive or intention or whether he anticipated damage. Accordingly, the defendants owed the plaintiff no duty of care in the course of abstracting the water from their land and the plaintiff could not maintain an action in negligence against them for the consequential damage to her land caused by their water extraction. The appeal would therefore be dismissed (see p 380 e to p 384 c to f, post).

f *Chasemore v Richards* [1843–60] All ER Rep 77 and *Bradford Corp v Pickles* [1895–9] All ER Rep 984 applied.

Notes

g For the nature of the duty of an occupier to his neighbours, see 34 Halsbury's Laws (4th edn) para 29, and for cases on the subject, see 36(1) Digest (Reissue) 123–124, 469–470.

For rights in respect of subterranean water, see 49 Halsbury's Laws (4th edn) paras 413–414, and for cases on the subject, see 49 Digest (Reissue) 191–194, 1480–1499.

Cases referred to in judgment

h *Bradford Corp v Pickles* [1895] AC 587, [1895–9] All ER Rep 984, HL.
Chasemore v Richards (1859) 7 HL Cas 349, [1843–60] All ER Rep 77, 11 ER 140.
Home Office v Dorset Yacht Co Ltd [1970] 2 All ER 294, [1970] AC 1004, [1970] 2 WLR 1140, HL.
Jordeson v Sutton Southcoates and Drypool Gas Co [1899] 2 Ch 217, CA.
Langbrook Properties Ltd v Surrey CC [1969] 3 All ER 1424, [1970] 1 WLR 161.
Lotus Ltd v British Soda Co Ltd [1971] 1 All ER 265, [1972] Ch 123, [1971] 2 WLR 7.
j *Popplewell v Hodkinson* (1869) LR 4 Exch 248, [1861–73] All ER Rep 996, Ex Ch.

Cases also cited

Acton v Blundell (1843) 12 M & W 324, 152 ER 1223, Ex Ch.
Salt Union Ltd v Brunner Mond & Co [1906] 2 KB 822.

Application for leave to appeal and appeal

The plaintiff, Jennifer Elizabeth Stephens, applied for leave to appeal and, having been granted leave, appealed against the judgment of Farquharson J dated 14 March 1986 dismissing her appeal against the decision of Mr District Registrar Barker dated 27 June 1985 ordering that her claim against the defendant, the Anglian Water Authority, for damages for negligence be struck out on the ground that it disclosed no cause of action. The facts are set out in the judgment of the court.

J Melville Williams QC and Philip Sapsford for the plaintiff.
Mark Raeside for the defendants.

At the conclusion of argument the court announced that it would grant leave to appeal but dismiss the appeal for reasons to be given later.

17 July. The following judgment of the court was delivered.

SLADE LJ. On 14 March 1986 Farquharson J dismissed an appeal by the plaintiff in an action, Jennifer Elizabeth Stephens, from a decision of Mr District Registrar Barker given on 27 June 1985. By that decision the district registrar, on the application of the defendants, Anglian Water Authority, had struck out the plaintiff's claim pursuant to RSC Ord 18 and under the inherent jurisdiction of the court, on the grounds that it disclosed no cause of action. The judge refused the plaintiff leave to appeal to this court. She then applied to us for leave to appeal. Her application was listed on the basis that, if leave was given, the hearing of the subsequent appeal would immediately follow. With the consent of counsel on both sides, we heard the argument of the plaintiff's counsel on both the application for leave to appeal and (*de bene esse*) on the substantive appeal itself together. At the conclusion of his argument we acceded to the plaintiff's application for leave to appeal to this court (which the defendants' counsel did not oppose) but dismissed her appeal. We intimated that we would give our reasons at a later date, and this we now do.

The action in substance raises a short but not unimportant question of law, which can be sufficiently stated as follows: can a person whose land has subsided as a result of the abstraction by his neighbour of water percolating under the neighbour's land in any circumstances maintain an action in negligence against the neighbour for consequential damage?

The writ in the proceedings was issued on 6 December 1984 and was indorsed with a statement of claim. No evidence was filed on the defendants' subsequent application to strike out this pleading. Whether or not this accords with reality, we therefore have to assume for present purposes the truth of all the facts asserted in the statement of claim.

The material parts of the pleading are as follows:

'1. In January 1979 the Plaintiff was and remains the Owner of freehold property situate at 1 Great Yard, Saxthorpe, Norfolk where she then and now continues to reside. 2. The Defendants were and are statutory water undertakers in respect [of] *inter alia* the County of Norfolk. 3. In or about January 1979 the Defendants from land near Great Yard aforesaid, such nearby land belonging to the Defendants or in the alternative upon which they carried out extraction work with the permission of the owner, extracted such volume of water that part of Great Yard collapsed. 4. The point at which the said water extraction took place lies in close proximity to Great Yard aforesaid. 5. As a result of the collapse caused by the said action of the Defendants the value of 1 Great Yard aforesaid has depreciated considerably. 6. The matters complained of were caused by the negligence of the defendants, their servants and agents acting in the course of their employment.

PARTICULARS OF NEGLIGENCE

- a** (a) Carrying out such water extraction despite warnings of the likely consequences. (b) Failing to ascertain whether such water extraction would cause damage to Great Yard aforesaid or at all. (c) Failing to ascertain whether there was any preferential underground connection between the point of such water extraction and Great Yard aforesaid. (d) Failing to allow any or any sufficient margin for the effect of such water extraction upon the land and strata lying below Great Yard aforesaid.'

b The pleading finally contains an allegation that, by reason of the matters complained of, the plaintiff had suffered loss and damage. It gives particulars of such loss and claims damages and interest.

- We pause to make certain observations on this pleading. First, with due respect to the pleader, we do not think that the drafting of the particulars of negligence is entirely satisfactory. For present purposes, however, we propose to read para 6(a) of the pleading (favourably to the plaintiff) in the sense: 'Carrying out such water extraction despite warnings that it was likely to result in the collapse of all or part of Great Yard.' Second, the following features of the facts alleged (of which we must assume the truth) should be stressed: (1) no allegation is made of water flowing in a defined channel either above ground or underground; (2) no allegation is made of the abstraction of any mineral other than water; (3) it is not alleged that the plaintiff is entitled to any easement, either of support or otherwise; (4) no allegation is made of any derogation from any grant; (5) the claim is framed in negligence alone and not in nuisance.

- The issue of law now before this court (together with an issue arising from a parallel claim in nuisance) fell to be considered by Plowman J, on facts which were in material respects indistinguishable from those of the present case, in *Langbrook Properties Ltd v Surrey CC* [1969] 3 All ER 1424, [1970] 1 WLR 161. After a careful examination of a long line of authorities Plowman J summarised his conclusions as to the legal position thus ([1969] 3 All ER 1424 at 1439-1440, [1970] 1 WLR 161 at 178):

- 'The authorities cited on behalf of the defendants in my judgment establish that a man may abstract the water under his land which percolates in undefined channels to whatever extent he pleases, notwithstanding that this may result in the abstraction of water percolating under the land of his neighbour and, thereby, cause him injury. In such circumstances the principle of *sic utere tuo ut alienum non laedus* does not operate and the damage is *damnum sine injuria*. Is there then any room for the law of nuisance or negligence to operate? In my judgment there is not.'

- At the end of his judgment Plowman J recognised that, on the facts which he was required to assume, this might be thought to be an unsatisfactory result, observing ([1969] 3 All ER 1424 at 1440, [1970] 1 WLR 161 at 178-179):

'If indeed the defendants could have avoided damaging the plaintiffs' property by the exercise of reasonable care, it may be asked why they should not be liable for their failure to do so.'

- h** However, he said:

'But so far, at any rate, as a court of first instance is concerned, it must, I think, be taken as settled that the restrictions which the law imposes on a landowner's freedom of action for the benefit of his neighbours are not such as to give the plaintiffs a cause of action in this case.'

- j** In a well-sustained argument, counsel for the plaintiff attempted to persuade us that Plowman J's decision in the *Langbrook Properties* case, in so far as it related to the claim in negligence, was wrong. For that purpose he took us through a number of the leading authorities referred to in that decision and the later decision of Pennycuik V-C in *Lotus Ltd v British Soda Co Ltd* [1971] 1 All ER 265, [1972] Ch 123.

From the authorities cited to us we derive, inter alia, the following conclusions as to the present state of the law. (1) At common law the owner of land has, as an incident of his ownership, the right to have the surface of his land supported by subjacent strata of minerals on or under his neighbour's land. Accordingly, he has a cause of action against his neighbour if the subjacent support is removed (see *Lotus Ltd v British Soda Co Ltd* [1971] 1 All ER 265 at 268, [1972] Ch 123 at 128). (2) The last stated principle has been applied (a) by the Court of Appeal, so as to uphold the cause of action of a landowner against his neighbour, who withdrew support consisting of a bed of wet sand or running silt (see *Jordeson v Sutton Southcoates and Drypool Gas Co* [1899] 2 Ch 217) and (b) by Pennycuik V-C, so as to uphold the cause of action of a landowner against his neighbour, who withdrew support by causing a solid support (rock salt) to liquefy and then removing the resulting liquid (wild brine) (see *Lotus Ltd v British Soda Co Ltd*). (3) However, the owner of land does not have, as an incident of his ownership at common law, the equivalent right to have the surface of his land supported by water (see *Popplewell v Hodgkinson* (1869) LR 4 Exch 248, [1861-73] All ER Rep 996). (4) At common law the owner of land has no right at all in respect of subterranean water running in undefined channels, except to sink wells and so obtain a supply of water, although a neighbour by exercising the same right may deprive him of his supply (see *Chasemore v Richards* (1859) 7 HL Cas 349, [1843-60] All ER Rep 77). As Lord Chelmsford said in that case (7 HL Cas 349 at 374, [1843-60] All ER Rep 77 at 81-82):

‘... the principles which apply to flowing water in streams or rivers, the right to the flow of which in its natural state is incident to the property through which it passes, are wholly inapplicable to water percolating through underground strata, which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates.’

(6) In *Chasemore v Richards* 7 HL Cas 349 at 388, [1843-60] All ER Rep 77 at 87 Lord Wensleydale expressed the view that the landowner's right to abstract water, referred to in (5) above, was a qualified right, saying:

‘... he ought to exercise his right in a reasonable manner, with as little injury to his neighbour's rights as may be.’

However, the rest of their Lordships did not share that view. In the subsequent case of *Bradford Corp v Pickles* [1895] AC 587, [1895-9] All ER Rep 984 the House of Lords, following *Chasemore v Richards*, again held that the owner of land containing underground water which percolates by undefined channels and flows to the land of a neighbour has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbour of it, and that his motive and intentions in exercising this right are ‘absolutely irrelevant’ (see [1895] AC 587 at 594, [1895-9] All ER Rep 984 at 988 per Lord Halsbury LC).

Plowman J in the *Langbrook Properties* case [1969] 3 All ER 1424 at 1440, [1970] 1 WLR 161 at 178 gave two reasons for concluding that there was no room for the law of nuisance or negligence to operate on the facts of that case:

‘In the first place, if there were, it seems to me highly probable that the courts would already have said so, and yet I have not been referred to any case in which that was done. In *Chasemore v Richards* the opportunity was there, since the water authority concerned was found to have had reasonable means of knowing the natural and probable consequences of their excavations, but there was no suggestion in the House of Lords that this was a relevant matter. Moreover, since it is not actionable to cause damage by the abstraction of underground water, even where this is done maliciously, it would seem illogical that it should be actionable if it were done carelessly. Where there is no duty not to injure for the sake of inflicting injury, there cannot, in my judgment, be a duty to take care not to inflict the same injury.’

a Counsel for the plaintiff accepted that, if the plaintiff is to show an arguable cause of action in negligence on the facts of the present case, she has to show that it is arguable that the defendants owed her a duty of care. He recognised the force of at least the second of Plowman J's two reasons and candidly accepted that the decision of the House of Lords in *Bradford Corp v Pickles*, in particular, presented formidable obstacles in the way of his contention that the defendants in the present case owed the plaintiff a duty of care in the course of abstracting water from the neighbouring land. He also, properly, drew our
b attention to a recent dictum of high authority in *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294 at 326, [1970] AC 1004 at 1060, where Lord Diplock, in the course of listing a number of examples of acts or omission which give rise to no liability under the English law of tort, even though the probability of damage may be anticipated, observed:

c '... one may damage one's neighbour's land by intercepting the flow of percolating water to it even though the interception is of no advantage to oneself ...'

Nevertheless, counsel for the plaintiff submitted that the legal obstacles facing his client are not insuperable. He pointed out that, in none of the cases to which we have referred except the *Langbrook Properties* case, does a claim in negligence appear to have
d been pleaded or specifically considered by the court; and, indeed, the recital of the facts in *Popplewell v Hodkinson* (1869) LR 4 Exch 248 at 249, [1861-73] All ER Rep 996 at 997 specifically stated that the defendant had not been guilty of any negligence. He pointed out that all the decisions on which Plowman J relied were given long before the modern law of negligence had been developed in cases such as *Home Office v Dorset Yacht Co Ltd* and subsequent decisions of the House of Lords. He submitted that the dividing line
e drawn between water and other substances in decisions such as *Popplewell v Hodkinson*, the *Jordeson* case and *Lotus Ltd v British Soda Co Ltd* is artificial and illogical.

Apart from the older authorities referred to by Plowman J, counsel for the plaintiff submitted that there is no good reason why the modern law of negligence should not impose a duty of care, owed to his neighbour, on a person who abstracts water flowing in undefined channels beneath his land and can readily foresee that in so doing he will or
f may cause his neighbour's land, or buildings situated on that land, to subside (and a fortiori if there is an intention to injure).

While not accepting all the submissions made on behalf of the plaintiff as to the present state of the law, we have some sympathy with them. It would appear from the passages at the end of Plowman J's judgment in the *Langbrook Properties* case which we have cited that he may have felt some doubt whether the relevant law as it stands is
g wholly satisfactory. We have given the plaintiff leave to appeal because we consider that her claim raised issues which deserved ventilation in this court.

Nevertheless, counsel for the plaintiff recognised that the plaintiff could hope to persuade us to allow this appeal and permit her action to proceed only if he could distinguish the decision in *Bradford Corp v Pickles* from this present case. This he sought to do on two grounds.

h The first was that in that case, as he submitted, the House of Lords was directing its attention to the rights of the plaintiff, not to the duties and obligations of the defendant. Lord Halsbury LC said ([1895] AC 587 at 592, [1895-9] All ER Rep 984 at 986):

i '... it is necessary for the plaintiffs to establish that they have a right to the flow of water, and that the defendant has no right to do what he is doing.'

In the present case, counsel for the plaintiff stressed, the plaintiff is claiming not an unqualified right to the support of her land by water, but only a right not to have that support withdrawn by the negligent activities of her neighbours. The relevance of negligence, he pointed out, was not specifically considered in *Bradford Corp v Pickles*.

However, the House of Lords in that case did specifically refer to the rights of the defendant and in so doing, in our judgment, by necessary implication negatived the existence of any relevant duty owed by the defendant to the plaintiff. Thus Lord Watson said ([1895] AC 587 at 595, [1895-9] All ER Rep 984 at 989): a

‘... it is clear that, apart from any privilege which may have been conferred upon them by statute, the respondent, as in a question with the appellants, has a legal right to divert or impound the water percolating beneath the surface of his land, so as to prevent its reaching Trooper Farm ...’ b

Similarly, Lord Ashbourne said ([1895] AC 587 at 598, [1895-9] All ER Rep 984 at 991): ‘Putting aside the statutes, the defendant’s rights cannot be seriously contested.’ If a landowner has the right to abstract water from beneath his land, whatever be his motive or intention (even with the intention of causing his neighbour injury), it cannot, in our judgment, be said that he owes a duty to his neighbour to take care in doing it. c

Second, counsel for the plaintiff sought to distinguish *Bradford Corp v Pickles* on the grounds that in that case the damage caused to the plaintiff was simply the loss of its water supply, while, on the assumed facts in the present case, the abstraction of the water has caused subsidence. Without disrespect to this argument, we can only say that this appears to us a distinction without any essential difference. It seems to us an inevitable logical consequence of the reasoning of their Lordships in *Bradford Corp v Pickles* that the claim in that case would have no less failed if the defendant’s activities had resulted in subsidence of buildings or even personal injury. As the law stands, the right of the landowner to abstract subterranean water flowing in undefined channels beneath his land established by *Chasemore v Richards* and *Bradford Corp v Pickles* appears to us, in the light of those authorities, to be exercisable regardless of the consequences, whether physical or pecuniary, to his neighbours. Whether or not this state of the law is satisfactory is not for us to say. d

In the light of the authorities binding this court, we regard the answer to the question of law stated at the beginning of this judgment as being in the negative and consider that the plaintiff’s claim that the defendants owed her a duty of care is unarguable. If there is no duty of care, the defendants cannot have committed the tort of negligence in doing what they did. e

For these reasons, we have dismissed this appeal. f

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Thompson Quarrell Marcan & Dean*, agents for *Purdy & Holley*, Aylsham (for the plaintiff); *Mills & Reeve Francis*, Norwich (for the defendants). g

Mary Rose Plummer Barrister.

National Employers Mutual General Insurance Association Ltd v Jones

COURT OF APPEAL, CIVIL DIVISION

MAY, CROOM-JOHNSON LJ AND SIR DENYS BUCKLEY

2, 3 FEBRUARY, 27 MARCH 1987

Agent – Mercantile agent – Possession of goods – Consent of seller – Seller – Sale of goods – Sale by person in possession of goods with consent of seller – Stolen goods – Seller's possession deriving from thief – Whether 'seller' having to be owner if good title to pass – Whether good title can be derived from unlawful possession of a thief – Whether seller able to give good title – Factors Act 1889, s 9.

The plaintiffs were the insurers of a car which was stolen and, after two resales, was purchased by a car dealer, A Ltd, which sold it to another car dealer, M Ltd, which in turn sold it to the defendant who purchased in good faith and without notice of the original owner's rights in the car. Having paid the original owner for her loss the plaintiffs claimed possession of the car from the defendant under their subrogated title. When the defendant refused to return the car the plaintiffs brought proceedings in the county court in which they were awarded damages equivalent to the value of the car. The defendant appealed, contending that he had derived a good title from M Ltd under s 9^a of the Factors Act 1889, which provided that where 'a person, having bought . . . goods, obtains with the consent of the seller possession of the goods' the delivery or transfer by that person of the goods under a sale to a person receiving them in good faith 'shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods . . . with the consent of the owner'. The defendant submitted that 'the seller' in s 9 referred to the person currently in possession and not to the true owner, that accordingly, M Ltd had bought and obtained possession of the car with the consent of the seller, A Ltd, and that therefore the transfer from M Ltd to the defendant had the same effect as if M Ltd were a mercantile agent in possession of the car with the consent of the original owner. The plaintiffs contended that s 9 did not affect the operation of the principle that a person could not give what he did not already have and that since M Ltd's title derived from a thief it could not pass on a good title to the defendant.

Held (Sir Denys Buckley dissenting) – Although the 'seller' in s 9 of the 1889 Act did not have to be the 'owner' he had at least to be a person who had the general property in the goods before a person buying from him could acquire a good title under s 9. Accordingly, a good title could not be passed under s 9 where the seller's own possession was derived from the unlawful possession of a thief, and the defect in title derived from a thief passed down the chain of any further purported sales. It followed that the defendant had never acquired a good title to the car and the appeal would therefore be dismissed (see p 393 *a b*, p 395 *g*, p 396 *b* to *g*, p 398 *d e*, p 399 *c* and p 400 *d*, post).

Dictum of Denning LJ in *Pearson v Rose & Young Ltd* [1950] 2 All ER at 1031, *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] 2 All ER 105, *Elwin v O'Regan and Maxwell* [1971] NZLR 1124 and *Brandon v Leckie* (1972) 29 DLR (3d) 633 followed.

Du Jardin v Beadman Bros Ltd [1952] 2 All ER 160 and *Newtons of Wembley Ltd v Williams* [1964] 3 All ER 532 distinguished.

Notes

For disposition of goods by a seller in possession, see 41 Halsbury's Laws (4th edn) para 751, and for cases on the subject, see 39(2) Digest (Reissue) 333–337, 2609–2619.

a Section 9 is set out at p 387 *h j*, post

For the Factors Act 1889, s 9, see 1 Halsbury's Statutes (4th edn) 53.

Cases referred to in judgments

- A-G v Milne* [1914] AC 765, [1914-15] All ER Rep 1061, HL.
A-G of Canada v Hallett & Carey Ltd [1952] AC 427, PC.
Brandon v Leckie (1972) 29 DLR (3d) 633, Alta SC.
Bremner v Johnson [1946] 3 WWR 39, BC Cty Ct.
Butterworth v Kingsway Motors Ltd [1954] 2 All ER 694, [1954] 1 WLR 1286.
Cahn v Pockett's Bristol Channel Steam Packet Co Ltd [1899] 1 QB 643.
Car and Universal Finance Co Ltd v Caldwell [1964] 1 All ER 290, [1965] 1 QB 225, [1964] 2 WLR 600, CA.
Cook v Rodgers (1946) 46 SR (NSW) 229, NSW SC.
Du Jardin v Beadman Bros Ltd [1952] 2 All ER 160, [1952] 2 QB 712.
Elwin v O'Regan and Maxwell [1971] NZLR 1124, NZ SC.
Folkes v King [1923] 1 KB 282, [1922] All ER Rep 658, CA.
Leader v Duffy (1888) 13 App Cas 294, HL.
Marten v Whale [1917] 2 KB 480, CA.
Newtons of Wembley Ltd v Williams [1964] 3 All ER 532, [1965] 1 QB 560, [1964] 3 WLR 888, CA; *aff'd* [1964] 2 All ER 135, [1964] 1 WLR 1028.
Oppenheimer v Attenborough & Son [1907] 1 KB 510; *aff'd* [1908] 1 KB 221, [1904-7] All ER Rep 1016, CA.
Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd [1965] 2 All ER 105, [1965] AC 867, [1965] 2 WLR 881, PC.
Pearson v Rose & Young Ltd [1950] 2 All ER 1027, [1951] 1 KB 275, CA.
Van Casteel v Booker (1848) 2 Exch 691, 154 ER 668.
Westminster Bank Ltd v Zang [1966] 1 All ER 114, [1966] AC 182, [1966] 2 WLR 110, HL.

Cases also cited

- Fuentes v Montis* (1868) LR 3 CP 268; *aff'd* LR 4 CP 93, Ex Ch.
Helby v Matthews [1895] AC 471, [1895-9] All ER Rep 821, HL.
Lee v Butler [1893] 2 QB 318, [1891-4] All ER Rep 1200, CA.
Oppenheimer v Frazer & Wyatt [1907] 2 KB 50, [1904-7] All ER Rep 143, CA.

Appeal

The defendant, Robert William Jones, appealed from the decision of his Honour Judge ap Robert sitting in the Bridgend County Court on 30 January 1986 whereby he awarded the plaintiffs, National Employers Mutual General Insurance Association Ltd, damages of £2,650, being the value of a motor car to which the plaintiffs had title and which was in the possession of the appellant. The facts are set out in the judgment of May LJ.

John Leighton Williams QC and *Roger Garfield* for the defendant.
Malcolm Pill QC and *John Jenkins* for the plaintiffs.

Cur adv vult

27 March. The following judgments were delivered.

MAY LJ. This is a defendant's appeal against a judgment of his Honour Judge ap Robert of 30 January 1986 awarding the plaintiffs £2,650 by way of damages, together with interest of £824 and costs. The defendant now seeks to have that judgment set aside and judgment entered in the action for him against the plaintiffs.

All the facts in this case were agreed. A Miss Hopkin was the owner of a Ford Fiesta motor car which was stolen from her on 3 February 1983. On 23 September 1983 the thieves were convicted. Prior to this, however, they had sold the car to a person called

- a Lacey on a date and at a price unknown. Lacey then sold on to one Roderick Thomas, again on a date and at a price unknown. On 6 February 1983 Thomas in his turn sold the car to Autochoice (Bridgend) Ltd for £2,100. On 14 March 1983 Autochoice (Bridgend) Ltd sold the car to Mid-Glamorgan Motors Ltd for £2,350. On March 1983 Mid-Glamorgan Motors Ltd sold the car to the defendant for £2,650. It was accepted that the defendant was completely honest when he bought the car. The plaintiffs were Miss Hopkin's insurers, who, having bought out their insured's interest after the theft for
- b £2,750, thereby acquired rights to the car. They asked for the car back by letter of 6 January 1984 but the defendant refused to return it. The plaintiffs accordingly began these proceedings in the Bridgend County Court on 27 September 1984, in which they succeeded, as I have indicated, in recovering damages representing the value of the car from the defendant. The short point which was argued below and before us is the extent to which, if at all, the operation of the maxim *nemo dat quod non habet* has been affected
- c by the provisions of s 9 of the Factors Act 1889 (which is still in force) and what is now s 25 of the Sale of Goods Act 1979, which is in very much the same terms.

As the relevant provisions of the two statutes are for present purposes identical, I quote those in the earlier statute for convenience. Section 1(1) of the 1889 Act provides:

- d 'The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.'

Section 2(1) provides:

- e 'Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make
- f the same.'

Sections 8 and 9 of the Act are as follows:

- g '8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.
- h '9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods
- i or documents of title with the consent of the owner . . .'

The judge held that the operation of the maxim was not affected by, in particular, s 9 of the 1889 Act and that in effect one had to construe the section as if the word 'owner' has the same meaning as 'seller'. The argument in brief on behalf of the defendant, which

was the argument advanced before the judge below, was that one should look at the actual words of s 9 and interpret them literally. If one did so on the facts of the instant case, it followed, it was contended, that the defendant acquired a good title to the car when he bought it from Mid-Glamorgan Motors Ltd, as indeed may some or all of the earlier sub-purchasers to it, other than the purchaser from the thieves themselves. a

The argument advanced on behalf of the defendant was direct and uncomplicated. Counsel submitted that there was no reason why one should not give s 9 of the 1889 Act its literal and clear meaning. If one did so and, for instance, in relation to the sale by Autochoice (Bridgend) Ltd to Mid-Glamorgan Motors Ltd, substituted the names of the appropriate parties for their descriptions in the relevant words of s 9, it would read: b

‘Where Mid-Glamorgan, having bought or agreed to buy goods [the car], obtains with the consent of Autochoice possession of the car, the delivery or transfer, by Mid-Glamorgan, of the car, under any sale, to the defendant receiving the same in good faith and without notice of any lien or other right of Autochoice in respect of the car, shall have the same effect as if Mid-Glamorgan were a mercantile agent in possession of the car with the consent of Miss Hopkin.’ c

Then, the argument continued, by virtue of s 2 of the 1889 Act, the delivery or transfer of the car by Mid-Glamorgan to the defendant under the sale agreed between them was as valid as if the former had been expressly authorised by Miss Hopkin, as the owner of the car, to make the sale. Thus at least on the facts of this case, the defendant acquired a good title to the car and Miss Hopkin’s insurers ought not to have succeeded against the defendant in the court below. d

Counsel supported this argument by a number of collateral submissions. First, he contended that, other things being equal, the court should always adopt a literal approach to the construction of statutes. The court’s task was to see what Parliament had said, giving words their ordinary and natural meaning, and then to give effect to this in respect of the facts of a given case. It was only when the words of a statute in their ordinary meaning were unclear, or gave rise to an ambiguity, that the court in construing them should depart from the literal approach. e

Second, unless there was any clear reason to the contrary, a court should give the same meaning to the same word where it is used in different places in a statute. Thus ‘the owner’ of goods in s 2 clearly referred to the true owner, to the person having the general property in the goods. Unless there was any reason to the contrary, therefore, which counsel submitted there was not, the court should give the same meaning to the same words in s 9. On this basis any argument that one should read the word ‘owner’ in s 9 as equivalent to ‘seller’, or perhaps to ‘original seller’, could not be correct. Further, where in the same section of an Act the draftsman had used specific and different words, the clear inference was that Parliament had intended them to mean different things. Thus where in s 9 the draftsman had specifically referred to the seller and to the original seller, and thereafter to the owner, it again could not be right to equate one with the other. The care with which the section was drafted was demonstrated by the use of the phrase ‘the original seller’ at one point; this was used to make it quite clear that the reference was back to the seller referred to in the seventeenth word of the section and to avoid any possible confusion. f

Third, if the original seller in a s 9 situation already has the proprietary title to the relevant goods, then s 9 is not needed to pass that title to the ultimate buyer. g

In further support of his argument, counsel traced the legislative history of the relevant provisions. Section 2 of the 1889 Act had its general origin in s 1 of the Act 4 Geo 4 c 83 (factors (1823)). That enacted that, where goods were entrusted by their owner to an agent for the purpose of sale, then if that agent shipped the goods in his own name he should be deemed to be the true owner to any consignee of the goods who took them in good faith and without notice of any adverse interest in them. h

i

This basic principle was amended and extended in 1825 (6 Geo 4 c 94), 1842 (5 & 6 Vict c 39) and in 1877 (40 & 41 Vict c 39) and ultimately by the Factors Act 1889 itself, where it was given effect by s 2. Throughout, in order that an agent in possession of goods could pass a good title under this particular legislation, he had to have been entrusted with the goods, with the consent of their owner, as a mercantile agent and those taking from that agent must have done so in good faith and without notice of any other interest.

The extension of a similar principle to transactions by sellers permitted to remain in possession of the goods sold or buyers allowed to have possession of the goods bought, now embodied in ss 8 and 9 of the 1889 Act and ss 24 and 25 of the Sale of Goods Act 1979, was first brought about by ss 3 and 4 of the 1877 Act. Under those two sections the criterion to be complied with to enable an ultimate bona fide transferee without notice to obtain a good title was that after a sale the respective vendor or vendee should retain or obtain, as the case might be, the possession of the goods. Given that possession, then a subsequent delivery or transfer of the goods to such a transferee passed a good title. On the facts of the instant case, it was submitted, clearly Mid-Glamorgan had the necessary possession of the car, with the consent of Autochoice, and thus the sale by the latter to the defendant passed a good title to the latter.

So far as I am aware there are no English cases which are directly in point on this argument contended for on behalf of the defendant that the simple and literal construction of s 9 of the 1889 Act or s 25 of the 1979 Act is to be preferred. There are, however, one New Zealand and one Canadian decision at first instance against such a construction, to which I shall refer later.

In support of his argument, nevertheless, counsel for the defendant referred us to a number of decisions which have a substantial bearing on the points in issue in this appeal. The earliest to which I think I need refer is *Folkes v King* [1923] 1 KB 282, [1922] All ER Rep 658. In that case the owner of a motor car delivered it to a mercantile agent for sale on certain conditions. Dishonestly and in breach of those conditions the agent sold it to a purchaser who bought it in good faith and without notice of the agent's fraud. It was held by this court that the purchaser acquired a good title by virtue of s 2 of the 1889 Act. It was also held that the agent had not been guilty of the old larceny by a trick, since he was authorised by the erstwhile owner to pass the property in the car to a purchaser. Yet further, Bankes and Scrutton LJ expressed the view that as the owner had in fact consented to the mercantile agent having possession of the car, it was immaterial whether the latter had committed larceny by a trick. *Folkes v King* was, of course, a case decided on s 2 and not s 9 of the 1889 Act, but counsel was able to make the general observation, so far as it went, that even though goods may have been stolen title to them may pass where possession is or is deemed to be with the consent of the owner.

Next, in *Pearson v Rose & Young Ltd* [1950] 2 All ER 1027, [1951] 1 KB 275, another motor car case, it was held that title did not pass to the ultimate transferee because a mercantile agent could not sell a car 'in the ordinary course of business of a mercantile agent' unless he sold the registration book with the car. However, on the facts of that case, at the time of the purported sale to the transferee of both car and registration book the dishonest agent's possession of the latter was not 'with the consent of the owner'. Nevertheless, although obiter, the opening passage of the judgment of Denning LJ in that case ([1950] 2 All ER 1027 at 1031, [1951] 1 KB 275 at 286) is of interest in the context of the present appeal:

'In the early days of the common law the governing principle of our law of property was that no person could give a better title than he himself had got, but the needs of commerce have led to a progressive modification of this principle so as to protect innocent purchasers. We have had cases in this court recently about sales in market overt and sales by a sheriff, and now we have the present case about sale by a mercantile agent. The cases show how difficult it is to strike the right balance

between the claims of true owners and the claims of innocent purchasers. The way that Parliament has done it in the case of mercantile agents is this. Parliament has protected the true owner by making it clear that he does not lose his right to goods when they are taken from him without his consent, as, for instance, when they have been stolen from his house by a burglar who has handed them over to a mercantile agent. In that case the true owner can claim them back from any person into whose hands they come, even from an innocent purchaser who has bought from a mercantile agent. Parliament has not protected the true owner if he has himself consented to a mercantile agent having possession of them, because, by leaving them in the agent's possession, he has clothed the agent with apparent authority to sell them, and he should not, therefore, be allowed to claim them back from an innocent purchaser.'

A case where the facts were very close to that of the instant one was *Du Jardin v Beadman Bros Ltd* [1952] 2 All ER 160, [1952] 2 QB 712. The essential ones for present purposes were that a rogue agreed to buy a motor car from the defendants. He gave a cheque in payment and left another car with the defendants as security. They allowed him to take the first car and its registration book away with him. Subsequently the rogue surreptitiously took back the second car he had given as security. Three days later he sold the first car to the plaintiff, who received it in good faith and without notice of any defect in the rogue's title. However, his cheque was worthless and after he had been convicted of fraud that first car was returned to the defendants. The plaintiff then sued them for its return. The defendants denied that the car had at any material time belonged to the plaintiff. Having stated these facts, Sellers J said ([1952] 2 All ER 160 at 161, [1952] 2 QB 712 at 715):

'In these circumstances, notwithstanding the fraudulent conduct of Greenaway throughout, unless authority requires me to hold otherwise, I would find that Greenaway, having agreed to buy the Standard car, obtained possession of it with the consent of the defendants and that he sold and delivered it to the plaintiff, who received it in good faith and without notice of any lien or other right of the defendants in respect of the car. If these findings are correct, the plaintiff obtained a good title under s. 9 of the Factors Act, 1889.'

The judge then considered whether he was in law entitled to hold that the rogue's possession of the car had indeed been with the consent of the defendants, having regard to the fact that this had been brought about by the rogue's larceny by a trick. Having referred to the earlier authorities the judge held that he was so entitled, saying that he saw no reason to interpret 'consent' in the 1889 Act in an artificial way in order to bring it into harmony with the criminal law, which, in so far as larceny by a trick was concerned, was itself based on artificiality. The judge finally held, therefore, that the plaintiff had established a good title to the motor car which he claimed and made an order for its return to him.

As will appear, however, I think that the crucial distinction between *Du Jardin v Beadman Bros Ltd* and the one presently under appeal is that whereas in the former the root title to the motor car had been a good one in the defendants, nevertheless the relevant string of transactions in the present case began with a party with no title at all, namely the thieves who stole the Ford Fiesta from Miss Hopkin.

A similar point can be made in relation to the decision in *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] 2 All ER 105, [1965] AC 867. That was an appeal to the Privy Council from the High Court of Australia concerning s 28(1) of the New South Wales Sale of Goods Act 1923, which was in the same terms as s 8 of the 1889 Act and what is now s 24 of the 1979 Act. The opinion of the Privy Council, delivered by Lord Pearce, contained this paragraph ([1965] 2 All ER 105 at 110, [1965] AC 867 at 882):

a 'The English statutory provision [the Factors Act Amendment Act 1877, s 3] which was the origin of s. 28(1) was introduced in 1877 with the object of mitigating the asperity of the common law towards an innocent party purchasing goods from a person who has all the trappings of ownership but in truth has no proper title to the goods. *Nemo dat quod non habet*.'

b Later passages in the opinion delivered in this case stress the necessity to give the words of the relevant section their natural and ordinary meaning. For instance Lord Pearce said of the section under consideration in that case ([1965] 2 All ER 105 at 112, [1965] AC 867 at 886):

c 'One may, perhaps, say in loose terms that a person having sold goods continues in possession as long as he is holding because of, and only because of, the sale; but what justification is there for imposing such an elaborate and artificial construction on the natural meaning of the words? The object of the section is to protect an innocent purchaser who is deceived by the vendor's physical possession of goods or documents and who is inevitably unaware of legal rights which fetter the apparent power to dispose. Where a vendor retains uninterrupted physical possession of the goods, why should an unknown arrangement, which substitutes a bailment for ownership, disentitle the innocent purchaser to protection from a danger which is just as great as that from which the section is admittedly intended to protect him?'

d In this part of this judgment I turn finally to *Newtons of Wembley Ltd v Williams* [1964] 2 All ER 135, [1964] 1 WLR 1028 tried at first instance by Davies LJ. In that case the plaintiffs sold a car to a rogue for which he paid by cheque. This was dishonoured. The plaintiffs then took all possible steps to trace the rogue and told the hire-purchase information bureau that they claimed that the car still belonged to them. By so doing they took all sufficient steps to avoid their contract of sale with the rogue in accordance with the principles laid down in *Car and Universal Finance Co Ltd v Caldwell* [1964] 1 All ER 290, [1965] 1 QB 525. A little later the rogue sold the car in Warren Street for cash and his purchaser resold it to the defendant, who took the car in good faith and without notice of any defect in his vendor's title to the car. The plaintiffs demanded it, but the defendant refused to return it. The judge dismissed the plaintiffs' claim and said ([1964] 2 All ER 135 at 139, [1964] 1 WLR 1028 at 1033):

e 'On the facts of this case, Andrew [the rogue], having bought the car, obtained possession of it with the consent of the plaintiffs. It is well established that consent in such circumstances obtained by fraud, is, nevertheless, consent (*Pearson v. Rose and Young, Ltd.* ([1950] 2 All ER 1027 at 1032-1033, [1951] 1 KB 275 at 288-289), per DENNING, L.J.; *Du Jardin v. Beadman Brothers, Ltd.* ([1952] 2 All ER 160, [1952] 2 QB 712)). From the decision in *Car and Universal Finance Co., Ltd. v. Caldwell* ([1964] 1 All ER 290, [1965] 1 QB 525), it must be taken that the plaintiffs withdrew their consent; but this makes no difference (s. 2 (2) of the Factors Act, 1889, and see per COLLINS, L.J., in *Cahn v. Pockett's Bristol Channel Steam Packet Co.* ([1899] 1 QB 643 at 658)). It follows, therefore, that the sale by Andrew to Biss was covered by s. 9 and s. 2 of the Factors Act, 1889. It had the same effect as though Andrew were a mercantile agent in possession of the car with the consent of the plaintiffs; that is to say, that, if the sale was in the ordinary course of business of a mercantile agent, it was effective to transfer title provided that Biss acted in good faith without notice of any rights of the plaintiffs in respect of the car and without notice that Andrew had no authority to sell.'

j He then raised the question whether the sale by the rogue could be said to have been in the ordinary course of business of a mercantile agent, but held that it should be so described on the evidence before him that in Warren Street and its neighbourhood there was a well-established street market for cash dealing in used cars.

The whole decision was affirmed by the Court of Appeal in *Newtons of Wembley Ltd v Williams* [1964] 3 All ER 532, [1965] 1 QB 560. That court was principally concerned with the difficult question of construction about the effect of the words in s 2 of the 1889 Act 'made by him when acting in the ordinary course of business of a mercantile agent' and in a case under s 9 of a buyer obtaining possession and then making a disposition. However, this need not trouble us in the present appeal since both Mid-Glamorgan Motors Ltd and Autochoice (Bridgend) Ltd were recognised dealers and each sold the Ford Fiesta in the course of their business as such.

However, in the course of his judgment Sellers LJ gave voice to this caution ([1964] 3 All ER 532 at 536, [1965] 1 QB 560 at 574):

'Before one takes too favourable a view for the buyer and too harsh a view against the true owner of the goods where s. 9 can be invoked, one must remember that it is taking away the right which would have existed at common law, and for myself I should not be prepared to enlarge it more than the words clearly permitted and required. It seems to me that all that s. 9 can be said clearly to do is to place the seller on this second sale, the sub-sale to the buyer, in the position of a mercantile agent when he has in fact in his possession the goods of somebody else and does no more than clothe him with that fictitious or notional position in this transaction.'

On this material the contention of counsel for the defendant in our present case can be summarised in this way. Apart from the New Zealand and Alberta decisions at first instance (to which I myself have not as yet referred, but will do hereafter) there is no case directly deciding that the literal construction of s 9 of the 1889 Act is wrong. Prima facie such a construction should be the preferred one. At least on their own facts such a clear construction was the one adopted in *Du Jardin v Beadman Bros Ltd* and *Newtons of Wembley Ltd v Williams*, in each of which the decision of the trial judge was upheld in this court. It has been applied in cases where the title passed by the original vendor has been no more than a voidable one, and indeed when on the facts that title has been avoided before the rogue passed the goods on. To adopt such a construction does 'mitigate the asperity of the common law' in this type of case. Although in the early development of the Factors Acts the important consideration was that the goods subsequently sold had been entrusted to an agent by the true owner, their later development stressed the importance of the possession of the goods through which the ultimate title was derived. Such an approach had received the approval of the Privy Council in *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* and it took care of the mischief against which the material statutory provisions were directed, namely the protection of innocent purchasers. On policy grounds there was no reason not to adopt the construction contended for: as between the two innocent parties, the original true owner and the ultimate innocent purchaser, it let the loss lie where it had fallen; it made for certainty; it avoided unnecessary litigation; the interests of the public were well protected by the requirement that to be protected the purchaser should have acquired the goods for value and without notice.

The judge in the court below rejected the argument based on the literal construction of s 9 of the 1889 Act and s 25 of the 1979 Act. In his opinion common sense dictated that 'dominion cannot arise or begin with the possession of a thief. The draftsman intended that in these two sections the words "owner" and "seller" should have the same meaning'. With respect to the judge, however, unless I am forced to this somewhat artificial construction of the two sections, I would prefer not to adopt it.

There has been some academic interest on this point. Some commentators have favoured the literal construction contended for by the defendant herein. Others have argued for various constructions, which respectfully I have found artificial, in order to avoid the result that an ultimate purchaser of goods can obtain a good title through a thief, and not merely one guilty of larceny by a trick (see 27 MLR 472, 35 MLR 268, 37 MLR 213, 38 MLR 77, 83).

However, as Professor Atiyah has written in his treatise *Sale of Goods* (7th edn, 1985) p 302, if the conclusion contended for by the defendant is correct it is a startling one—

‘which at first sight seems so contrary to everything one knows about the law that it cannot be right. If this indeed is the law, there can be little doubt that a large number of cases have been wrongly decided, and many innocent buyers of motor vehicles have been wrongfully deprived of their vehicles, because it has never seemed to have occurred to anybody that a buyer from a thief has a greater power to pass “title” than the thief himself has.’

As Professor Atiyah also says, however, the argument in favour of a literal construction and the consequent result is not easy to refute. In the instant appeal, counsel for the plaintiffs sought to do so by submitting that s 9 of the 1889 Act and s 25 of the 1979 Act had to be construed as applying solely to the one transaction to which one is seeking to apply them. The ‘owner’ in the two sections means merely the owner of the title which is the subject matter of the particular transaction which one is considering. In support he quoted and adopted a passage from Goode *Commercial Law* (1986) pp 413–414:

‘One other problem remains. Though the consent to possession necessary to attract section 9 is the consent of the *seller*, the delivery or transfer is given the same effect as if the person making it were a mercantile agent in possession with the consent of the owner. From this it has been deduced that section 9 can operate even if the original seller lacked title. Such an interpretation would produce the result, absurd in policy terms, that whilst a thief could not pass title in the stolen goods to his purchaser, yet that purchaser could pass title on a resale. This conclusion has rightly been rejected by courts in Kenya, Canada and New Zealand, though they have been hard put to it to escape from the language of the section. One can see how, as a matter of drafting, the problem has arisen. The draftsman, whose compression of language has caused difficulty elsewhere, evidently felt that rather than spell out the effect of section 9 *in extenso* he could achieve the same result more elegantly by incorporating by reference the effect of section 2. But this section, dealing with a different problem, refers to the consent of the *owner*, so that the concluding words of section 9 necessarily had to refer to the consent of the owner, for a reference to the consent of the *seller* would have been meaningless when translated back into section 2. There is no wholly satisfactory method of reading the language of section 9; but the most satisfactory explanation is that advanced by Professor Battersby and Mr Preston [see (1975) 38 MLR 77], that “owner” is to be read as meaning “the relevant owner”, that is, the owner of the title which is the subject of the transaction, i.e. the title vested in S. If this is the best title, then that is what passes on the buyer’s disposition. If it is merely a possessory title, then the innocent third party acquires a mere possessory title; good against anyone except the true owner. In producing this last result, section 9 is admittedly otiose, for the third party would anyway acquire a possessory title under the general law. An alternative approach, which does somewhat more violence to the language of the section but produces much the same result, is to read “seller” as meaning “seller who is the owner”. This has the effect that only an indefeasible title could pass under section 9; but if S had a mere possessory title, this would still pass to the sub-purchaser at common law.’ (Professor Goode’s emphasis.)

Counsel for the plaintiffs contended that at common law the principle embodied in the maxim *nemo dat quod non habet* was a fundamental one, that it would be surprising to find it disapplied merely by the somewhat ambiguous words of s 9 of the 1889 Act, that an indication of the invalidity of this particular construction of the relevant sections is the fact that for over 100 years no one is reported to have advanced it before this case, or if they have then in no case has it succeeded.

In so far as the mischief referred to by counsel for the defendant as justifying his literal approach to the relevant sections is concerned, counsel for the plaintiffs echoed arguendo the comment by Lord Donovan towards the end of his reservation to the 12th Report of the Law Reform Committee on the Transfer of Title to Chattels in 1966 (Cmnd 2958) to the effect that only a small proportion of stolen property is ever recovered, and that it does not seem that the successful disposal of such property is particularly difficult or that the innocent purchasers of it are being dispossessed on a scale which calls for their protection. a

Counsel then referred us to the two Commonwealth decisions which I have mentioned. In *Elwin v O'Regan and Maxwell* [1971] NZLR 1124 Beattie J had before him in the Supreme Court in Wellington, first, a claim by the ultimate purchaser of a motor car against the agent of a finance company which had purported to repossess the car. The allegation was that a person who had originally taken the car on hire purchase from the finance company had sold it without their consent, and that after a number of subsequent sales it had been bought by the plaintiff in good faith and without notice of any defect in the title of his seller. The plaintiff relied on the same argument as that raised by the defendant in this appeal, based on a literal reading of s 27(2) of the New Zealand Sale of Goods Act 1908, which was in the same terms as s 9 of the English Factors Act 1889 or s 25 of our Sale of Goods Act 1979. b

Before Beattie J counsel submitted that the deliberate wording of the section had always been regarded as putting the point beyond doubt and that it could not be assumed that the use of the word 'owner' at the end of the section was a slip. However, the judge then quoted from an earlier edition of Professor Atiyah's book (3rd edn, 1966, p 163), in which a similar passage to that which I have quoted appeared, and then said (at 1131): c

'I am inclined to think that what Atiyah has said seems to accord with commonsense and what has apparently been the practice adhered to in the past. By use of the word "seller" it seems to me that the section clearly envisages a *contract of sale*.' d

The judge then referred to *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286 and quoted a passage from the judgment of Pearson J in that case in which the latter clearly thought that the maxim *nemo dat* applied in similar circumstances to those in *Elwin v O'Regan and Maxwell*, at least until the original purported seller who had been in breach of her hire-purchase agreement perfected her title by paying the finance company the outstanding sum due. e

Beattie J then continued (at 1132): f

'It seems to me that these comments of Pearson J lend some weight to the interpretation of the section by Atiyah and I cannot accept, for example, that stolen goods finding a haven with a third or fourth purchaser would give title, yet on the argument for the plaintiff it appears they would. I say this against an argument before me that it is one thing for the "owner" of a chattel to maintain title against the purchaser for value without notice who had purchased direct from a fraudulent "seller" who had no title, but it is quite a different thing for the owner to assert title against a purchaser for value without notice who has purchased, in turn, from a purchaser for value without notice. Counsel contended that, viewed in this light, the policy of the section seems to indicate that when there is a chain of transactions as here, there must be a point at which the "owner's" title is extinguished at which moment the most recent purchaser in the chain acquires an unassailable title. While I can appreciate the hardship that is demonstrated by finding against his argument and the difficulty that later purchasers in the chain are confronted with concerning making of fruitful inquiries, regrettably it seems to me the principle of "*nemo dat quod non habet*" is applicable.' g

In *Brandon v Leckie* (1972) 29 DLR (3d) 633 in the Alberta Supreme Court Moore J in his turn had before him for trial two actions in which two plaintiffs sought to recover h

a caravans which had been stolen from them, but which were later sold through a mercantile agent to the defendants who were each bona fide purchasers for value without notice of any defect in their sellers' titles. Section 27(2) of the Alberta Sale of Goods Act 1970 is in the same terms as s 25 of the English 1979 Act and the defendants relied on its literal construction in the same way as does the defendant before us.

In his judgment on this point, Moore J also referred to Professor Atiyah's comments (3rd edn, 1966, pp 163–164) which I have quoted and then later in his judgment said (at b 637):

'Section 27(2) of the *Sale of Goods Act* makes no reference to the rights of the true and lawful owner or for that matter to the rights of anyone other than the seller. Section 3(1) of the *Factors Act* states that the sale is "as valid" as if the mercantile agent were expressly authorized by the owner of the goods to make the same. It does not remove any right accruing in the true owner, either by statement or by implication. It therefore follows that the section applies on the face only to rights between a buyer and a seller and not against the true owner. It simply does not seem logical that the legislature of this province, in its wisdom, would enact legislation, the effect of which would be to preclude a true owner, who has done no wrongful act, from attempting to regain and in fact regaining a chattel stolen from him. Never at any time from the moment of the original theft of each motor home has title passed from the original owners. As counsel for the plaintiff argued—*nemo dat quod non habet*. Nobody can give good title to what he does not possess . . . George Young [the rogue in the case] never had title to give to Calgary Automotive and consequently neither Leckie nor Borgal [the defendants] could receive good title from Calgary Automotive. The rule *nemo dat quod non habet* must prevail in the absence of overriding statutory provisions. One can paraphrase sections of statutes with magnificent results. However, in the instant case George Young had nothing to sell—thus the end of the paraphrasing. There is no need to distinguish "seller" and "owner" other than to say that Young never fell into either category as he could never sell something he did not have the right to sell and obviously he was never the owner of either motor home. Nor is there any need to comment on the fact that Calgary Automotive was admitted to be a mercantile agent at the outset of the trial. Calgary Automotive could not in any way, shape or form pass on good title.'

For my part, I agree with Professor Atiyah's comment that the defendant's argument in the instant appeal is at first sight, and indeed on further consideration, so contrary to everything one knows or had been taught about the law that it cannot be right. On the other hand, I would prefer not to have to adopt any artificial construction of either s 25 of the 1979 Act or the other statutory provisions with which we are concerned in this appeal. Although the drafting of the sections is not entirely clear, if the draftsman in 1889 used the word 'owner' in s 9 of the Act of that year in error for the word 'seller', I find it surprising that he repeated the error in 1893 and still more surprising that he repeated it again in 1979.

Ever mindful of Lord Halsbury LC's warning in *Leader v Duffey* (1888) 13 App Cas 294, to which Sir Denys Buckley refers, nevertheless in my respectful opinion the resolution of the problem lies in large measure in adopting the approaches of Beattie J in *Elwin v O'Regan and Maxwell* and of Moore J in *Brandon v Leckie* and concentrating more on the earlier part of s 25 than on the latter, to which alone the argument for the defendant herein has in truth been addressed.

By s 2(1) of the 1979 Act:

'A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.'

By s 2(4) that Act provides:

'Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale.' a

By s 61(1) of the Act 'property' in goods means the general property in goods, and not merely a special property. Thus, the essence of sale is the transfer of the ownership or general property in goods from a seller to a buyer for a price. By the same subsection a 'buyer' means a person who buys or agrees to buy goods and a 'seller' is similarly defined b *mutatis mutandis*. Thus in my opinion the opening words of s 25, those which lay down the condition precedent for the consequences provided for by the later words of the section, only contemplate a transaction in which the general property in the relevant goods has been acquired or it has been agreed should be acquired. A transaction whereby a thief purports to sell goods to A, in which he purports to but cannot pass the general property in the goods to A because it is not vested in him, is not one which can bring s 25 into operation at all. c

Similarly where A, *ex hypothesi* having no property in the goods, purports to sell them on to B, who receives them in good faith and without notice of the absence in A of any property in them, the transaction is not a 'sale' within the definition in the 1979 Act, nor can A or B respectively properly be described as 'seller' or 'buyer'. Thus the condition precedent to the subsequent operation of the later part of s 25 has not been satisfied. d

The same result, or non-result, follows on any purported further sales from B to C or C to D and so on. If the original transferor is a thief from the true owner, then he has never acquired property in the goods and no purported 'sale' by him or by anyone to whom he may have purported to 'sell' the goods can attract the consequences of s 9 of the 1889 Act or s 25 of the 1979 Act.

Where, however, a rogue buys a motor car from its true owner and sells it on, whether before or more particularly after the true owner has rescinded the contract between him and the rogue, there is at least for a time a 'sale' in law and thus scope for the subsequent operation of the second half of s 25 on later transactions involving the car between innocent parties. e

If this is the correct approach to the construction of s 25, then there is no need to construe the word 'owner' in the section in any other sense than its literal, ordinary meaning. However, there is only scope for s 25 to operate at all where the general property in the goods passed at some stage, at least temporarily to a transferee from him. f

In my opinion, therefore, the judge in this case reached the correct conclusion, although by a somewhat different route from the one I have followed. I would therefore dismiss this appeal. g

CROOM-JOHNSON LJ. The agreed facts are that Miss Hopkin was the owner of a Ford car number DVH635V which was stolen on 3 February 1983. On 23 September 1983 the thieves were convicted. The thieves sold it to a person called Lacey. Lacey then sold it to Roderick Thomas. On 6 February 1983 Mr Thomas sold to Autochoice (Bridgend) Ltd for £2,100. On 14 March 1983 Autochoice sold it to Mid-Glamorgan Motors Ltd for £2,350. On 18 March 1983 Mid-Glamorgan sold it to the defendant for £2,650. It is agreed that the defendant is completely honest. The plaintiffs bought Miss Hopkin's interest for £2,750 and acquired her rights to the car. They wrote to the defendant asking for the car back. He did not return it, and was sued to judgment for £2,650 plus interest. The defendant now appeals. h

The plaintiffs say that once the car was stolen no subsequent purchaser acquired any title to the car because *nemo dat quod non habet*. They rely on the Sale of Goods Act 1979, s 21(1): j

'Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the

a buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.'

No question arises of any estoppel against the plaintiffs or Miss Hopkins. Section 21(2) provides:

b 'Nothing in this Act affects—(a) the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner . . .'

The defendant relies, as he did before the judge, on s 9 of the Factors Act 1889, which was included (with one immaterial omission) in the Sale of Goods Act 1893 as s 25(2). It has now been re-enacted as s 25 of the Sale of Goods Act 1979. Since its interpretation requires consideration of other provisions of the 1889 Act, it is convenient to quote s 9, which is still in force. It deals with the position of a buyer who obtains possession:

c 'Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof . . .
d to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner . . .'

'Mercantile agent' is defined in s 1(1) of the 1889 Act:

e 'The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.'

The powers of such a mercantile agent are set out in s 2(1):

f 'Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.'

By s 1(2) a person shall be deemed to be in possession of goods or of the documents of title where the goods or documents are in his actual custody or subject to his control.

The defendant's submission is that s 9 of the 1889 Act gives him a good title to the car which defeats that of Miss Hopkin and therefore that of the plaintiffs. This is because if
h one gives the words of the section their ordinary and natural meaning it means that Mid-Glamorgan bought the car from the seller Autochoice, that they obtained possession of it with the consent of Autochoice and delivered it to the defendant. The result is that the delivery to him had the same effect as if Mid-Glamorgan were a mercantile agent in possession of the car with the consent of the owner. 'Owner' it is said means 'true owner' whoever that may be, in this case Miss Hopkin. It is submitted that this process of
i reasoning applies to everyone in the chain after the purchaser from the thief. It is submitted that Lacey, who bought from the thief, would not get a good title himself but would be able to give one to Thomas, who in turn gave one to Autochoice, and so on down the line.

Before the judge the plaintiffs argued that in s 9 'owner' and 'seller' are to be equated,

an argument which the judge accepted. As a matter of construction that has great difficulties, because the statute could hardly be using, within one section, two different words to describe the same person. Before this court the argument was put in a different way, on the basis that 'owner' is not referring to the 'true owner' (Miss Hopkin) but to the owner of the mere possessory title which is being transferred in the particular transaction. The meaning of 'owner' in s 9 has been the subject of much discussion by legal writers. Professor Goode, in his *Commercial Law* (1986) p 414 suggests that 'owner' here means 'relevant owner', which again means the seller. a

One difficulty in giving the word 'owner' the suggested special meaning lies in the context in which it is found. The delivery of the goods has the same effect 'as if' the deliverer were a mercantile agent as defined in s 1. *Newtons of Wembley Ltd v Williams* [1964] 3 All ER 532, [1965] 1 QB 560 requires that the notional mercantile agent can only exercise the powers given to a real one by s 2(1). This requires him to be in possession of the goods with the consent of the owner. 'Possession' is given a wide definition in the Act. There is no definition of 'owner', which must therefore be given its ordinary meaning. b

Section 9 comes into operation where someone has bought or agreed to buy goods. Buying and selling in a commercial context means the transfer of title, of ownership. Agreeing to buy or sell means a binding agreement to the same effect. On this interpretation, the section requires an effective transaction, even though it may later be avoided by one of the parties on sufficient grounds. At any rate, it must be a transaction capable of transferring the true title. If that is what 'bought' means in the section it follows that both the seller and his buyer must have been parties to such a transaction. This does not mean that the 'owner' is always the same person as the seller, although in many cases he will be. The seller is the person who consents to the buyer having the possession of the goods but the seller might be a duly authorised agent of the true owner. Nevertheless, the 'owner' who is bound by the transaction is the true owner. c

The proper approach where there is a chain of transactions is to start with the initial defect in the title, in this case the thief. Lacey, who bought from the thief, got no title. Nor could he give one. The situation was the same as in *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286, where a Miss Rudolph, who had hired the car, sold it on. It went through several further sales. None of the purchasers acquired a title until it so happened that Miss Rudolph belatedly completed her own hire-purchase transaction and obtained thereby a title which was transmitted down the line and 'fed' the title of the later purchasers. But until that happened only the hire-purchase company were the true owners. d

The first Factors Act was passed in 1823. Others were passed in 1825 and 1842. They were concerned with protecting innocent purchasers or pledgees of goods or documents of title where they had been 'entrusted' by the owner to a mercantile agent. The 1889 Act was both an amending and a consolidating Act. It substituted for the concept of entrusting that of obtaining possession with consent. The pre-1889 Acts were in 1899 declared to be in force in New South Wales Act. Section 9 of the 1889 Act was later paralleled in the New South Wales Sale of Goods Act 1923, as s 28(2) and s 2(1) in almost identical language became s 5 of the Factors (Mercantile Agents) Act 1923 of New South Wales. e

In *Cook v Rodgers* (1946) 46 SR (NSW) 229, a case in the Supreme Court of New South Wales, Roper J had to consider claims to a car both by the true owner and by a possessor at the end of a chain of transactions which included a sale by the hirer under a hire-purchase agreement. The possessor relied on s 5 of the Factors (Mercantile Agents) Act 1923 Roper J referred to a number of English decisions on the pre-1889 Acts, where the matters at issue were whether the goods had been 'entrusted' and whether the agent in question was a mercantile agent so as to come within the terms of the Acts. He observed that they were all cases where the 'entrusting' arose from the acts of, or acts binding on, the true owner. He referred in particular to *Van Casteel v Booker* (1848) 2 Exch 691 at f

- 698, 154 ER 668 at 671, where Parke B indicated in argument that to bring the transaction within the Factors Acts the entrusting must be by the true owner. He recognised that in s 2(1) of the 1889 Act the wording now required that the mercantile agent should be in possession of the goods 'with the consent of the owner', while in s 5 of the New South Wales Factors (Mercantile Agents) Act 1923 the wording was 'entrusted' with the possession, but he adopted the words of Channell J in *Oppenheimer v Attenborough & Son* [1907] 1 KB 510 at 516 that there was no real difference between the two expressions. He decided that to obtain title from a mercantile agent the possession (in the English Act) and the entrusting with possession (in the New South Wales Act) required the possession to come from or be with the consent of the true owner of the goods.

- Nevertheless, the wording in the new s 9 is different, and it would be right to consider its meaning afresh, and not to rely on that part of the approach of Roper J. For the reasons which I have already given, I conclude that the buying and the selling referred to in s 9 presuppose a valid transaction by or on behalf of the true owner at some stage.

- In the present case the judge followed *Elwin v O'Regan and Maxwell* [1971] NZLR 1124. The plaintiff bought a car from Maxwell. Maxwell had purchased it from a company which in turn had purchased it from a man called Nevin. Nevin had obtained it in New South Wales under a hire-purchase agreement and wrongfully sold it on. O'Regan had seized possession of the car on behalf of the true owners, the finance company. It was held that notwithstanding that there was a chain of purchasers for value without notice of any defect of title, the principle of *nemo dat quod non habet* applied, and the true owner could assert his right to the car. Reliance was placed by the plaintiff on the New Zealand Sale of Goods Act 1908 s 27(2), which is identical to s 28(2) of the Sale of Goods Act 1923 (NSW), a section relied on in *Cook v Rodgers*. They are both identical to the 1889 Act, s 9. The conclusion to which Beattie J came was that in s 9 'owner' means 'seller', in reliance on a dictum of Scrutton LJ in *Marten v Whale* [1917] 2 KB 480 at 486, where he equated the two.

- But Beattie J also adopted a dictum of Pearson J in *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694 at 701, [1954] 1 WLR 1286 at 1295:

- 'The various purported sales all took place at times when Bowmaker, Ltd. were still the owners of the car, so that all the purported sellers in this rather long chain had no title to it at the times when the purported sales were made.'

Beattie J appears to have adopted as an alternative finding that the 'seller' in s 9 of the 1889 Act must be someone who can give a title.

- The only other case in which this problem seems to have been decided is *Brandon v Leckie, Avco Corp v Borgal* (1972) 29 DLR (3d) 633, consolidated actions tried in the Alberta Supreme Court. These, like the present, were cases where the goods were stolen. In each case the thief, a man called Young, sold to a mercantile agent who in turn sold on to a bona fide purchaser. The question was whether the purchaser could rely on s 10(1) of the Alberta Factors Act, which again is the same as s 9 of the 1889 Act. That section involved reading into it the Alberta equivalent of s 2 of the 1889 Act. Again the point was taken that 'seller' means the same thing as 'owners'.

- The judge, Moore J, put the matter simply. For simplicity I am indicating in square brackets the English equivalent of the Alberta legislation. He said (at 637):

- 'Section 27(2) of the *Sale of Goods Act* [s 9 of the 1889 Act] makes no reference to the rights of the true and lawful owner or for that matter to the rights of anyone other than the seller. Section 3(1) [s 2(1)] of the *Factors Act* states that the sale is "as valid" as if the mercantile agent were expressly authorized by the owner of the goods to make the same. It does not remove any right accruing in the true owner, either by statement or by implication. It therefore follows that the section applies on the face only to rights between a buyer and a seller and not against the true owner.'

After referring with approval to a decision of Sargent J of the British Columbia County Court in *Bremmer v Johnson* [1946] 3 WWR 39, he said:

'The rule *nemo dat quod non habet* must prevail in the absence of overriding statutory provisions . . . in the instant case George Young had nothing to sell . . . There is no need to distinguish "seller" and "owner" other than to say that Young never fell into either category as he could never sell something he did not have the right to sell and obviously he was never the owner of either motor home. Nor is there any need to comment on the fact that Calgary Automotive [the purchasers from Young] was admitted to be a mercantile agent at the outset of the trial. Calgary Automotive could not in any way, shape or form pass on good title.'

There cases are not directly in point with the present case on their facts, because there was no 'seller' to Calgary Automotive who put them in possession of the motor homes. There was no equivalent to Roderick Thomas. But the principle is clear. Just as the thief could not give title to Lacey, so Lacey could not be a 'seller' to Thomas, or Thomas a 'seller' to Autochoice, or Autochoice to Mid-Glamorgan.

My conclusion is that s 9 of the 1889 Act did not by a sidewind change the law as it had been up to that time. 'Owner' in that section means the true owner, but the effect of the section is not to give title where the seller's own possession is derived from unlawful possession, as from a thief. I base this conclusion on the construction of ss 9 and 2(1) read together, on the history of the Factors Acts and on the authorities such as they are. The dearth of case law on this point is only an example of the saying that the more self-evident a proposition is, the harder it is to find authority for it.

I would dismiss the appeal.

SIR DENYS BUCKLEY. When a court is required to interpret a statute its function is to discover the intention of the legislature in enacting the particular statutory provision under consideration. The material from which that intention must primarily be discovered is the language used in the particular provision, read in the context of the statute as a whole. If that language is clear and unequivocal, the court must interpret and give effect to the provision in the sense of that clear and unequivocal language, unless to do so would be incongruent with some other part of the statute, or produce an irrational result, thus engendering uncertainty about the legislature's true intention. If authority is required in these respects, it is to be found in *Leader v Duffey* (1888) 13 App Cas 294 at 301 per Lord Halsbury LC, *A-G v Milne* [1914] AC 765 at 771 per Lord Haldane LC, *A-G for Canada v Hallett & Carey Ltd* [1952] AC 427 at 449, per Lord Radcliffe, *Westminster Bank Ltd v Zang* [1966] 1 All ER 114 at 120, [1966] AC 182 at 222 per Lord Reid and many other authorities cited in the notes to 44 Halsbury's Laws (4th edn) paras 856-857.

The question in the present case is whether the defendant can successfully assert that he has in the events which happened an indefeasible title as owner of the relevant motor car. The amount at stake is not great, but the question is one of general public interest.

The answer depends on the true interpretation and effect of s 9 of the Factors Act 1889 and s 25 of the Sale of the Goods Act 1979. Those sections are for present purposes in identical terms. I shall refer to s 9 only, but precisely similar considerations apply to s 25.

For the sake of clarity and ease of reference I will set out the words used in the sections, omitting all words which can be regarded as surplusage in relation to the facts of the present case, and introducing letters to identify the persons referred to in the various parts of the sections.

When so treated s 9 reads thus:

'Where a person (B), having bought or agreed to buy goods, obtains with the consent of the seller (A) possession of the goods . . . the delivery or transfer, by that person (B) . . . of the goods . . . under any sale, pledge, or other disposition thereof . . . to any person (C) receiving the same in good faith and without notice of any lien

or other right of the original seller (A) in respect of the goods, shall have the same effect as if the person making the delivery or transfer (B) were a mercantile agent in possession of the goods . . . with the consent of the owner.'

It will be observed that everything in that passage which follows the words 'as if' sets up a fictitious hypothesis on which the section is to operate. I will call this 'the s 9 hypothesis'. To understand the effect of it, one must then turn to s 2 of the 1889 Act, which provides:

'(1) Where a mercantile agent is, with the consent of the owner, in possession of goods . . . any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.'

This section clearly infers that a mercantile agent to whom it applies has not in fact full authority to make the disposition in question, for, if he were duly authorised, the section would be otiose. Section 2 consequently, when read in conjunction with s 9, introduces a further hypothetical element to the operation of s 9, viz that the person who makes the disposition is doing so in the purported exercise of an authority with which he is not clothed.

Having regard to the s 9 hypothesis, it is not necessary for the purpose of applying s 9 to establish that B was in fact a mercantile agent at the relevant time or (if in fact he was so) that he was acting as a mercantile agent in his relevant transaction with C; nor is it necessary to establish that he was in possession of the goods with the consent of the owner. These matters are to be assumed. Nor, in my judgment, is it necessary to consider who is the owner whose consent is to be assumed. In a case to which s 2 alone applies, the fact of the owner's consent must be established, in which connection the identity of the owner must be ascertained; but, in a case in which s 2 is called into play only as a feature or consequence of the s 9 hypothesis, it is the quality of the assumed consent that is significant, not the identity of the person whose consent is to be assumed. In other words, the owner referred to in the s 9 hypothesis is as hypothetical as are the mercantile agent and the consent.

The hypothetical basis of the operation of s 9 was remarked on by Sellers and Pearson LJ in *Newtons of Wembley Ltd v Williams* [1964] 3 All ER 532, [1965] 1 QB 560. As was recognised in that case, some difficulty arises in applying s 2 as part of the s 9 hypothesis because s 2 requires that the disposer of the goods shall have disposed of them when acting in the ordinary course of business as a mercantile agent. This is not a feature which is expressly required to be assumed as part of the s 9 hypothesis. In *Newtons of Wembley Ltd v Williams* the party answering to B in my exposition of s 9 had bought a car and obtained possession of it with the consent of A, the vendor. The vendor subsequently rescinded the contract, but the car was still in B's possession when he sold it at a later date to C. The sale by B to C took place in a kerbside market in Warren Street, London, but it was not suggested that this constituted a sale in market overt. B by then had no subsisting title to the car, but s 9 was held to enable C to resist a claim by A for the return of the car. B seems not in fact to have been selling as a mercantile agent, but this court treated the conditions of s 2 as satisfied on the ground (as was expressed by Pearson LJ ([1964] 3 All ER 532 at 539, [1965] 1 QB 560 at 579)) either (i) that B's hypothetical business should be that of a mercantile agent or (ii) that B on his sale to C was doing something which would constitute acting in the ordinary course of business if he were a mercantile agent.

I must now consider the circumstances in which the s 9 hypothesis is to operate. These are set out in that part of s 9 which precedes the words 'as if', the requirements of which

must historically have been fully satisfied for the section to apply. These requirements can be analysed as follows: (a) B must have bought or agreed to buy the relevant goods from A, (b) B must have obtained possession of the goods with A's consent, (c) B must have delivered or transferred the goods to C, (d) that delivery or transfer must have been effected under a sale, pledge or other disposition of the goods and (e) C must have received the goods in good faith and without notice of any lien or other right 'of the original seller'. It is, in my view, clear that the transaction between A and B must be a sale, or an agreement to sell, in which A is the seller and B the purchaser. It is also clear that the transaction between B and C must be a sale or a pledge or some other kind of disposition by B to C. a
b

The objective of the section is clearly, in my judgment, to confer on C an unassailable title to the ownership of the goods notwithstanding some circumstance which would otherwise prevent him having such a title. The circumstance in the present case which might have that effect is the fact that the car was stolen from Miss Hopkin. The contention of the plaintiffs is that the thief, having no title to the ownership of the car, could pass no such title to Lacey, and that that disability continued through the chain of successive sub-purchasers, so that the defendant could acquire no title to the ownership of the car from Glamorgan Motors. This, it was submitted, is the consequence of the ancient maxim of the common law *nemo dat quod non habet*. The question for consideration appears to me to be whether s 9 on its true construction confers a statutory title to the ownership of the goods overriding the title of the original owner. c
d

Suppose that goods in the ownership of O are stolen by a thief, T. T acquires no legal right to either the ownership or the possession of the goods. T, having the goods *de facto* in his possession or under his control, sells or agrees to sell them to X, or purports to do so. Having no title to the goods, T cannot pass any title in them to X, who accordingly acquires no title to them at common law. The transaction between T and X is not affected by s 9 because T has not bought or agreed to buy the goods, and so cannot be equated with B in my exposition of s 9; so X acquires no statutory title to the goods. So far I am entirely in agreement with this analysis. X obtains possession of the goods with T's consent and sells them to Y. At that point (if T, X and Y are to be equated with A, B and C in my exposition of s 9) the section will come into play, provided that Y has acted in good faith and without notice of any lien or other right of 'the original seller'. In that case O would, in my judgment, be barred by the section from recovering the goods from Y, who would consequently become entitled to the ownership of the goods against all the world. The fact that T had stolen the goods from O must thereupon, in my judgment, cease to have any relevance to the ownership of the goods. e
f

Who then is to be understood to be referred to by the description 'the original seller'? One cannot go back further than T, for O was not a seller. If T can be regarded as a seller, he is not, I apprehend, a seller who could assert a lien or other right in the goods because, having stolen them, he could not claim to have had any title to them or interest in them. I for my part think that the most acceptable interpretation of 'the original seller' is to relate it to that party who answers to A in my exposition of s 9. That party is the first seller referred to in the section, that is to say the earliest seller whose sale is relevant to the operation of the section. g
h

But, as in the present case, the goods may have been the subject of a considerable series of sub-sales before O attempts to recover them. I must consider how the section works in such a case.

The list of persons through whom the possession of the car passed in the present case is Miss Hopkin, the thieves, Lacey, Thomas, Autochoice, Glamorgan Motors, the defendant. We are without information about the transfers from the thieves to Lacey and from Lacey to Thomas. Accordingly none of the requirements of s 9 can be shown to be satisfied by anyone before Autochoice. We do know that Autochoice bought the car from Thomas in good faith and without notice of any lien or other right existing in any other person, and obtained possession of it with Thomas's consent. Autochoice j

consequently, in my view, fulfills the requirements relating to party B in s 9. We also
 a know that Glamorgan Motors bought the car from Autochoice in good faith and without
 any such notice, and obtained possession of it with the consent of Autochoice. Glamorgan
 Motors consequently, in my view, fulfills the requirements relating to party C in s 9.
 Where, as in this case, there are several successive possessors in the chain, the section, in
 my judgment, only requires consideration of the circumstances relating to the last three
 members of the chain, the last of whom will be the party invoking the protection of the
 b section, that is to say in the present case the defendant. It follows in my judgment that,
 unless the presence of the thieves in the chain of successive possession somehow excludes
 the operation of the section, the plaintiffs cannot succeed in this action.

Counsel for the plaintiffs contended that s 9 can confer on the last person in the chain
 (ie the party from whom the true owner seeks to recover the goods) no better title than
 that of the 'original seller', who in the present case, he says, was either the thieves or some
 c subsequent possessor of the goods who could have no better title than the thieves. They
 submitted that, where the goods have been stolen, the section has no effect on the title of
 the true owner from whom they have been stolen. In this respect they submitted that s 9
 only effects the rights inter se of the parties who I have called A, B and C and has no effect
 on the title of the original true owner.

Counsel for the defendant relied on a literal construction of s 9. With deference to
 d those who think otherwise, I consider that the language of s 9 is clear and unequivocal,
 free from ambiguity and uncertainty. It is, in my opinion, susceptible of only one
 interpretation. The difficulty involved in applying the language of s 2 to the s 9
 hypothesis is, in my view, disposed of, so far as this court is concerned, by the decision in
Newtons of Wembley Ltd v Williams [1964] 3 All ER 532, [1965] 1 QB 560. Indeed, the
 e present case is, I think, a stronger case than that because, as is common ground,
 Glamorgan Motors do carry on a business of selling cars as mercantile agents and their
 sale to the defendant was carried out at their business premises and in just such a manner
 as a sale in the course of their business as mercantile agents would have been.

Those who take the contrary view, and hold that s 9 should be considered in some
 sense other than what its language appears literally to say, seem to me, with great
 f deference, to fall into the error against which Lord Halsbury LC gave a warning in *Leader*
v Duffey (1888) 13 App Cas 294 at 301, where he said:

'But it appears to me to be arguing in a vicious circle to begin by assuming an
 intention apart from the language of the instrument itself, and having made that
 fallacious assumption to bend the language in favour of the assumption so made.'

I do not find anything elsewhere in the Factors Act 1889 which conflicts with s 9
 g construed in its literal sense. Nor, in my view, does a literal construction of s 9 produce
 an unreasonable or unsensible result. The 1889 Act was the latest of a series of Acts of
 Parliament for the protection of innocent purchasers which at each stage increased the
 amount of protection afforded. The section as I would construe it confers no protection
 on a purchaser from a thief. Such a purchaser might by diligent inquiry have been able
 h to discover that his vendor was a thief. The section, so construed, would, however, enable
 that purchaser to confer on an innocent purchaser from him an unassailable title. The
 latter purchaser would be unlikely to be aware of any circumstances that would put him
 on inquiry whether his vendor's vendor had stolen the goods. In such a case it would not,
 in my view, be at all irrational that the legislature should consider that it would be right
 to let the loss resulting from the theft rest where it falls on the original owner, who
 j would, as was pointed out in argument, very probably be insured, rather than on the
 innocent purchaser.

May LJ has placed reliance on the definition of 'a contract of sale of goods' contained in
 s 2(1) of the 1979 Act and on ss 2(4) and 6(1) of the same Act. With very great diffidence,
 I do not think that a solution can be found by this route. When a thief contracts to sell
 stolen property, the fact that he cannot transmit a good title in that property to the

purchaser does not, as I understand the law, mean that he has not contracted to sell it. He has contracted to sell it, and can be made liable in damages if and when the purchaser suffers damage by reason of the thief's breach of contract by selling without a good title. In the present case, on the assumed facts, the thieves, in my view, agreed to sell and sold the car to Lacey within the meaning of s 9, and each successive sub-purchaser did the same. Moreover, in my opinion, by handing over the car to Lacey the thieves conferred on him a possessory title good against the thieves and indeed everyone except the true owner. So, in my respectful opinion, each of the transactions in the chain in the present case was a contract to sell the car resulting in a sale of the car, notwithstanding any defect there may have been in the vendor's capacity to transmit a good title to it. The first requirement of s 9 is thus satisfied.

It is certainly surprising that the argument in favour of a literal construction of s 9 which has been presented in the present case by the defendant does not seem to have been presented in any reported case except to some extent in *Newtons of Wembley Ltd v Williams*. We have been referred to a considerable number of English authorities. I hope I shall not be thought discourteous to counsel's arguments if I do not discuss these cases in detail. Some were decisions on s 2 of the 1889 Act and were not concerned with s 9. I do not find these of assistance in construing s 9.

Two Commonwealth cases were referred to in which arguments, which were evidently on similar lines to the defendant's argument in the instant case, were presented and rejected in each case. Each of those cases was concerned with statutory provisions in terms identical with ss 2(1) and 9 of the 1889 Act. Those decisions, although not binding on us, are worthy of great respect. *Brandon v Leckie* (1972) 29 DLR (3d) 633 related to stolen vehicles which were sold by the thief to a concern called Calgary Automotive Brokerage Ltd (a mercantile agent) by whom the vehicles were sold to members of the public. Moore J of the Alberta Supreme Court took the view that the sections with which he was concerned made no reference to the rights of the true and lawful owners from whom the vehicles had been stolen, nor to the rights of anyone other than the seller, and did not remove any rights of the true owners. He held that the rule *nemo dat quod non habet* must prevail in the absence of overriding statutory provisions, that the thief could not sell something he did not have the right to sell and that the mercantile agent could not pass on a good title. With deference to the judge, I consider that, for reasons which I have already indicated, s 9 of the 1889 Act is a statutory provision which is designed to override the *nemo dat* principle and effectively does so, not by expressly destroying the rights of the true and lawful owner, but by conferring on the purchasers from the hypothetical mercantile agent a statutory title which is unassailable by that owner.

Elwin v O'Regan and Maxwell [1971] NZLR 1124 is concerned with a car which was initially the subject matter of a hire-purchase agreement. The hire-purchaser sold the car, while there were still instalments unpaid, to Broadlands Finance Ltd, who sold it to the defendant Maxwell, who sold it to the plaintiff. The defendant O'Regan was an agent of the true owners of the car, that is to say the hire-purchase company, who had repossessed the car. Beattie J in the New Zealand Supreme Court held with regret that the principle of *nemo dat* applied. He consequently upheld the claim of the hire-purchase company. In the course of his judgment the judge referred to the decision of Pearson J in *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286, which was also a case of a car subject to a hire-purchase agreement. In that case also the hire-purchaser purported to sell the car while there were still instalments unpaid, and there were three further sub-sales. Pearson J said ([1954] 2 All ER 694 at 701, [1954] 1 WLR 1286 at 1295):

"The next question is as to the present ownership of the car. The various purported sales all took place at times when Bowmaker, Ltd. [the hire-purchase company] were still the owners of the car, so that all the purported sellers in this rather long chain had no title to it at the times when the purported sales were made. But on or about July 25, 1952, Miss Rudolph acquired a good title from Bowmaker, Ltd., or, at any

a rate, made a payment to Bowmaker, Ltd., which extinguished their title and induced them to relinquish any claim which they had to the car. I think that the right view is that Miss Rudolph acquired the title as between her and Bowmaker, Ltd., but I further hold on authority that the title so acquired went to feed the previously defective titles of the subsequent buyers and enured to their benefit.'

b It is perfectly clear that the judge there assumed that s 9 of the 1889 Act had not conferred a good title to the car on any of the sub-purchasers, but it was unnecessary for him to decide that question or even to give it close consideration, in view of the effect of the payment off of the arrears under the hire-purchase agreement.

c In my judgment, once the factual requirements of s 9 of the 1889 Act have been satisfied, the operation of this section is not to strike from the hand of the original true owner of the goods his title of ownership, but to place in the hand of him who has acquired those goods from the notional mercantile agent an impregnable shield which makes it impossible thenceforth for the original true owner to assert his original title against him who has the goods.

For these reasons I for my part would allow this appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

d Solicitors: *Randalls*, Bridgend (for the defendant); *Dolmans*, Cardiff (for the plaintiffs).

Carolyn Toulmin Barrister.

Shaw and another v Commissioner of Police of the Metropolis (Natalegawa, claimant)

f COURT OF APPEAL, CIVIL DIVISION

FOX, LLOYD AND STOCKER LJ

26, 27 MARCH, 15 APRIL 1987

Sale of goods – Transfer of title – Owner giving seller documents enabling seller to represent himself as owner – Seller agreeing to sell car to plaintiffs – Plaintiffs paying by banker's draft –

g *Bank refusing to cash draft – Seller disappearing – Bank reimbursing plaintiffs – Plaintiffs claiming title to car – Whether seller had bought or agreed to buy car from owner – Whether owner precluded by conduct from denying seller's authority to sell if merely an agreement to sell and no actual sale – Sale of Goods Act 1979, ss 2(5), 21, 25.*

h The claimant owned a car which he advertised for sale. He was contacted by L, who claimed to be interested in purchasing it on behalf of a client. L took delivery of the car and the claimant gave him a letter stating that he had sold the car to L and disclaiming further legal responsibility for it. He also completed a notification of sale form. In return L gave the claimant a postdated cheque for £17,250 which subsequently proved to be worthless. L agreed to sell the car to the plaintiffs for £11,500, £10,000 being paid by banker's draft. When L presented the draft the bank refused to cash it, whereupon L disappeared and in due course the police took possession of the car. The plaintiffs were later reimbursed by the bank for the amount of the draft, which was never presented. The plaintiffs issued a writ against the police seeking possession of the car as owners. On an interpleader summons to determine the ownership of the car the master found in favour of the claimant. The plaintiffs appealed, contending (i) that L had bought or agreed to buy the car from the claimant and had with his consent obtained possession of

the car and document of title and therefore, applying s 25^a of the Sale of Goods Act 1979, there had been a valid sale to the plaintiffs, who had acted in good faith and without notice of the claimant's rights or (ii) alternatively, that the claimant was, under s 21^b of the 1979 Act, precluded by his conduct from denying L's authority to sell. a

Held – The appeal would be dismissed for the following reasons—

(1) An intermediate seller in possession of goods or the documents of title could only pass good title to a bona fide purchaser under s 25 of the 1979 Act if the intermediate seller had 'bought or agreed to buy' the goods from the owner. Despite the documents signed by the claimant, the evidence showed that L had in fact been acting as his agent in respect of the sale and had never bought or agreed to buy the car himself, with the result that s 25 did not apply to confer good title on the plaintiffs (see p 408 g to j and p 410 f to j, post). b

(2) The owner of goods was precluded by s 21 of the 1979 Act from denying an intermediate seller's authority to sell goods of which the seller was not the owner only if the goods were 'sold' by the intermediate seller; s 21 did not apply where there was merely an agreement to sell, since under s 2(5)^c an agreement to sell by definition involved no transfer of property. Accordingly, even though the claimant had by his conduct represented that L had title to the car and authority to sell it, s 21 did not apply because the property in the car was not to pass to the plaintiffs until L was paid, and since the banker's draft was never cashed that had never occurred. It followed that the car remained the property of the claimant (see p 409 g to p 410 c h j, post). c
d

Notes

For the disposition of goods by a seller in possession, see 41 Halsbury's Laws (4th edn) para 751, and for cases on the subject, see 39(2) Digest (Reissue) 333–337, 2609–2619. e

For the Sale of Goods Act 1979, ss 2, 21, 25 see 49 Halsbury's Statutes (3rd edn) 1105, 1123, 1126.

Cases referred to in judgments

Anderson v Ryan [1967] IR 34, Ir HC.

Central Newbury Car Auctions Ltd v Unity Finance Ltd [1956] 3 All ER 905, [1957] 1 QB 371, [1956] 3 WLR 1068, CA. f

Eastern Distributors Ltd v Goldring [1957] 2 All ER 525, [1957] 2 QB 600, [1957] 3 WLR 237, CA.

Henderson & Co v Williams [1895] 1 QB 521.

Joblin v Watkins & Roseveare (Motors) Ltd [1949] 1 All ER 47.

National Employers Mutual General Insurance Association v Jones [1987] 3 All ER 385, CA. g

Pearson v Rose & Young Ltd [1950] 2 All ER 1027, [1951] 1 KB 275, CA.

Worcester Works Finance Ltd v Cooden Engineering Co Ltd [1971] 3 All ER 708, [1972] 1 QB 210, [1971] 3 WLR 661, CA.

Appeal

By writ dated 30 October 1984 the plaintiffs, Tom Shaw and Nidd Vale Motors Ltd, who claimed to be the lawful owner of a Porsche motor car registration no NVS 958V which was in the possession of the defendant, the Commissioner of Police of the Metropolis, sought delivery up of the vehicle or damages for its unlawful detention. The defendant, having received a claim to the vehicle from the registered owner, Achmad Dessi Hanafiah Natalegawa (the claimant), issued an interpleader summons to determine the respective h
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^a Section 25, so far as material, is set out at p 408 b c, post

^b Section 21, so far as material, is set out at p 409 b c, post

^c Section 2(5) provides: 'Where under a contract for sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.'

a claims to the vehicle. On 7 October 1986 Master Grant heard the summons and decided in favour of the claimant. The plaintiffs appealed to the Court of Appeal. The facts are set out in the judgment of Lloyd LJ.

Rodney Ferm for the plaintiffs.

Robert Reid QC and K Mydeen for the claimant.

The commissioner did not appear.

b *Cur adv vult*

15 April. The following judgments were delivered.

LLOYD LJ (giving the first judgment at the invitation of Fox LJ). In December 1982 Mr Natalegawa, a student from Indonesia, acquired a red Porsche motor car, for which c he paid £16,750. In March 1984 he decided to return home to complete his studies. So on 6 April 1984 he advertised the car for sale in the Evening Standard. The price was £17,250 ono. On 15 April a man calling himself Jonathan London spoke to him on the telephone. He said he was a car dealer who was interested in purchasing the car on behalf of a client. On 16 April Mr Natalegawa, who I shall refer to as 'the claimant', let him have the car. On 1 May Mr London agreed to sell the car to another car dealer, Mr Tom Shaw. d Mr Shaw trades in association with Nidd Vale Motors Ltd. I shall refer to them together as 'the plaintiffs'. The price was £11,500. It was to be paid by a banker's draft for £10,000, and the balance in cash. The plaintiffs obtained a banker's draft dated 1 May from the Midland Bank, made out in favour of Mr London. The following day a representative of the plaintiffs met Mr London. They drove together in the car to a bank in Chiswick, where Mr London had opened an account the previous week. The plaintiffs' e representative gave Mr London the banker's draft. Mr London took it into the bank, and attempted to cash it. But the bank was unwilling to give him cash, whereupon Mr London disappeared, and has not been seen since.

In due course the police were called, and took possession of the car. The banker's draft has never been cashed. Within a few days Midland Bank reimbursed the plaintiffs with f the amount of the draft, against the plaintiffs' undertaking to indemnify the bank should the draft be presented hereafter. The date of the indemnity is 5 May 1984.

On 30 October 1984 the plaintiffs commenced proceedings against the Metropolitan Police Commissioner claiming that the car belonged to them. In December 1984 the police issued an interpleader summons. On 28 January 1985 Master Grant ordered an issue to be tried. Lengthy affidavits were sworn on either side. On 7 October 1986 Master g Grant, in a judgment of which we only have a note, but which, even from the note, appears to have been exceptionally careful and clear, decided the issue in favour of the claimant. He added the comment that he was glad that the law should, in this case, accord with justice.

It is, of course, a frequent occurrence that the courts have to decide which of two h innocent parties is to suffer by the fraud of a third. In *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1956] 3 All ER 905 at 909, [1957] 1 QB 371 at 379 Denning LJ described it as the 'ever-recurring question' and 'the familiar contest between the original owner who had been deceived into parting with his property, and the innocent purchaser who has been deceived into buying it'. In such cases it is often very difficult to say where justice lies. What makes the present case unique in my experience is that the plaintiffs, so far from suffering as a result of London's fraud will, if they succeed, have obtained a car without having had to pay for it. If they fail, they will have suffered nothing except j the loss of their bargain. They are not a penny out of pocket. They still have the £1,500 in cash, and although there is a theoretical possibility that they might have to honour the indemnity which they gave in favour of the Midland Bank, the chances of that happening in practice must now be regarded as extremely remote. So it is not surprising that the master regarded his decision in favour of the claimant in the present case as according with the justice of the case.

Counsel for the plaintiffs, who argued a difficult case with great skill, accepted that the burden was on him to show that the property in the car had passed to the plaintiffs. He sought to discharge that burden in two stages. First, by submitting that London had bought, or agreed to buy, the car from the claimant, and second by relying on s 25 of the Sale of Goods Act 1979. That section provides:

'(1) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner . . .'

As to the first step in the argument of counsel for the plaintiff, there was a good deal of evidence from which the master might have inferred that the claimant had sold the car to Mr London. Thus on 1 May, shortly before Mr London agreed to sell to the plaintiffs, the claimant gave Mr London, at London's request, a letter in the following terms:

'This letter serves to certify that I, A. D. H. NATALEGAWA Have sold the PORSCHE 3.3 TURBO Registration number NVS 958V to MR. JONATHAN LONDON of . . . and from the date shown below no longer have any legal responsibility connected with that car. [Signed] A. D. H. NATALEGAWA 18 March 1984.'

The claimant also signed the notification of sale or transfer slip attached to the car registration certificate showing that he had sold the car to Mr London on 18 March 1984, in return for which Mr London gave the claimant a postdated cheque in the sum of £17,250 which subsequently proved to be valueless. Even if the claimant had originally dealt with Mr London as an agent, or intermediary, the documents to which I have just referred show, according to counsel, that the claimant was 'backing it both ways'; in other words, if Mr London should fail to find a buyer for the car, then he had agreed to buy the car himself. Counsel for the plaintiffs relied on a statement taken by the police on 3 May 1984, in which the claimant said, in unambiguous terms, that he was selling the car to London, and that he had accepted the cheque as payment.

The difficulty with that argument is that it is contrary to the claimant's affidavit, in which he was equally specific that Mr London was acting as his agent in respect of the sale at all material times, and that he had not in fact sold the car to him as a purchaser.

These inconsistencies could have been explored if the plaintiffs had applied to cross-examine the claimant on his affidavit. But they did not. In those circumstances the master was entitled to accept the evidence contained in the claimant's affidavit, in preference to the statement which he had previously given to the police. The master held that there never was a purported sale between the claimant and London. I see no ground on which we ought to interfere with that finding.

It follows that Mr London never bought or agreed to buy the car, and that the argument of counsel for the plaintiffs fails at the first stage. Since s 25 only applies, according to its terms, when a person has bought or agreed to buy goods, the second stage of the argument does not arise. But for completeness I should add the following points.

(i) It was not suggested that Mr London was a mercantile agent acting in the ordinary course of business so as to enable him to pass a good title under s 2 of the Factors Act 1889, irrespective of s 25 of the 1979 Act.

(ii) I would respectfully disagree with the master's view that the car registration certificate and the other documents to which I have referred were documents of title. In *Joblin v Watkins & Roseveare (Motors) Ltd* [1949] 1 All ER 47 it was held that a car registration book is not a document of title; see also *Pearson v Rose & Young Ltd* [1950] 2 All ER 1027 at 1033, [1951] 1 KB 275 at 289 per Denning LJ and *Central Newbury Car*

Auctions Ltd v United Finance Ltd [1956] 3 All ER 905 at 914, [1957] 1 QB 371 at 387 per Hodson LJ.

(iii) Since preparing this judgment I have read the very recent judgments of the Court of Appeal in *National Employers Mutual General Insurance Association Ltd v Jones* [1987] 3 All ER 385, in which it fell to the court to consider s 25 in some detail. However, there is nothing in that decision which throws any light on the present case.

That brings me to the only point of difficulty in the case. If the plaintiffs cannot rely on s 25 of the 1979 Act, are they nevertheless entitled to rely on s 21? That section provides:

‘(1) Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell ...’

Counsel for the plaintiffs submits that the claimant is precluded by his conduct from denying Mr London’s authority to sell, since he represented that Mr London had been the owner of the car since 18 March 1984, and that the plaintiffs relied on that representation. Counsel did not develop the point at any great length, and did not cite any authority. Nevertheless it deserves attention.

In *Central Newbury Car Auctions Ltd v United Finance Ltd* it was decided that the mere possession by an intermediate seller of the car and the registration book with the consent of the owner does not preclude the owner from asserting his title. The owner does not thereby represent that the intermediate seller has authority to sell. But here the facts go much further. The signature of the notification of sale or transfer slip, and above all, the document stating in so many words that the claimant had sold the car to Mr London, is the clearest possible representation, intended to be relied on by the ultimate purchaser, that the claimant had transferred the ownership to Mr London. So far as any representation goes, therefore, the case comes within the principles stated in *Henderson & Co v Williams* [1895] 1 QB 521 and *Eastern Distributors Ltd v Goldring* [1957] 2 All ER 525, [1957] 2 QB 600; and, if the plaintiffs had bought the car, I should have held that they had acquired a good title against the claimant, and, in practice, against all the world, by virtue of s 21 of the 1979 Act or, alternatively, by virtue of common law estoppel by representation, if it be different.

But the critical factor in the present case is that the plaintiffs did not buy the car. They agreed to buy it. It was expressly, and in my view rightly, conceded that the property in the car was not intended to pass until Mr London was paid. So when Mr London went into the bank to cash the banker’s draft, the moment had not yet come when the property was to pass from Mr London to the plaintiffs. That moment never did come. Does that make a difference? The master has held that it does. In my view he was right.

The meaning of the word ‘sold’ in the phrase ‘where goods are sold’ in s 21 of the 1979 Act does not appear to have been considered in any decided case or text book, except by Professor Atiyah in *Sale of Goods* (7th edn, 1985) p 266 and Professor Guest in *Benjamin’s Sale of Goods* (2nd edn, 1981) p 465. Professor Atiyah says: ‘It may be that the words “where goods are sold” must be given their strict significance and do not cover cases of an agreement to sell.’ The authority cited is *Anderson v Ryan* [1967] IR 34. In that case a car dealer agreed to sell a car to which he had no title. But he obtained title before he delivered the car. It was argued that the buyer could have no better title than the seller had had at the time of the agreement. Not surprisingly, that argument was rejected. I doubt if that decision helps much either way in the present case.

Professor Guest expresses the view in *Benjamin’s Sale of Goods* p 465, n 31 that the principle stated in s 21 applies not only to sale, but also where goods are pledged or otherwise disposed of for value to a third party. But there is no suggestion that the section applies to an agreement to sell. On principle, it seems to me that s 21 does not apply to an agreement to sell. It can only apply where the intermediate seller has purported to transfer the property in the goods, whether the general property or perhaps the special

property. Section 21 is the first of a group of six sections, all of which are concerned with the transfer of title. Thus s 22 provides that a buyer who buys in a market overt acquires a good title, provided he buys in good faith without notice of any want of title on the part of the seller. Section 23 makes similar provision in the case of a buyer who buys from a seller with a voidable title. It was no doubt for the same reason that the phrase 'sale, pledge, or other disposition' in ss 24 and 25 was held by the Court of Appeal to be confined to cases where there had been a transfer of property, or some interest in property. Transfer of possession is not enough: see *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1971] 3 All ER 708 at 714, [1972] 1 QB 210 at 220, where Megaw LJ said: "Disposition" must involve some transfer of an interest in property, in the technical sense of the word "property", as contrasted with mere possession.

If that is true of the word 'disposition' in ss 24 and 25 of the 1979 Act, a word which, as a matter of ordinary usage, is capable of a very wide meaning, it must be equally true of the word 'sale' in s 21 of the Act. So I would hold that 'sale' in s 21 does not include an agreement to sell, which, by definition, involves no transfer of property: see s 2(5) of the 1979 Act. Since it is conceded that the transaction between Mr London and the plaintiffs never got beyond an agreement to sell, it must follow that s 21 does not apply.

The second half of s 21 and ss 22 to 25 are all statutory exceptions to the rule *nemo dat quod non habet*, a rule which is expressed in statutory form in the first half of s 21. In the present case the plaintiffs fail, not because they cannot bring themselves within any of the exceptions to the rule (though they fail for that reason also in the case of s 25), but for the more fundamental reason that Mr London never even purported to give what he did not have. If he had purported to transfer the property in the car, then I should have held, as I have already said, that the case fell within *Henderson & Co v Williams* [1895] 1 QB 521 and *Eastern Distributors Ltd v Goldring* [1957] 2 All ER 525, [1957] 2 QB 600. But as he never purported to transfer the property, neither s 21 nor common law estoppel helps.

In para 1 of the statement of claim, the plaintiffs plead as follows:

'The plaintiff is the lawful owner of a Porsche motor car . . . having purchased the same in May 1984 . . . in good faith and without notice of any adverse claim upon it.'

I would hold that the plaintiffs are not the lawful owner of the car and never have been for the simple reason that Mr London never purported to transfer the property in the car. Nothing in ss 21 to 26 of the 1979 Act, or the general law of estoppel, can supply that omission.

In my view the master was right to decide the interpleader issue in the way he did. Like him, I am glad to have reached that conclusion. Although the claimant may be regarded as having been exceptionally gullible, it would offend my sense of justice if he were to lose the car, and the plaintiffs were to obtain it, for nothing. In the course of the argument we suggested various ways in which the appeal might have been compromised without injustice. But a compromise was not acceptable to either party.

For the reasons I have given, I would dismiss the appeal.

STOCKER LJ. I agree.

FOX LJ. I agree.

Appeal dismissed.

Solicitors: *Victor D Zermansky & Co*, Leeds (for the plaintiffs); *Charles Hunt & Co* (for the claimant).

Frances Rustin Barrister.

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R v Williams

COURT OF APPEAL, CRIMINAL DIVISION

LORD LANE CJ, SKINNER AND McCOWAN JJ

28 NOVEMBER 1983

b *Criminal law – Mistake – Mistake as a defence – Belief of defendant – Reasonableness of belief – Whether belief must be reasonable or merely honestly held.*

M saw a youth attempting to rob a woman in the street. He gave chase, knocked the youth to the ground and attempted to immobilise him. The appellant, who had not witnessed the attempted robbery, then came on the scene. M told the appellant that he was a police officer, which was untrue, and that he was arresting the youth. When M failed to produce a warrant card a struggle ensued in which the appellant punched M in the face. The appellant was charged with assault causing actual bodily harm. At his trial his defence was that he had honestly believed that the youth was being unlawfully assaulted by M and that it was irrelevant whether his mistake was reasonable or unreasonable. The judge directed the jury that the appellant had to have an honest belief based on reasonable grounds that M was acting unlawfully. The appellant was convicted. He appealed on the ground that the judge had misdirected the jury.

Held – If a defendant was labouring under a mistake of fact as to the circumstances when he committed an alleged offence he was to be judged according to his mistaken view of the facts regardless of whether his mistake was reasonable or unreasonable. The reasonableness or otherwise of the defendant's belief was only material to the question of whether the belief was in fact held by the defendant at all. It followed that there had been a material misdirection. The appeal would therefore be allowed and the conviction quashed (see p 413 g, p 414 c to e and p 415 d e g j, post).

Dictum of Lawton LJ in *R v Kimber* [1983] 3 All ER at 320 applied.

Dictum of Hodgson J in *Albert v Lavin* [1981] 1 All ER at 639 disapproved.

f Per curiam. The defence of self-defence is made out if the defendant shows that he used such force in the defence of himself or another as was reasonable in the circumstances as he believed them to be. However, if the defendant's alleged belief was mistaken and his mistaken belief was unreasonable that may be good grounds for the jury to find that the belief was not honestly held (see p 415 f, post).

g Notes

For defence of mistake in relation to a criminal charge, see 11 Halsbury's Laws (4th edn) para 21, and for cases on the subject, see 14(1) Digest (Reissue) 31, 118–124.

Cases referred to in judgment

h *Albert v Lavin* [1981] 1 All ER 628, [1982] AC 546, [1981] 2 WLR 1070, DC; *aff'd on other grounds* [1981] 3 All ER 879, [1982] AC 546, [1981] 3 WLR 955, HL.
DPP v Morgan [1975] 2 All ER 347, [1976] AC 182, [1975] 2 WLR 912, HL.
R v Abraham [1973] 3 All ER 694, [1973] 1 WLR 1270, CA.
R v Kimber [1983] 3 All ER 316, [1983] 1 WLR 1118, CA.

j Appeal against conviction

Gladstone Williams appealed against his conviction on 9 March 1983 in the Crown Court at Inner London Sessions before Mr Recorder Richard Du Cann QC and a jury of assault occasioning bodily harm in respect of which he was given a conditional discharge for 12 months, ordered to pay £100 compensation to the victim and £50 legal aid contribution. He appealed on a point of law, namely that the recorder erred in directing the jury by

failing to make it clear to them that it was for the prosecution to eliminate the possibility that the appellant was acting under a genuine mistake of fact whether that mistake was reasonable or otherwise. The facts are set out in the judgment of the court. a

Desmond Fennell QC and John Perry (both assigned by the Registrar of Criminal Appeals) for the appellant.

William Howard QC and Austen Issard-Davies for the Crown. b

LORD LANE CJ delivered the following judgment of the court. On 9 March 1983 Gladstone Williams appeared in the Crown Court at Inner London Sessions charged with assault occasioning actual bodily harm. After a trial he was convicted and was given a conditional discharge for twelve months together with certain financial penalties. He now appeals on a point of law against his conviction. c

The facts were somewhat unusual and were as follows. On the day in question the alleged victim, a man called Mason, saw a black youth seizing the handbag belonging to a woman who was shopping. He caught up with the youth and held him, he said with a view to taking him to a nearby police station, but the youth broke free from his grip. Mason caught the youth again and knocked him to the ground, and he then twisted one of the youth's arms behind his back in order to immobilise him and to enable him, d Mason, so he said, once again to take the youth to a police station. The youth was struggling and calling for help at this time, and no one disputed that fact.

On the scene then came the appellant, who had only seen the latter stages of this incident. According to Mason he told the appellant first of all that he was arresting the youth for mugging the lady and secondly that he, Mason, was a police officer. That was not true. He was asked for his warrant card, which obviously was not forthcoming, and thereupon something of a struggle ensued between Mason on the one hand and the appellant and others on the other hand. In the course of these events Mason sustained injuries to his face, loosened teeth and bleeding gums. e

The appellant put forward the following version of events. He said he was returning from work by bus when he saw Mason dragging the youth along and striking him again and again. He was so concerned about the matter that he rapidly got off the bus and made his way to the scene and asked Mason what on earth he was doing. In short he said that he punched Mason because he thought if he did so he would save the youth from further beating and what he described as torture. f

There was no doubt that none of these dramatis personae were known to each other beforehand.

That simple statement of affairs caused a great deal of difficulty for the unfortunate recorder, with whom we have the utmost sympathy, because it raised issues of law which have been the subject of debate for more years than one likes to think about and the subject of more learned academic articles than one would care to read in an evening. Submissions were made to him as to the way in which he should direct the jury on the issue of possible mistake on the part of the appellant as to the circumstances in which he, g the appellant, used violence on Mason. h

The contention of the Crown was that the prosecution needed only to prove to the satisfaction of the jury that the appellant was not acting under a mistaken view of the facts. Their contention was that they did not have to go further and (given that there was a mistake) show that the mistake was an unreasonable one. The appellant on the other hand contended that the reasonableness or otherwise of the mistake was immaterial, and once the jury were satisfied that he, the appellant, was labouring under a mistake and that on the mistaken facts as he believed them to be he would not have committed any offence, then the jury were not obliged to consider further the question of reasonableness. j

The recorder ruled that the prosecution's contentions as to the law were correct and rejected the submissions made by counsel for the appellant to the contrary.

a Undoubtedly this question of the proper direction to the jury loomed very largely on the horizon so far as the court was concerned, and understandably the recorder had his attention directed primarily, if not exclusively, to the problem of whether the belief had to be reasonable in order to afford a defence, if one may put it in that way. Consequently certain fundamental matters to which the jury's attention should have been directed were unhappily overlooked. If one turns to the transcript, one finds first of all the recorder giving the usual and perfectly correct direction to the jury as to the burden of proof being on the prosecution. He then at a later stage deals with the question of mistake and this is what he says:

c 'If you come to the conclusion that the defendant . . . had a belief, had the honest and genuine belief (and one could use all sorts of adjectives before the word "belief" but I am not sure they add very much), had the true belief and the reasonable belief, that is to say the belief based on reasonable grounds that Mason was acting unlawfully, then [his] use of force would be excused provided again that it was in all the circumstances reasonable and directed to preventing crime, namely the assault on the youth, and directed to no more than that in the way that I have explained.'

d That direction he repeats later almost word for word in order to make it clear to the jury. It is plain to this court that those directions failed to make it clear to the jury that it is for the prosecution to eliminate the possibility that the appellant was acting under a genuine mistake of fact. The nearest that the recorder ever got to such a direction is to be found at a stage where the jury returned to court with a question to ask of the recorder, and in the course of answering that question the recorder said:

e 'If you think the position is, or the position may be, that the defendant Mr Williams had such an honest and genuine belief based on reasonable grounds that Mason was acting unlawfully, then you go on to ask yourselves: was Mr Williams's use of force to be excused because, again in all the circumstances, it was a reasonable use of force and directed to no more than preventing the commission of crime?'

f We take the view that the words 'or the position may be' does not cure the earlier defect. If authority is required for the necessity of a careful direction in circumstances such as these, it is to be found in *R v Abraham* [1973] 3 All ER 694 at 696, [1973] 1 WLR 1270 at 1273-1274. More recently a similar indication is to be found in the judgment of Lawton LJ in *R v Kimber* [1983] 3 All ER 316, [1983] 1 WLR 1118 (to which it will be necessary for the court to refer at a later stage in the judgment).

g The answer is that this was a material misdirection. It was something at the very foundation of the case and that on its own would have been enough to require this court to allow the appeal and quash the conviction. But the story does not end there. We have been addressed on the question of whether the recorder was right in ruling against the submission by counsel for the appellant with regard to the reasonableness of the defendant's belief.

h Counsel for the Crown has helpfully conceded before this court first of all that the passage to which reference has already been made was indeed a material misdirection and that he cannot argue the contrary, and second he has made a further helpful concession that *R v Kimber* on the question of reasonable belief not only is binding upon this court, but answers the question contrary to the submissions of the Crown in the court below. Against that background we turn to consider the second point.

j One starts off with the meaning of the word 'assault'. 'Assault' in the context of this case, that is to say, using the word as a convenient abbreviation for assault and battery, is an act by which the defendant, intentionally or recklessly, applies unlawful force to the complainant. There are circumstances in which force may be applied to another lawfully. Taking a few examples. Firstly, where the victim consents, as in lawful sports, the application of force to another will, generally speaking, not be unlawful. Secondly, where

the defendant is acting in self-defence the exercise of any necessary and reasonable force to protect himself from unlawful violence is not unlawful. Thirdly, by virtue of s 3 of the Criminal Law Act 1967, a person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of an offender or suspected offender or persons unlawfully at large. In each of those cases the defendant will be guilty if the jury are sure that first of all he applied force to the person of another, and secondly that he had the necessary mental element to constitute guilt. a

The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more. b

What then is the situation if the defendant is labouring under a mistake of fact as to the circumstances? What if he believes, but believes mistakenly, that the victim is consenting, or that it is necessary to defend himself, or that a crime is being committed which he intends to prevent? He must then be judged against the mistaken facts as he believes them to be. If judged against those facts or circumstances the prosecution fail to establish his guilt, then he is entitled to be acquitted. c

The next question is: does it make any difference if the mistake of the defendant was one which, viewed objectively by a reasonable onlooker, was an unreasonable mistake? In other words should the jury be directed as follows: 'Even if the defendant may have genuinely believed that what he was doing to the victim was either with the victim's consent or in reasonable self-defence or to prevent the commission of crime, as the case may be, nevertheless if you, the jury, come to the conclusion that the mistaken belief was unreasonable, that is to say that the defendant as a reasonable man should have realised his mistake, then you should convict him.' d

It is on this point that the large volume of historical precedent with which counsel for the Crown threatened us at an earlier stage is concerned. But in our judgment the answer is provided by the judgment of this court in *R v Kimber* [1983] 3 All ER 316, [1983] 1 WLR 1118, by which, as already stated, we are bound. There is no need for me to rehearse the facts, save to say that that was a case of an alleged indecent assault on a woman. Lawton LJ, delivering the judgment of the court said ([1983] 3 All ER 316 at 319-320, [1983] 1 WLR 1118 at 1122-1123): e

'The application of the *Morgan* principle [see *DPP v Morgan* [1975] 2 All ER 347, [1976] AC 182] to offences other than indecent assault on a woman will have to be considered when such offences come before the courts. We do, however, think it necessary to consider two of them because of what was said in the judgments. The first is a decision of the Divisional Court in *Albert v Lavin* [1981] 1 All ER 628, [1982] AC 546. The offence charged was assaulting a police officer in the execution of his duty, contrary to s 51 of the Police Act 1964. The defendant, in his defence, contended, inter alia, that he had not believed the police officer to be such and in consequence had resisted arrest. His counsel analysed the offence in the same way as we have done and referred to the reasoning in *Morgan*. Hodgson J, delivering the leading judgment, rejected this argument and in doing so said ([1981] 1 All ER 628 at 639, [1982] AC 546 at 561-562): "In my judgment counsel's ingenious argument for the appellant fails at an earlier stage. It does not seem to me that the element of unlawfulness can properly be regarded as part of the definitional element of the offence. In defining a criminal offence the word 'unlawful' is surely tautologous and can add nothing to its essential ingredients. . . . And, no matter how strange it may seem that a defendant charged with assault can escape conviction if he shows that he mistakenly but unreasonably thought his victim was consenting but not if he was in the same state of mind whether his victim had a right to detain him, that in my judgment is the law." We have found difficulty in agreeing with this reasoning [and I interpolate, so have we], even though the judge seems to be accepting that belief in consent does entitle a defendant to an acquittal on a charge of assault. We cannot accept that the word "unlawful" when used in a definition of an offence is to f

a be regarded as "tautologous". In our judgment the word 'unlawful' does import an essential element into the offence. If it were not there, social life would be unbearable, because every touching would amount to a battery unless there was an evidential basis for a defence. This case was considered by the House of Lords (see [1981] 3 All ER 879, [1982] AC 546). The appeal was dismissed, but their Lordships declined to deal with the issue of belief.'

b That is the end of the citation from *R v Kimber* in so far as it is necessary for the second point. I read a further passage which sets out the proper direction to the jury, and is relevant to the first leg of the appellant's argument in this case. It reads as follows ([1983] 3 All ER 316 at 320, [1983] 1 WLR 1118 at 1123):

c 'In our judgment the recorder should have directed the jury that the Crown had to make them sure that the appellant never had believed that Betty was consenting. As he did not do so, the jury never considered an important aspect of his defence.'

We respectfully agree with what Lawton LJ said there with regard both to the way in which the defence should have been put and also with regard to his remarks as to the nature of the defence. The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting or that a crime was not being committed and so on. In other words, the jury should be directed, first of all, that the prosecution have the burden or duty of proving the unlawfulness of the defendant's actions, second, that if the defendant may have been labouring under a mistake as to the facts he must be judged according to his mistaken view of the facts and, third, that that is so whether the mistake was, on an objective view, a reasonable mistake or not.

f In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected.

g Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it. We have read the recommendations in the Criminal Law Revision Committee's 14th Report, Offences Against the Person (Cmnd 7844 (1980)), in Pt IX, para 72(a) of which the following passage appears:

h 'The Common Law defence of self-defence should be replaced by a statutory defence providing that a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person . . .'

In the view of this court that represents the law as expressed in *DPP v Morgan* and in *R v Kimber* and we do not think that the decision of the Divisional Court in *Albert v Lavin* from which we have cited can be supported.

j For those reasons this appeal must be allowed and the conviction quashed.

Appeal allowed. Conviction quashed.

Solicitors: *D M O'Shea* (for the Crown).

N P Metcalfe Esq Barrister.

R v Whyte

a

COURT OF APPEAL, CRIMINAL DIVISION

LORD LAKE CJ, CAULFIELD AND STUART-SMITH JJ

15 MAY 1987

Criminal law – Wounding – Self-defence – Excessive force – Direction to jury – Defendant stabbing victim with lock-knife when punched in face by victim – Victim unarmed – Knife already open when defendant hit – Judge failing to direct jury that excessive force could be reasonable if defendant acting in a moment of unexpected anguish – Whether material misdirection.

b

The defendant stabbed a man with a lock-knife, the blade of which was already open, when the man punched him in the face. At his trial on a charge of wounding with intent the judge directed the jury that it was for them to decide whether the defendant had used the knife in self-defence and, if so, whether the use of a knife against an unarmed man was reasonable. The defendant was convicted. He appealed, contending that the judge ought to have directed the jury that the defendant was entitled to be acquitted if they thought that he had only done what he honestly and instinctively thought was necessary in a moment of unexpected anguish.

c

d

Held – Although what was reasonable by way of self-defence depended on the nature of the attack, if the moment was one of crisis for someone who was in imminent danger it might be necessary for that person to take instant action to avert that danger, in which case if the defendant showed that he had only done what he honestly and instinctively thought was necessary in a moment of unexpected anguish that would be very strong evidence that the defensive action he had taken was reasonable. However, since the defendant had deliberately used an already opened knife on his assailant in circumstances where such use could not possibly be reasonable, the absence of any direction regarding whether the defendant had acted in the agony of the moment was irrelevant. The appeal would therefore be dismissed (see p 418 c to f h to p 419 b f, post).

e

Dictum of Lord Morris in *Palmer v R* [1971] 1 All ER at 1088 considered.

f

Notes

For self-defence, see 11 Halsbury's Laws (4th edn) para 1217, and for cases on the subject, see 15 Digest (Reissue) 1189–1190, 10196–10207.

Cases referred to in judgment

Palmer v R [1971] 1 All ER 1077, [1971] AC 814, [1971] 2 WLR 831, PC.

R v Shannon (1980) 71 Cr App R 192, CA.

g

Appeal against conviction

Ese Etenyin Whyte appealed against his conviction on 2 December 1986 in the Crown Court at Snaresbrook before his Honour Judge Stable QC and a jury, on count 1 of an indictment charging him with wounding with intent contrary to s 18 of the Offences against the Person Act 1861, in respect of which he was sentenced to three and a half years' imprisonment. An alternative count of wounding was allowed to remain on the file. The grounds of the appeal were, inter alia, that the judge had failed to direct the jury as to the appellant's state of mind at the time of the alleged assault. The facts are set out in the judgment of the court.

h

j

Keith Mitchell (assigned by the Registrar of Criminal Appeals) for the appellant.

John O Haines for the Crown.

LORD LANE CJ delivered the following judgment of the court. On 2 December 1986 in the Crown Court at Snaresbrook before his Honour Judge Stable QC the appellant was convicted and sentenced on count 1 of the indictment of wounding with intent contrary to s 18 of the Offences against the Person Act 1861, and was sentenced to three and a half years' imprisonment. He now appeals against conviction by leave of the single judge.

The facts of the case were these. The appellant and his brother lived in an upstairs flat in a road called Pyrland Road, London N5. Their neighbours were a Mr and Mrs Holmes. Mr and Mrs Holmes owned a dog, which apparently was not fully house-trained. Mr and Mrs Holmes lived in the downstairs flat, but the appellant's flat and the Holmeses' flat shared a common landing and it seems that the door leading to the upstairs flat was close to the door which led into the Holmeses' flat. What happened was this. On the evening of 30 March Mr and Mrs Holmes were in a public house, and they met a man called Michael Khan, who had been an acquaintance of theirs for many years but whom they had not seen for some time. After they finished drinking in the public house they returned to the Holmeses' flat.

Thereafter there is a sharp divergence in the account of what happened, because according to Mr Khan, who was the eventual victim of the incident, the appellant's voice was heard outside the flat. Mr Khan went to the door to see what was required. When he opened the door, according to Mr Khan, the appellant punched him and said: 'The dog's pissed against my door.' Mr Khan, according to him, tried to calm the appellant down because he was very agitated, but the appellant reached round into the door which led into his, the appellant's, premises, produced a lock-knife, the blade of which was already open, and tried to stab Mr Khan in the stomach. Mr Khan put his arm across his stomach to protect himself, and as a result the arm received the effect of the knife. It was very severely cut. Mr Khan, having blocked the blow in that way, punched the appellant and slammed the door, and that, according to Mr Khan, was the end of the incident.

The appellant was interviewed by the police. To the police he was uncommunicative. He declined to answer any of the questions which they posed to him. The account of the events which he gave at the trial was this. He said first of all that he had not deliberately stabbed Mr Khan at all. It remained to some degree a mystery in those circumstances how Mr Khan received the wound that he did. But his defence was that he was acting in self-defence of himself and also of his brother. He said that what happened was this. He said that there was a knock at his door. He opened the door, but before he did so, he placed his lock-knife, the six-inch blade of which he had already opened, in his back pocket. This was before the door was open at all. He opened the door and there was Mrs Holmes, who asked him to join her for a drink. At that moment, he said, Mr Khan stepped in front of him, though it is not quite clear why. The appellant, according to himself, said: 'The dog's pissed on the floor.' Mr Khan told him to calm down, but then Mr Khan made a gesture towards him which he endeavoured to avoid, but he did not avoid. In other words Mr Khan struck him on the face. The appellant then took out the knife, according to him, but dropped it on the floor. There was then a struggle. He managed to pick up the knife. He tried to push away Mr Khan, and in some way, which he could not explain, the knife had penetrated Mr Khan's arm. The appellant then threw away the knife and ran away from the flat. Eventually, having seen his solicitor some two days later, he went to see the police seven or eight days later.

Those were the two conflicting versions.

The two complaints made by counsel for the appellant, to whom we are indebted for his concise submissions to us, are these. First of all the judge failed to direct the jury as to the appellant's state of mind at the time of the alleged assault. What the judge said to the jury on the question of self-defence, having given them an impeccable direction on the general effect of that defence, was this:

‘... if a man does use violence and claims he was only violent in self-defence, he may only use such force to defend himself as was reasonable in all the circumstances. It is for you, the jury, to decide as a matter of common sense whether a blow with a knife was in self-defence, and if it was, if the use of a knife against a man who is not alleged to have been armed was reasonable... So before you can convict Mr Whyte of either count 1 or count 2, you must be satisfied so that you are sure that Mr Whyte struck Mr Khan a blow with a knife as an assailant, and that the blow was not a blow in self-defence, or if it was, it was an unreasonable amount of force, having regard to the danger Mr Whyte himself was in at the hands of Mr Khan.’ a
b

In most cases, where the issue is one of self-defence, it is necessary and desirable that the jury should be reminded that the defendant's state of mind, that is his view of the danger threatening him at the time of the incident, is material. The test of reasonableness is not, to put it at its lowest, a purely objective test.

We have been referred to two authorities. The first is an opinion of the Privy Council in *Palmer v R* [1971] 1 All ER 1077, [1971] AC 814 and the second is *R v Shannon* (1980) 71 Cr App R 192, a decision of this court which of course is binding on us. The effect of those two decisions seems to be this. A man who is attacked may defend himself, but may only do what is reasonably necessary to effect such a defence. Simple avoiding action may be enough if circumstances permit. What is reasonable will depend on the nature of the attack. If there is relatively a minor attack, it is not reasonable to use a degree of force which is wholly out of proportion to the demands of the situation. But if the moment is one of crisis for someone who is in imminent danger, it may be necessary to take instant action to avert that danger. c
d

Although the test is what is sometimes called an objective one, yet nevertheless, to quote the words of Lord Morris in *Palmer v R* [1977] 1 All ER 1077 at 1088, [1971] AC 814 at 832: e

‘If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action had been taken.’

In *R v Shannon*, to which we have already referred, the trial judge had directed the jury to consider the question, ‘Are you satisfied that the defendant used more force than necessary in the circumstances?’ without going on to consider the qualification what the defendant may have done in ‘a moment of unexpected anguish’. On the facts of *R v Shannon*, that was clearly a fatal flaw which led to the conviction being quashed. f

The judge in the present case likewise omitted to mention the qualification which Lord Morris had suggested should be made and which *R v Shannon* says should be made in appropriate circumstances. g

It is a trite observation, but nevertheless true, that the requirements of a summing up will depend on the particular facts of the case. Whereas on the facts of *R v Shannon* the court correctly held that the qualifying effect mentioned by Lord Morris should have been given, one has to look at this case to see whether it was similarly necessary here. The jury in convicting him of the s 18 offence must have come to the conclusion that he had deliberately stabbed Mr Khan with the knife, despite what he himself said. They were directed correctly on the question of accident. The appeal on that point has been abandoned. So the jury must have decided that the knife was deliberately used by the appellant on Mr Khan. At the very best, from the appellant's point of view, the jury must have come to the conclusion that he stabbed Mr Khan because Mr Khan had hit him in the face with his hand. Now I am assuming in favour of the appellant that the facts were, with that small amendment about accident, as the appellant himself stated them to be. It is highly likely that the jury entirely disbelieved the appellant. h
j

Was it necessary in those circumstances that the judge should mention the qualifying factor as mentioned by Lord Morris? In our judgment it was not. There was no question

a raised by the appellant that he, acting in the agony of the moment, went too far, that he failed to weigh accurately the precise degree of the attack which he was suffering. It is perfectly plain that on any view the use of an already prepared knife, the blade having been extended, in circumstances such as this, could not possibly be reasonable under any circumstances, whether the direction in *Palmer v R* was given or not.

b For those reasons we think that in this particular case it was not necessary for the judge to give the *Palmer* direction, although as a matter of abundance of caution he might perhaps have given it. So much for the first point.

The second point raised by counsel for the appellant is this, that the judge failed to direct the jury correctly on the law in respect of the issue of self-defence by stating to the jury that the defence of self-defence was not available to the appellant if there was an easy and obvious way out of the fight, that the appellant chose to reject that easy way out. The transcript reveals this passage of which complaint is made:

c 'Furthermore, the defence of self-defence is not open to a man, if there was an obvious and easy way of avoiding the incident instead of using violence. If a person rejects the obvious and easy way out of the trouble, and chooses instead to resort to violence, then he is not entitled to rely on self-defence.'

d The complaint is that the judge should have said that the ease of escape is only one of the matters which the jury has to consider when coming to the conclusion whether or not the actions of the appellant were reasonable in the circumstances.

e It may be that in a perfect world that would have been the way in which the judge expressed himself. But once again against the background of this case it seems to us that this expression of the law by the judge was perfectly accurate. If, even on the appellant's own story, he had chosen simply to back out of the way and close the door, any further trouble could have been avoided.

In those circumstances it seems to us that the second ground of appeal likewise must fail.

f The final point really disappears by reason of what we have already said. Counsel for the appellant contends that the joint effect of those two mistakes was to render the conviction unsafe and unsatisfactory. As each of those two grounds of appeal has severally failed, therefore the combined effect of them must also fail.

For those reasons this appeal against conviction must be dismissed.

Appeal dismissed.

Solicitors: Crown Prosecution Service.

N P Metcalfe Esq Barrister.

R v O'Grady

COURT OF APPEAL, CRIMINAL DIVISION

LORD LAKE CJ, BOREHAM AND McCOWAN JJ

2, 11 JUNE 1987

Criminal law – Murder – Self-defence – Excessive force – Mistake – Self-induced intoxication – Defendant killing friend owing to mistake of fact caused by voluntary intoxication – Defendant pleading self-defence – Defendant mistaken as to severity of attack on him – Defendant believing his life endangered by attack – Whether reasonableness of force used by defendant to be judged according to his mistaken view of facts.

The defendant and the deceased spent the day drinking large quantities of alcohol and then went to the defendant's flat, where they fell asleep. The defendant woke to find the deceased hitting him and retaliated with what he thought were a few blows to defend himself. The fight eventually subsided and the defendant fell asleep again. When he awoke he found that the deceased was dead. A post-mortem revealed that the deceased had suffered extensive serious wounds to the face, a fracture of the spine, a fractured rib and severe bruising to the head, brain, neck and chest consistent with blows from both blunt and sharp objects. The defendant was charged with murder. At his trial he claimed to have acted in self-defence. The trial judge directed the jury that the defendant was entitled to rely on a mistake as to the existence of an attack but was not entitled to rely on a mistake as to the severity of the attack or the amount of force necessary to defend himself. The defendant was convicted of manslaughter. He appealed on the ground that the judge had misdirected the jury.

Held – A defendant was not entitled to rely on the defence of self-defence if, because of his own self-induced intoxication, he had made a mistake as to the amount of force reasonably necessary to defend himself and had used more force than was necessary. The defendant had accordingly been rightly convicted and his appeal would therefore be dismissed (see p 423 *de* and p 424 *gh*, post).

R v Lipman [1969] 3 All ER 410, *DPP v Majewski* [1976] 2 All ER 142 and *R v Williams* (1983) [1987] 3 All ER 411 considered.

Notes

For self-defence as a defence to murder or manslaughter, see 11 Halsbury's Laws (4th edn) para 1180 and for cases on self-defence in relation to justifiable homicide, see 15 Digest (Reissue) 1171, 9967–9968.

Cases referred to in judgment

DPP v Majewski [1976] 2 All ER 142, [1977] AC 443, [1976] 2 WLR 623, HL.

Marshall's Case (1830) 1 Lew CC 76, 168 ER 965, Assizes.

Palmer v R [1971] 1 All ER 1077, [1971] AC 814, [1971] 2 WLR 831, PC.

R v Gamlin (1858) 1 F & F 90, 175 ER 639, NP.

R v Lipman [1969] 3 All ER 410, [1970] 1 QB 152, [1969] 3 WLR 819, CA.

R v Wardrope [1960] Crim LR 770, CCC.

R v Williams (1983) [1987] 3 All ER 411, CA.

Cases also cited

R v Letenock (1917) 12 Cr App R 221, CCA.

R v Shannon (1980) 71 Cr App R 192, CA.

R v Whyte [1987] 3 All ER 416, CA.

R v Woods (1981) 74 Cr App R 312, CA.

Appeal against conviction and sentence

a Patrick Gerald O'Grady appealed against his conviction in the Central Criminal Court on 19 September 1986 before his Honour Judge Underhill QC and a jury of manslaughter and against his sentence of seven years' imprisonment. The case is reported only on the appeal against conviction. The facts are set out in the judgment of the court.

b *James Wadsworth QC* and *Peter Spink* (assigned by the Registrar of Criminal Appeals) for the appellant.

Michael Worsley QC and *Michael Neligan* for the Crown.

Cur adv vult

c 11 June. The following judgment of the court was delivered.

LORD LANE CJ. On 19 September 1986 at the Central Criminal Court the appellant, having been charged with murder, was convicted by the jury of manslaughter and was sentenced to seven years' imprisonment. He now appeals against conviction and sentence **d** by leave of the single judge, McCullough J.

The appellant was addicted to drinking large quantities of alcohol, as were the friends and acquaintances with whom he consorted, one of whom was McCloskey, the deceased man. On Thursday, 26 September 1985 the appellant, McCloskey and another man called Brennan spent the day drinking. The appellant had drunk huge quantities of cider (some eight flagons), and he and Brennan and McCloskey repaired to the appellant's flat.

e Early on Friday morning Brennan woke up to see that the appellant was covered in blood. 'We [meaning McCloskey and himself] had a fight,' said the appellant, 'and I felt him. He was cold.' The appellant went to the police station saying he wished to report a murder. He was medically examined. He had a number of cuts and bruises to the head, hands and legs which were consistent with (a) fighting and (b) grasping broken glass.

f A post-mortem on McCloskey revealed extensive serious wounds to the face, no less than 20 in number, of varying degrees of severity, as well as injuries to the hands and a fractured rib. The wounds to the hands were probably defence injuries. There was severe bruising to the head, brain, neck and chest. There was a fracture of the spine at the level of the fifth cervical vertebra (probably caused by the head being forced backwards). There was a fractured rib. The blows to the body had been delivered by both sharp and blunt objects. He had bled to death from the wounds inflicted on and around the face.

g There was no doubt but that both the appellant and McCloskey were very drunk at the material time. The only evidence of what had led to the injuries of necessity came from the appellant himself. He and McCloskey were friends: there was no animosity between them. After their drinking bout the two fell asleep.

The material part of the appellant's account was as follows:

h 'I was awakened by a bang on the head and I jumped up and put my hand to my head and the blood was running down. I am not sure if it was one bang I got or more. I saw Eddie [McCloskey] standing up . . . he had a piece of glass in one hand . . . I made for him to stop him hitting me again. I picked up a piece of glass and I hit him. We were both standing up facing each other . . . We struggled. He was getting the better of me, trying to knock me over. I hit him to stop him hitting **j** me again.'

He went on to describe how the two of them had fought, how he thought that McCloskey was getting the better of him, how he thought he had only hit McCloskey a few times, how the fight eventually subsided. He described how he had then cooked a chop for McCloskey, who did not seem to want it. The appellant then sat down and fell asleep.

His evidence continued as follows:

'Then I woke up and found that Eddie had gone from where he had been. I was scared at that. I was scared he would get out of the flat [and go and get men to help him]. I jumped up with the intention of leaving the place. I went to the toilet on the way to the front door and found Eddie kneeling by the toilet, his hands over the bowl. I called him and he gave no answer. I took hold of him and found he was cold. I moved him on to the floor and I thought to myself: "He is dead."' a

The appellant described how he reported McCloskey's condition to some friends and then went to Peckham police station. He said: 'I did not want to kill him. I wanted him alive, not dead. I had no enmity to him. If I had not hit him I would be dead myself.' b

The judge gave an impeccable direction on the ingredients of murder and on the way in which intoxication may affect proof of intent to kill or to do serious bodily harm. Likewise impeccable was his direction on provocation, including the correct observation that, when considering whether a reasonable man would have been caused to lose his self-control, questions of drink are irrelevant. c

Finally he gave the classic direction on self-defence. He made no mention of the possibility that the appellant might by reason of intoxication have been mistaken as to the threat posed to him by McCloskey's action. This was no doubt because no one had taken the point. Counsel for the prosecution, towards the close of the judge's directions, saw fit to invite the judge to remedy what he plainly regarded as this lacuna in the charge to the jury. Counsel for the appellant wisely held his peace. The judge then gave this further direction: d

'It might be a view that you might take, I know not, that this defendant thought he was under attack from the other man mistakenly and made a mistake in thinking that he was under attack because of the drink that was in him. If he made such a mistake in drink he would nevertheless be entitled to defend himself even though he mistakenly believed that he was under attack. He would be entitled in those circumstances to defend himself. But if in taking defensive measures, then he went beyond what is reasonable either because of his mind being affected by drink or for any other reason, then the defence of self-defence would not avail him because, as I told you earlier on, you are entitled to defend yourself if it is necessary to do so, but the defensive measures that you take must be reasonable ones and not go beyond what is reasonable.' e

The grounds of appeal advanced by counsel for the appellant are as follows. (1) Whilst the judge was correct to refer to mistake induced by drink in connection with self-defence, he was wrong to limit the reference to mistake as to existence of an attack: he should have included the possibility of mistake as to the severity of an attack which was the most likely possibility on the facts. (2) By leaving the matter to the jury as he did, the judge in effect divorced the reasonableness of the appellant's reaction from the appellant's state of mind at the time. (3) The judge failed when giving his further direction to the jury to remind them that a defendant is never required to judge to a nicety the amount of force which is necessary and that they should give great weight to the view formed by the appellant at the time, even though that view might have been affected by alcohol. f

As to the first two grounds, these require an examination of the law as to intoxication in relation to mistake. Counsel have referred us to a number of authorities. It is not necessary for us to refer to all of these. In three of them the jury were invited to take the defendant's drunkenness into account when deciding whether he genuinely apprehended an assault on himself: *R v Gamlen* (1858) 1 F & F 90, 175 ER 639, *Marshall's Case* (1830) 1 Lew CC 76, 168 ER 965 and *R v Wardrope* [1960] Crim LR 770. However, the reports of these cases leave a great deal to be desired and as far as we can discover there is no case directly in point which is binding on us. g

h

i

j

As McCullough J pointed out helpfully in his observations for the benefit of the court:

- a 'Given that a man who *mistakenly* believes he is under attack is entitled to use reasonable force to defend himself, it would seem to follow that, if he is under attack and mistakenly believes the attack to be more serious than it is, he is entitled to use reasonable force to defend himself against an attack of the severity he believed it to have. If one allows a mistaken belief induced by drink to bring this principle into operation, an act of gross negligence (viewed objectively) may become lawful even though it results in the death of the innocent victim. The drunken man would be guilty of neither murder nor manslaughter.'
- b

- c How should the jury be invited to approach the problem? One starts with the decision of this court in *R v Williams* (1983) [1987] 3 All ER 411, namely that where the defendant might have been labouring under a mistake as to the facts he must be judged according to that mistaken view, whether the mistake was reasonable or not. It is then for the jury to decide whether the defendant's reaction to the threat (real or imaginary) was a reasonable one. The court was not in that case considering what the situation might be where the mistake was due to voluntary intoxication by alcohol or some other drug.

- d We have come to the conclusion that, where the jury are satisfied that the defendant was mistaken in his belief that any force or the force which he in fact used was necessary to defend himself and are further satisfied that the mistake was caused by voluntarily induced intoxication, the defence must fail. We do not consider that any distinction should be drawn on this aspect of the matter between offences involving what is called specific intent, such as murder, and offences of so called basic intent, such as manslaughter. Quite apart from the problem of directing a jury in a case such as the present where
- e manslaughter is an alternative verdict to murder, the question of mistake can and ought to be considered separately from the question of intent. A sober man who mistakenly believes he is in danger of immediate death at the hands of an attacker is entitled to be acquitted of both murder and manslaughter if his reaction in killing his supposed assailant was a reasonable one. What his intent may have been seems to us to be irrelevant to the problem of self-defence or no. Secondly, we respectfully adopt the reasoning of
- f McCullough J already set out.

- This brings us to the question of public order. There are two competing interests. On the one hand the interest of the defendant who has only acted according to what he believed to be necessary to protect himself, and on the other hand that of the public in general and the victim in particular who, probably through no fault of his own, has been injured or perhaps killed because of the defendant's drunken mistake. Reason recoils
- g from the conclusion that in such circumstances a defendant is entitled to leave the court without a stain on his character.

- We find support for that view in the decision of the House of Lords in *DPP v Majewski* [1976] 2 All ER 142, [1977] AC 443, and in particular in the speeches of Lord Simon and Lord Edmund-Davies. We cite a passage from the speech of the former as follows ([1976] 2 All ER 142 at 152, [1977] AC 443 at 476):

- h '(1) One of the prime purposes of the criminal law, with its penal sanctions, is the protection from certain proscribed conduct of persons who are pursuing their lawful lives. Unprovoked violence has, from time immemorial, been a significant part of such proscribed conduct. To accede to the argument on behalf of the appellant would leave the citizen legally unprotected from unprovoked violence where such
- i violence was the consequence of drink or drugs having obliterated the capacity of the perpetrator to know what he was doing or what were its consequences. (2) Though the problem of violent conduct by intoxicated persons is not new to society, it has been rendered more acute and menacing by the more widespread use of hallucinatory drugs. For example, in *R v Lipman* [1969] 3 All ER 410, [1970] 1

QB 152, the accused committed his act of mortal violence under the hallucination (induced by drugs) that he was wrestling with serpents. He was convicted of manslaughter. But, on the logic of the appellant's argument, he was innocent of any crime.' a

Lord Edmund-Davies said ([1976] 2 All ER 142 at 166, [1977] AC 443 at 492):

'The criticism by the academics of the law presently administered in this country is of a twofold nature: (1) it is illogical and therefore inconsistent with legal principle to treat a person who of his own volition has taken drink or drugs any differently from a man suffering from some bodily or mental disorder of the kind earlier mentioned or whose beverage had, without his connivance, been "laced" with intoxicants. (2) It is unethical to convict a man of a crime requiring a guilty state of mind when, ex hypothesi, he lacked it.' b

Lord Edmund-Davies then demonstrated the fallacy of those criticisms. c

Finally we draw attention to the decision of this court in *R v Lipman* itself. The defence in that case was put on the grounds that the defendant, because of the hallucinatory drug which he had taken, had not formed the necessary intent to found a conviction for murder, thus resulting in his conviction for manslaughter. If the appellant's contentions here are correct, Lipman could successfully have escaped conviction altogether by raising the issue that he believed he was defending himself legitimately from an attack by serpents. It is significant that no one seems to have considered that possibility. d

The third and final ground of appeal has in effect already disappeared, because, if the judge's additional direction was unnecessary, so was any repetition of the passage from the speech of Lord Morris in *Palmer v R* [1971] 1 All ER 1077 at 1088, [1971] AC 814 at 832, namely: e

'If there has been [an] attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.' f

Indeed, those words are scarcely apt to describe the actions of a man labouring under the effect of a drunken mistake. They accordingly add some marginal support to the views which we have expressed.

We have therefore come to the conclusion that a defendant is not entitled to rely, so far as self-defence is concerned, on a mistake of fact which has been induced by voluntary intoxication. g

As already indicated, the judge's addendum to his summing up, which he made at the suggestion of prosecuting counsel, was unnecessary and erred in favour of the appellant.

The appeal against conviction is accordingly dismissed.

[The court then went on to deal with the appeal against sentence and dismissed it.] h

Appeal dismissed.

The court refused leave to appeal to the House of Lords but certified, under s 33(2) of the Criminal Appeal Act 1968, that the following point of law of general public importance was involved in the decision: is a defendant who raises the issue of self-defence entitled to be judged on the basis of what he mistakenly believed to be the situation when that mistaken belief was brought about by self-induced intoxication by alcohol or other drugs? i

Solicitors: Crown Prosecution Service.

N P Metcalfe Esq Barrister.

Beckford v R

PRIVY COUNCIL

LORD KEITH OF KINKEL, LORD ELWYN-JONES, LORD TEMPLEMAN, LORD GRIFFITHS AND LORD OLIVER OF AYLERTON

12, 13 MAY, 15 JUNE 1987

a

Criminal law – Murder – Self-defence – Excessive force – Mistake – Police officer shooting and killing man he believed to be a dangerous gunman – Police officer honestly believing he had to fire in self-defence – Officer charged with murder – Prosecution alleging that officer did not have reasonable grounds for believing man to be armed and dangerous – Whether accused required to have reasonable belief or merely honest belief in mistaken facts when relying on self-defence.

c

The appellant was a police officer who was a member of an armed posse which was sent to investigate a report that an armed man was terrorising and menacing his family at their house. When the police arrived at the house a man ran out of the back of the house pursued by police officers, including the appellant. There was a conflict of evidence about what then occurred. The Crown alleged that the man was unarmed and was shot by the

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appellant and another police officer after he had been discovered in hiding and had surrendered, while the appellant claimed that the man had a firearm, had fired at the police and had been killed when they returned the fire. At the trial of the appellant for murder the judge directed the jury that if the appellant had a reasonable belief that his life was in danger or that he was in danger of serious bodily injury he was entitled to be acquitted on the grounds of self-defence. He was convicted. He appealed to the Court of

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Appeal of Jamaica, contending that he was entitled to rely on the defence of self-defence if he had had an honest belief that he had been in danger. The Court of Appeal held that the appellant's belief that the circumstances required self-defence had to be reasonably and not merely honestly held, and dismissed his appeal. The appellant appealed to the Privy Council.

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Held – If a plea of self-defence was raised when the defendant had acted under a mistake as to the facts, he was to be judged according to his mistaken belief of the facts regardless of whether, viewed objectively, his mistake was reasonable. Accordingly, the test for self-defence was that a person could use such force in the defence of himself or another was reasonable in the circumstances as he honestly believed them to be. It followed that the trial judge had misdirected the jury. The appeal would therefore be allowed and the conviction quashed (see p 426 g, p 431 e f and p 432 e f, post).

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R v Williams (1983) [1987] 3 All ER 411 approved.

Palmer v R [1971] 1 All ER 1077 explained.

Per curiam. A man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot: circumstances may justify a pre-emptive strike in self-defence (see p 431 c d, post).

h

Notes

For self-defence as a defence to murder or manslaughter, see 11 Halsbury's Laws (4th edn) para 1180 and for cases on self-defence in relation to justifiable homicide, see 15 Digest (Reissue) 1171, 9967–9968.

j

Cases referred to in judgment

Albert v Lavin [1981] 1 All ER 628, [1982] AC 546, [1981] 2 WLR 1070, DC; *affd on other grounds* [1981] 3 All ER 879, [1982] AC 546, [1981] 3 WLR 955, HL.

DPP v Morgan [1975] 2 All ER 347, [1976] AC 182, [1975] 2 WLR 913, HL; *affg* [1975] 1 All ER 8, [1976] AC 182, [1975] 2 WLR 913, CA.

Forster, Re (1825) 1 Lew 187, 168 ER 1007, Assizes.

Palmer v R [1971] 1 All ER 1077, [1971] AC 814, [1971] 2 WLR 831, PC. a

R v Barrett (31 May 1985, unreported), Jam CA.

R v Chisam (1963) 47 Cr App R 130, CCA.

R v Fennell [1970] 3 All ER 215, [1971] 1 QB 428, [1970] 3 WLR 513, CA.

R v Kimber [1983] 3 All ER 316, [1983] 1 WLR 118, CA.

R v Pheko [1981] 3 All ER 84, [1981] 1 WLR 1117, CA.

R v Rose (1884) 15 Cox CC 540, Assizes. b

R v Weston (1879) 14 Cox CC 346, Assizes.

R v Williams (1983) [1987] 3 All ER 411, 74 Cr App R 276, CA.

Appeal

Solomon Beckford appealed, with leave of the Court of Appeal of Jamaica granted on 7 November 1985, against the decision of that court (*Rowe P, Carey and Campbell JJA*) on 10 October 1985 dismissing his appeal against conviction of murder before Wolfe J and a jury on 28 March 1983. The facts are set out in the judgment of the Board. c

Michael Burton QC, Daniel Serota and John Perry for the appellant.

The Director of Public Prosecutions for Jamaica (Ian X Forte QC) and *The Deputy Director of Public Prosecutions for Jamaica (Kent Pantry)* for the Crown. d

At the conclusion of the argument the Board announced that it would advise Her Majesty that the appeal be allowed and the conviction quashed for reasons to be given later.

15 June. The following judgment of the Board was delivered. e

LORD GRIFFITHS. On 28 March 1985 the appellant was convicted of murder and sentenced to death. On 10 October 1985 the Court of Appeal of Jamaica dismissed his appeal against conviction, and gave leave to appeal, certifying the following question as being of exceptional public importance: f

'1.(a) Must the test to be applied for Self defence be based on what a person reasonably believed on reasonable grounds to be necessary to resist an attack or should it be what the accused honestly believed? 1.(b) Where, in the instant case, on a trial of an indictment for murder the issue of self defence is raised is it a proper direction in law for the Jury to be told by the trial Judge: A man who is attacked in circumstances where he reasonably believes his life to be in danger or that he is in danger of serious bodily injury may use such force as on reasonable grounds he thinks necessary in order to resist the attack and if in using such force he kills his assailant he is not guilty of any crime even if the killing is intentional?' g

At the conclusion of the hearing their Lordships indicated that they would humbly advise Her Majesty that the appeal ought to be allowed and the conviction quashed, and that they would give their reasons later. This they now do. h

The facts out of which the conviction arose present a confused pattern with many loose ends which might with advantage have been dealt with by further evidence. The appellant was a police officer who on 8 March 1983 was issued with a shot gun and ammunition and sent with a number of other armed police officers to a house at Greenvale Park in Manchester. The prosecution called no evidence to explain the circumstances in which this armed posse was sent out that morning but according to the appellant, in a statement he made from the dock, he and other police officers, including a Constable Reckord, were told by Deputy Superintendent Wilson that a report had been received from Heather Barnes that her brother Chester Barnes was terrorising her mother with a gun and that the police must come immediately to save her life. The appellant said that they were warned that the man appeared to be a dangerous gunman and that j

a they must take special care. Heather Barnes, however, who was the first witness called by the prosecution, denied in cross-examination that she had made a telephone call to the police or that her brother Chester Barnes was armed. It is to be regretted that the prosecution called no evidence to explain why these armed police were sent to the Barneses' house. If in fact Heather Barnes had telephoned for assistance, it might have thrown grave doubt on her testimony that her brother was unarmed; if she had not telephoned, the jury were surely entitled to know why so many armed police officers b were sent to the house. The inference is obviously that the police must have believed that they were dealing with a dangerous armed man, but in a capital murder charge such matters should be dealt with by evidence, not inference.

The prosecution case, based primarily on the evidence of Heather Barnes and a witness named Peart, was that the appellant, armed with a shotgun, and Pc Reckord, armed with a revolver, had aggressively entered the house whereupon the unarmed Chester Barnes c had fled from the house, run across the yard, jumped over a wall and tried to hide by a pigsty on the adjoining common. Heather Barnes said the appellant had fired at her brother in the yard and then he and Pc Reckord had pursued him over the wall onto the common from whence she heard more shots. Peart said he saw Chester Barnes jump the wall pursued by the police. Later he saw Barnes hiding by a pigsty, he put his hands in the air and both police officers fired at him. He heard Barnes say: 'Do officer, don't shoot d me, because me a cook.' He said Barnes had nothing in his hands, and when he fell after the first shots the appellant shot the deceased in the belly.

The evidence of the pathologist showed that the deceased had been shot three times, once in the head by the handgun and twice by the shotgun, once in the chest and lower neck and once on the inner side of the left forearm. There were no burn marks and this indicated that the shots were fired at more than 18 inches from the deceased's body.

e The police evidence established that prior to the incident the accused had been issued with a shotgun and nine cartridges and after the incident he returned the shotgun, seven cartridges and one spent cartridge. Pc Reckord handed in the revolver, nine cartridges and three spent shells.

On the prosecution evidence therefore this was a case of two police officers shooting at f and pursuing an unarmed man and finally killing him when he was pleading with them with his hands up. On this version of events both police officers were equally guilty of murder and the only reason why Pc Reckord did not also stand trial was that he had died since the incident.

After an inevitably unsuccessful submission of no case to answer the appellant presented his defence in a statement from the dock, which was summarised thus in the judgment of the Court of Appeal:

g 'The appellant made a statement from the dock, the gist of which was that he and other men from Mandeville police station were ordered to a house in Greenvale Park where, he was told, a gunman was menacing the occupant. He was informed, he said, that Heather Barnes had reported that her brother Chester Barnes, who had arrived from Kingston that morning armed with a firearm, was terrorising her. He h said further that the deputy superintendent who had dispatched them cautioned that Barnes was a dangerous gunman. On arrival at the house, they took up positions as instructed. The appellant said he saw a man run from the back door with an object which appeared to be a firearm. This man first hid behind a wall and took aim as if to fire. The appellant fired in his direction, whereupon the man ran off, jumped a wall and went into a common, where the appellant lost sight of him. The j police party went in the direction the man had taken. He heard gunshots and, as he neared the location from which the shots were being fired, he saw the same man firing at the police. He returned the fire as did other police officers. The man ran off and was pursued. He continued by saying: "We went in trace of him and still hear shots coming from a tree root in the common. Other policemen went in that direction, and I saw when Constable Reckord discharged three rounds at the man

that morning, and he fell. We were looking around for the gun that we saw the man with in the bushes, searching and looking for the gun but we didn't find it. I went and searched the man and took from his pockets a kerchief and two live rounds of .38 cartridges was wrapped into a kerchief." Finally the appellant said that later that day when other policemen and himself returned to the scene they were informed that relatives of the slain man recovered the gun but had thrown it away. On the Crown's case, this amounted to a callous killing, an execution of Barnes by the appellant and another police officer, for the slain man had his hands raised in surrender but was nevertheless cut down. On the defence side, this was a plain case of self-defence. Policemen who were instructed to investigate a report of a dangerous gunman in their neighbourhood allegedly committing a breach of the peace were fired on and had returned the fire resulting in his death.'

At the conclusion of the defence case the only live issue for the jury was whether the prosecution had proved that the appellant had not killed in self-defence. The first ground of appeal before the Court of Appeal in Jamaica, and the only ground with which their Lordships are concerned, was that the trial judge had misdirected the jury on the issue of self-defence. No criticism can be made of the trial judge: his direction to the jury was in accordance with a recent decision of the Court of Appeal in Jamaica. The Court of Appeal likewise considered itself bound by its previous decision and dealt succinctly with the appellant's submission:

'A ground of appeal which may be dealt with shortly challenged the trial judge's directions to the jury with respect to self-defence. [Counsel for the appellant] submitted that the trial judge's direction that "A man who is attacked in circumstances where he reasonably believes his life to be in danger or that is in danger of serious bodily injury may use such force as on reasonable grounds as he thinks necessary in order to resist the attack and if in using such force he kills his assailant he is not guilty of any crime even if the killing is intentional" was wrong in law as being against the weight of current authorities in the United Kingdom. The test suggested in the extract was the reasonable man's assessment of circumstances that would make defensive action necessary. He submitted that the true principle of law is that the test is the appellant's assessment of all the circumstances and the question of what is reasonable is merely to be used in determining whether the appellant's assertion as to the belief he holds is honest or not. We accept that there appears to be two schools, the "reasonable belief" on the one hand and the "honest belief" on the other. Be that as it may, in our judgment this point is concluded by a recent decision of the court in *R v Barrett* (31 May 1985, unreported), in which the same point was canvassed by the same counsel. We can see no warrant whatever to depart from that decision or to amplify or alter the reasons on which it is based. We are content to say that the directions of the trial judge on this aspect of the case are in keeping with the law as we conceive it to be in this jurisdiction. This ground of appeal therefore fails.'

It is accepted by the Crown that there is no difference on the law of self-defence between the law of Jamaica and the English common law and it therefore falls to be decided whether it was correctly decided by the Court of Appeal in *R v Williams* (1983) [1987] 3 All ER 411 that the defence of self-defence depends on what the accused 'honestly' believed the circumstances to be and not on the reasonableness of that belief: what the Court of Appeal in Jamaica referred to as the 'honest belief' and 'reasonable belief' schools of thought.

There can be no doubt that prior to the decision of the House of Lords in *DPP v Morgan* [1975] 2 All ER 347, [1976] AC 182 the whole weight of authority supported the view that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. No elaborate citation of authority is necessary but counsel

for the Crown rightly drew attention to such nineteenth century authorities as *Re Forster* (1825) 1 Lew 187, 168 ER 1007, *R v Weston* (1879) 14 Cox CC 346 and *R v Rose* (1884) 15 Cox CC 540, in which the judges charged the jury that self-defence provided a defence to a charge of murder if the accused honestly and on reasonable grounds believed that his or another's life was in peril. It is, however, to be remembered that it was not until 1898 that an accused was able to give evidence in his own defence and it is natural that the judges, in the absence of any direct statement of his belief from the accused, should have focused attention on the inference that could be drawn from the surrounding circumstances. Nevertheless, even after 1898 the law of self-defence continued to be stated as propounded by the judges in the nineteenth century: see *R v Chisam* (1963) 47 Cr App R 130, in which Lord Parker CJ approved the following statement of the law in 10 Halsbury's Laws (3rd edn) p 721, para 1382:

'Where a forcible and violent felony is attempted upon the person of another, the party assaulted, or his servant, or any other person present, is entitled to repel force by force, and, if necessary, to kill the aggressor. There must be a reasonable necessity for the killing, or at least an honest belief based upon reasonable grounds that there is such a necessity ...'

In *R v Fennell* [1970] 3 All ER 215 at 217, [1971] 1 QB 428 at 431 Widgery LJ, who was soon to succeed Lord Parker CJ as Lord Chief Justice, said:

'Where a person honestly and reasonably believes that he or his child is in imminent danger of injury, it would be unjust if he were deprived of the right to use reasonable force by way of defence merely because he had made some genuine mistake of fact.'

The question then is whether the present Lord Chief Justice, Lord Lane CJ, in *R v Williams* (1983) [1987] 3 All ER 411 was right to depart from the law as declared by his predecessors in the light of the decision of the House of Lords in *DPP v Morgan*.

DPP v Morgan was a case of rape, and counsel for the prosecution has submitted that the decision of the majority turns solely on their view of the specific intention required for the commission of that crime and accordingly had no relevance to the law of self-defence. It was further submitted that the question now before their Lordships was settled by an earlier decision of the Privy Council in *Palmer v R* [1971] 1 All ER 1077, [1971] AC 814. This submission is founded on the fact that Lord Morris in giving the judgment of the Board set out a very lengthy passage from the summing up of the judge and commented ([1971] 1 All ER 1077 at 1082, [1971] AC 814 at 824):

'Their Lordships conclude that there is no room for criticism of the summing-up or of the conduct of the trial unless there is a rule that in every case where the issue of self-defence is left to the jury they must be directed that if they consider that excessive force was used in defence then they should return a verdict of guilty of manslaughter. For the reasons which they will set out their Lordships consider that there is no such rule.'

The only question raised for the determination of the Board was that stated by Lord Morris. It is true that, in the passage quoted from the summing up the judge had stated the ingredients of self-defence in the then conventional form of reasonable belief; but it was not this part of his summing up that was under attack nor did it receive any particular consideration by the Board. Their Lordships are unable to attach greater weight to the approval of the summing up than as indicating that it was in conformity with the practice of directing juries that the accused must have reasonable grounds for believing that self-defence was necessary.

In *DPP v Morgan* each member of the House of Lords held that the mens rea required to commit rape is the knowledge that the woman is not consenting or recklessness whether she is consenting or not. From this premise the majority held that unless the

prosecution proved that the man did not believe the woman was consenting or was at least reckless as to her consent they had failed to prove the necessary mens rea which is an essential ingredient of the crime. Lord Edmund-Davies in his dissent referred to the large body of distinguished academic support for the view that it is morally indefensible to convict a person of a crime when owing to a genuine mistake as to the facts he believes that he is acting lawfully and has no intention to commit the crime and therefore has no guilty mind. He expressed his preference for this moral approach but felt constrained by the weight of authority, including the cases on self-defence, to hold that the law required that the accused's belief should not only be genuine but also based on reasonable grounds.

In *R v Kimber* [1983] 3 All ER 316, [1983] 1 WLR 1118 the Court of Appeal applied the decision in *DPP v Morgan* to a case of indecent assault and held that a failure to direct the jury that the prosecution had to make them sure that the accused had never believed that the woman was consenting was a misdirection. Lawton LJ, in the course of his judgment, rejected the submission that the decision in *DPP v Morgan* was confined to rape and clearly regarded it as of far wider significance. Commenting on an obiter dictum in *R v Pheko* [1981] 3 All ER 84, [1981] 1 WLR 1117, he said:

'... the court went on, after referring to *DPP v Morgan*, to say, clearly obiter ([1981] 3 All ER 84 at 93, [1981] 1 WLR 1117 at 1127): "... it seems to us clear that this decision was confined and intended to be confined to the offence of rape." We do not accept that this was the intention of their Lordships in *Morgan's* case. Lord Hailsham started his speech by saying that the issue of belief was a question of great academic importance in the theory of English criminal law.'

(See [1983] 3 All ER 316 at 320, [1983] 1 WLR 1118 at 1123.)

In *R v Williams* the decision in *DPP v Morgan* was carried a step further and, in their Lordships' view, to its logical conclusion. The facts and the grounds of the decision are adequately summarised in the headnote (see 78 Cr App Rep 276):

'One M. saw a black youth rob a woman in a street. He caught the youth and held him, but the latter broke from M.'s grasp. M. caught the youth again and knocked him to the ground. The appellant, who had only seen the later stages of the incident, was told by M. that he, M. was arresting the youth for mugging a woman. M. said that he was a police officer, which was untrue, so when asked by the appellant for his warrant card, he could not produce one. A struggle followed and the appellant assaulted M. by punching him in the face and was charged with assault occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861. His defence was that he honestly believed that the youth was being unlawfully assaulted by M. The jury was directed that, on the assumption that M. was acting lawfully, the appellant's state of mind on the issue of defence of another was to be determined by whether the appellant had an honest belief based on reasonable grounds that reasonable force was necessary to prevent a crime. The appellant was convicted and appealed on the ground that the judge had misdirected the jury. Held, that the jury should have been directed that, first, the prosecution had the burden of proving the unlawfulness of the appellant's actions; secondly, if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of the facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellant's belief was material to the question whether the belief was held by him at all. If the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant. Accordingly, the appeal must be allowed and the conviction quashed.'

In the course of his judgment Lord Lane CJ, discussing the offence of assault, said ([1987] 3 All ER 411 at 414):

a 'The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more.'

And later in the judgment he expressly disapproved the decision of the Divisional Court in *Albert v Lavin* [1981] 1 All ER 628, [1982] AC 546, in which it was said that the word 'unlawful' was tautologous and not part of the definitional element of assaulting a police officer in the course of his duty. In so doing Lord Lane CJ was expressing the same view

b of *Albert v Lavin* that had been previously expressed by Lawton LJ in *R v Kimber*.
The common law recognises that there are many circumstances in which one person may inflict violence on another without committing a crime, as for instance in sporting contests, surgical operations or, in the most extreme example, judicial execution. The common law has always recognised as one of these circumstances the right of a person to protect himself from attack and to act in the defence of others and if necessary to inflict

c violence on another in so doing. If no more force is used than is reasonable to repel the attack such force is not unlawful and no crime is committed. Furthermore, a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot: circumstances may justify a pre-emptive strike.
It is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful that self-defence, if raised as an issue in a criminal

d trial, must be disproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime, namely that the violence used by the accused was unlawful.
If then a genuine belief, albeit without reasonable grounds, is a defence to rape because

e it negates the necessary intention, so also must a genuine belief in facts which if true would justify self-defence be a defence to a crime of personal violence because the belief negates the intent to act unlawfully. Their Lordships therefore approve the following passage from the judgment of Lord Lane CJ in *R v Williams* [1987] 3 All ER 411 at 415 as correctly stating the law of self-defence:
f 'The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting or that a crime was not being committed and so on. In other words, the jury should be directed, first of all, that the prosecution have the burden or duty of proving the unlawfulness of the defendant's actions, second, that if the defendant may have been

g labouring under a mistake as to the facts he must be judged according to his mistaken view of the facts and, third, that that is so whether the mistake was, on an objective view, a reasonable mistake or not. In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or

h that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.'

i Looking back, *DPP v Morgan* can now be seen as a landmark decision in the development of the common law, returning the law to the path on which it might have developed but for the inability of an accused to give evidence on his own behalf. Their Lordships note that not only has this development the approval of such distinguished

criminal lawyers as Professor Glanville Williams and Professor Smith (see *Textbook of Criminal Law* (2nd edn, 1983) pp 137–138 and Smith and Hogan *Criminal Law* (5th edn, 1983) pp 329–330) but it also has the support of the Criminal Law Revision Committee (see 14th Report on Offences Against the Person (1980) (Cmnd 7844) and of the Law Commission (see Codification of the Criminal Law (1985) (Law Com no 143)).

There may be a fear that the abandonment of the objective standard demanded by the existence of reasonable grounds for belief will result in the success of too many spurious claims of self-defence. The English experience has not shown this to be the case. The Judicial Studies Board, with the approval of the Lord Chief Justice, has produced a model direction on self-defence which is now widely used by judges when summing up to juries. The direction contains the following guidance:

‘Whether the plea is self-defence or defence of another, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken belief of the facts: that is so whether the mistake was, on an objective view, a reasonable mistake or not.’

Their Lordships have heard no suggestion that this form of summing up has resulted in a disquieting number of acquittals. This is hardly surprising, for no jury is going to accept a man’s assertion that he believed that he was about to be attacked without testing it against all the surrounding circumstances. In assisting the jury to determine whether or not the accused had a genuine belief the judge will of course direct their attention to those features of the evidence that make such a belief more or less probable. Where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held.

Their Lordships therefore conclude that the summing up in this case contained a material misdirection and they answer question 1(a) by saying that the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another. It follows from this that their Lordships answer the second part of the question 1(b) in the negative.

Their Lordships received a powerful submission from the Crown that notwithstanding the misdirection they should nevertheless apply the proviso to s 14(1) of the Judicature (Appellate Jurisdiction) Act and dismiss the appeal on the ground that no substantial miscarriage of justice had actually occurred. It was submitted that the jury must have accepted the evidence of Peart that the deceased had been shot down in the act of surrender and rejected the appellant’s account that he was killed in a gun battle, which the judge had clearly directed them would amount to self-defence. Their Lordships have given anxious consideration to this submission for there is much force in it. If on the facts as they appear from the summing up the judge had left the matter to the jury on the basis of a choice between the two accounts then any misdirection as to the reasonableness or otherwise of the appellant’s belief would have been of only academic interest.

However, the judge did not leave it to the jury as a choice between the two accounts, for he clearly thought that there was a further possibility, namely that the appellant mistakenly believed that the deceased was armed and would shoot him if he did not shoot first. It is not readily apparent why the judge regarded this as a possible view of the facts, but their Lordships have no transcript of the evidence and must accept the view of the judge that the facts were open to such an interpretation. Directing the jury on this alternative, the judge said:

‘The other situation is this, if you say you don’t find that he had a gun, but we are satisfied that the accused reasonably believed that the man had a gun and that he reasonably apprehended danger to himself because of the belief which he held, and if in those circumstances he used reasonable force to prevent that danger which he reasonably apprehended, in those circumstances he would also be entitled to

a acquittal. And if you are in doubt about that as well, he must also be acquitted. If
you are in doubt about whether or not he reasonably believed that the man had a
gun, you must acquit him as well. I don't think I can put it any plainer. So then,
what are the verdicts which are open to you on this case? There are only two,
namely, guilty of murder as charged, or not guilty of murder. Those are the only
two verdicts that I leave to you on these facts. One other thing before I ask you to
retire, when you come to consider—remember I told you that you must consider
b all circumstances of the case, all the circumstances of the case includes all the
circumstances that exist in the Jamaica of today, you cannot divorce that from your
mind, because, when you come to consider the question of reasonableness, that is a
factor to be considered; the Jamaica today that we live in. But when I tell you that,
you must consider that, it doesn't mean that a man is entitled to say that because the
Jamaica in which we live today many people are armed with guns and many people
c are out there with guns, a man can just come and say I believe because we live in
Jamaica today and so many guns are around and firing willy-nilly, he must
reasonably, that is the test, reasonably believe and he must believe that he had
reasonable cause to act as he did. So it is not just a matter of saying to yourselves,
plenty man have gun in Jamaica today, so when I see a man running I believe him
d have a gun and shoot him down. That is not the test, the test is reasonableness, but
of course, you consider it, the situation in the country today when you come to
consider the reasonableness of his belief.'

In this passage the judge is emphasising time and again that the appellant's belief had to
be held on reasonable grounds, and it was the final passage of his summing up before the
jury retired. As counsel for the appellant said, the jury retired with the test of reasonable
e belief ringing in their ears. In these circumstances their Lordships cannot feel with that
utter certainty that is required in a case of capital murder that the jury would necessarily
have returned the same verdict if they had been directed in terms of 'honest' as opposed
to 'reasonable' belief.

Before parting with this appeal there is one further matter on which their Lordships
wish to comment. The appellant chose not to give evidence but to make a statement
f from the dock which, because it cannot be tested by cross-examination, is acknowledged
not to carry the weight of sworn or affirmed testimony. Their Lordships were informed,
to their surprise, by counsel for the Crown that it is now the practice, rather than the
exception, in Jamaica for an accused to decline to give evidence in his own defence and
to rely on a statement from the dock, a privilege abolished in this country by s 72 of the
Criminal Justice Act 1982. Now that it has been established that self-defence depends on
g a subjective test their Lordships trust that those who are responsible for conducting the
defence will bear in mind that there is an obvious danger that a jury may be unwilling
to accept that an accused held an 'honest' belief if he is not prepared to assert it in the
witness box and subject it to the test of cross-examination.

h *Appeal allowed. Conviction quashed*

Solicitors: *Philip Conway Thomas & Co* (for the appellant); *Charles Russell & Co* (for the Crown).

Charles Whittier Esq Barrister.

Practice Note

COURT OF APPEAL, CIVIL DIVISION

SIR JOHN DONALDSON MR

2 OCTOBER 1987

Court of Appeal – Practice – Lists – List of forthcoming appeals – Abolition of warned list – Entry of appeals in list of forthcoming appeals – Timetable following entry of appeal in list – Compliance with timetable – Bundles – Estimates of length of hearing – Listing for hearing – Default in compliance with timetable – RSC Ord 59, r 9.

SIR JOHN DONALDSON MR made the following statement at the sitting of the court. In the interests of achieving a further simplification and streamlining of the progress of appeals in the Court of Appeal, Civil Division, it is proposed to abolish the warned list, which has ceased to fulfil its original purpose. Its function will be taken over by the list of forthcoming appeals, which will become the sole list of pending appeals and will be printed in the Daily Cause List in the same manner and with the same frequency as the warned list appeared in the past.

With a view to assisting appellants and their legal representatives to comply with the very strict and important timetable which is based on the date when appeals enter the list of forthcoming appeals, the Civil Appeals Office, when acknowledging the setting down of an appeal, will not only inform the parties of the number allocated to the appeal in the list in which it is entered, but will also specify the date on which it is intended to include it in the list of forthcoming appeals.

This change will take effect from 2 October 1987. As from that date the significance of an appeal entering the list of forthcoming appeals will be as follows.

(i) Bundles

The requisite number of bundles for the use of the judges must be lodged not later than 14 days after the appeal enters the list of forthcoming appeals, or within such longer period (if any) as the registrar may allow on application for cause. Any application for an extension should be made to the registrar by letter setting out the length of extension sought and the reasons for it.

The documents required to be included are listed in RSC Ord 59, r 9 (as amended) and the bundles must comply with this court's practice statement of 22 October 1986 (see *Practice Note* [1986] 3 All ER 630, [1986] 1 WLR 1318). (For further guidance on the form and content of bundles see *The Supreme Court Practice 1988* vol 1, paras 59/9/1–59/9/12.)

(ii) Counsel's estimates of the length of hearing

A written estimate signed by counsel for the appellant must be sent or delivered to the Civil Appeals Office and a photocopy sent to the respondent's counsel, either directly or through the respondent's solicitors, not later than 14 days after the appeal enters the list of forthcoming appeals or within such further period as the registrar may allow on an application for cause.

It is the duty of the respondent's counsel to consider the estimate signed by the appellant's counsel as soon as it is received by him and to notify the Civil Appeals Office in writing of his own estimate if it differs from that of the appellant's counsel. In the absence of such notification the respondent's counsel will be deemed to have adopted the estimate by the appellant's counsel as his own.

It is a further, and very important, duty of both counsel to notify the Civil Appeals Office in writing of any change in their respective estimates immediately on that change taking place, whether it arises out of new matters coming to their attention or out of a revised appreciation of the position.

Listing for hearing

- a** Without prejudice to listing earlier in case of urgency, an appeal may be listed for hearing at any time after the expiry of a period of 14 days from its entry in the list of forthcoming appeals or such longer period as the registrar may have ordered in response to an application for an extension.

In order to avoid being taken by surprise, counsel's clerks should keep in touch with the Civil Appeals Office, which will provide them with such information as can be made available on the likely progress of appeals towards being listed for hearing.

- b** Appellants and respondents who are not represented by solicitors and counsel will be notified of the date for hearing by the Civil Appeals Office.

Default in compliance with the timetable

Non-compliance by appellants with this timetable will result in the appeal being listed to show cause why it should not be dismissed.

- c**

Mary Rose Plummer Barrister.

***d* City of London Building Society v Flegg and others**

HOUSE OF LORDS

LORD BRIDGE OF HARWICH, LORD TEMPLEMAN, LORD MACKAY OF CLASHFERN, LORD OLIVER OF

- e** AYLMEYTON AND LORD GOFF OF CHIEVELEY

9, 10, 11, 12 MARCH, 14 MAY 1987

Land registration – Overriding interest – Rights of person in actual occupation of land – Parents and daughter and son-in-law jointly purchasing house – Conveyance in names of daughter and son-in-law only – Parents occupying house as their home – Daughter and son-in-law mortgaging property without parents' knowledge or consent – Daughter and son-in-law defaulting on mortgage repayments – Possession sought by mortgagee – Whether parents having an 'overriding interest' – Whether disposition by two trustees for sale overreaching parents' equitable interest – Law of Property Act 1925, ss 2(1)(ii), 14 – Land Registration Act 1925, s 70(1)(g).

- f** In 1977 the respondents, their daughter and her husband jointly purchased a house in which all four intended to live. The respondents provided £18,000 of the purchase price of £34,000. The property was conveyed into the names of the daughter and her husband as beneficial joint tenants under an express trust for sale and they were registered as the proprietors in the Land Registry. In 1982 the daughter and her husband mortgaged the property to the plaintiffs, a building society, as security for an advance of £37,500. The plaintiffs were unaware that the respondents were in occupation of the property and made no inquiries to ascertain who was in occupation before making the advance. The respondents were unaware of the mortgage. The daughter and her husband subsequently defaulted on the mortgage repayments and the plaintiffs brought an action for possession of the property. The judge held that the respondents' overriding interest arising under s 70(1)(g)^a of the Land Registration Act 1925 because of their actual occupation of the property had been overreached by the plaintiffs' mortgage by virtue of s 2(1)(ii)^b of the Law of Property Act 1925, which provided that a conveyance of a legal estate to a purchaser overreached any equitable interests in that estate, whether or not the purchaser had notice of the equitable interests, if 'the conveyance is made by trustees for sale and

a Section 70(1), so far as material, is set out at p 440 e, post

b Section 2(1), so far as material, is set out at p 444 b, post

the equitable interest . . . is . . . capable of being overreached by such trustees'. The judge accordingly made an order for possession. The Court of Appeal allowed an appeal by the respondents on the grounds that their equitable interest in the property was an overriding interest which was protected by s 70(1)(g) and therefore binding on the plaintiffs and was also protected by s 14^c of the Law of Property Act 1925, which provided, inter alia, that Pt I of that Act (which included s 2) was not prejudicially to affect the interest of any person in actual occupation of land to which he was entitled in right of such occupation. The plaintiffs appealed to the House of Lords.

Held – The rights which the respondents had by reason of their occupation of the property and as beneficiaries under the trust for sale were no more than the rights to enjoy in specie the rents and profits of the land held in trust for them and were referable to and derived from the trust for sale. Accordingly, when the daughter and her husband, exercising as registered proprietors the powers conferred on them as trustees for sale, created a legal mortgage, the respondents' rights shifted from the land to the capital advanced to and the equity of redemption vested in the daughter and her husband as trustees for sale and thereafter the respondents no longer had an interest in the land which their occupation could protect as an overriding interest under s 70(1)(g) of the Land Registration Act 1925. Furthermore, the respondents' position was not saved by s 14 of the Law of Property Act 1925, because s 14 could not enlarge or add to the respondents' beneficial interest in the equity of redemption by preserving it as an equitable interest in the land or by bringing it on to the title. It followed that the respondents' interest had been overreached by and subordinated to the legal charge executed by the daughter and her husband in favour of the plaintiffs, who were therefore entitled to an order for possession. The appeal would accordingly be allowed (see p 437 g, p 439 c to g, p 440 d f g, p 441 d, p 445 j to p 446 a c f g, p 448 b to h, p 451 f g and p 453 f to p 454 b e f, post).

Williams & Glyn's Bank Ltd v Boland [1980] 2 All ER 408 distinguished.

Per curiam. (1) One of the main objects of the 1925 legislation was to effect a compromise between the public interest in securing that land held on trust is freely marketable and the interests of beneficiaries in preserving their rights under the trusts. The Land Registration Act 1925 and the Law of Property Act 1925 were intended to operate in parallel and (per Lord Templeman) the object of s 70 of the Land Registration Act was to reproduce for registered land the same limitations regarding overriding interests as s 14 of the Law of Property Act produced for both registered and unregistered land (see p 437 g, p 440 f h j, p 441 d, p 449 b c and p 454 f, post).

(2) Although the interest of a beneficiary of the trust for sale who is in actual occupation will not be overreached or overridden if a mortgagee makes an advance to a single trustee of the trust for sale without the beneficiary's knowledge or consent, the beneficiary's interest will be overreached if there are two or more trustees to whom the advance is made (see p 437 g, p 441 d, p 452 e f, p 453 d and p 454 f, post); *Williams & Glyn's Bank Ltd v Boland* [1980] 2 All ER 408 explained.

Decision of the Court of Appeal [1986] 1 All ER 989 reversed.

Notes

For overriding interests, see 26 Halsbury's Laws (4th edn) paras 987–991, and for cases on the subject, see 39(1) Digest (Reissue) 145–153, 1597–1622.

For overreaching powers, see 39 Halsbury's Laws (4th edn) paras 590–595.

For the Law of Property Act 1925, ss 2, 14, see 27 Halsbury's Statutes (3rd edn) 350, 365.

For the Land Registration Act 1925, s 70, see *ibid* 843.

Cases referred to in opinions

Barclay v Barclay [1970] 2 All ER 676, [1970] 2 QB 677, [1970] 3 WLR 82, CA.

^c Section 14 is set out at p 439 b, post

- Buchanan-Wollaston's Conveyance, Re, Curtis v Buchanan-Wollaston* [1939] 2 All ER 302, [1939] Ch 738, CA.
- Bull v Bull* [1955] 1 All ER 253, [1955] 1 QB 234, [1955] 2 WLR 78, CA.
- Cook v Cook* [1962] 2 All ER 811, [1962] P 235, [1962] 3 WLR 441, CA.
- Cooper v Critchley* [1955] 1 All ER 520, [1955] Ch 431, [1955] 2 WLR 150, CA.
- Hunt v Luck* [1902] 1 Ch 428, [1900-3] All ER Rep 295.
- Hyde's Conveyance, Re* (1952) 102 L Jo 58.
- Irani Finance Ltd v Singh* [1970] 3 All ER 199, [1971] Ch 59, [1970] 3 WLR 330, CA; *affg* [1969] 3 All ER 1455, [1971] Ch 59, [1970] 2 WLR 117.
- Kemphorne, Re, Charles v Kemphorne* [1930] 1 Ch 268, [1929] All ER Rep 495, CA.
- National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472, [1965] AC 1175, [1965] 3 WLR 1, HL.
- Waller v Waller* [1967] 1 All ER 305, [1967] 1 WLR 451.
- Warren, Re, Warren v Warren* [1932] 1 Ch 42, [1931] All ER Rep 702.
- Williams & Glyn's Bank Ltd v Boland* [1980] 2 All ER 408, [1981] AC 487, [1980] 3 WLR 138, HL; *affg* [1979] 2 All ER 697, [1979] Ch 312, [1979] 2 WLR 550, CA.

Appeal

- d* City of London Building Society appealed with leave of the Appeal Committee of the House of Lords granted on 13 March 1986 against the decision of the Court of Appeal (Kerr, Dillon LJ and Sir George Waller) ([1986] 1 All ER 989, [1986] Ch 605) on 4 December 1985 allowing an appeal by the respondents, Edgar Edward Flegg and Joan Eileen Flegg, against the judgment of his Honour Judge Thomas sitting as a judge of the High Court in the Chancery Division on 31 July 1985 whereby he (i) held that the equitable interest of the respondents in a freehold property known as Bleak House,
- e* Gillingham, Kent which they occupied as their home was overreached by a charge in favour of the appellants dated 12 January 1982 created by George Maxwell-Brown and Marilyn Maxwell-Brown, who were the registered proprietors of the property, and (ii) granted possession of the property to the appellants. The facts are set out in the opinion of Lord Templeman.

- f* John Lindsay QC and Robert Wakefield for the appellants.
Jules Sher QC and Robert McCracken for the respondents.

Their Lordships took time for consideration.

- g* 14 May. The following opinions were delivered.

LORD BRIDGE OF HARWICH. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Templeman and Lord Oliver. I agree with them and for the reasons they give I would allow the appeal and restore the order of his Honour Judge Thomas.

- h*
- LORD TEMPLEMAN.** My Lords, the appellants, City of London Building Society, are the mortgagees under a charge by way of legal mortgage of registered land held at the date of the charge by two trustees on trust for sale and to stand possessed of the net proceeds of sale and rents and profits until sale on trust for four tenants in common including the respondents, Mr and Mrs Flegg. The legal charge was entered into by the trustees in breach of trust, although the appellants were unaware of this. The respondents, who were in actual occupation of the mortgaged land, claim that the appellants' legal charge is subject to the respondents' overriding interest. The Court of Appeal declined to order the respondents to deliver up possession of the land to the appellants; hence this appeal.

By a conveyance dated 18 October 1977 the land appropriately named Bleak House

was conveyed to Mr and Mrs Maxwell-Brown in fee simple on trust for sale and to stand possessed of the net proceeds of sale and rents and profits until sale on trust for the Maxwell-Browns as joint tenants. In fact, the purchase price paid by the Maxwell-Browns for Bleak House, amounting to £34,000, had been provided as to £18,000 or more by the respondents, who were the parents of Mrs Maxwell-Brown. In consequence and notwithstanding the express trusts set out in the conveyance, Bleak House was held by the Maxwell-Browns on trust for sale and to stand possessed of the net proceeds of sale and rents and profits until sale on trust for the Maxwell-Browns and the respondents as tenants in common in the proportions in which they had respectively contributed to the purchase price. The respondents were entitled to occupy Bleak House together with the Maxwell-Browns as tenants in common under the trust for sale and all four beneficiaries duly went into occupation. a

By a legal charge by way of mortgage dated 12 January 1982 the Maxwell-Browns charged Bleak House to secure £37,500 advanced by the appellants to the Maxwell-Browns. The respondents knew nothing of the legal charge, which was granted by the Maxwell-Browns for their own purposes and in breach of trust. The appellants knew nothing of the respondents. b

By s 27 of the Law of Property Act 1925 (as amended by the Law of Property (Amendment) Act 1926, Sch): c

'(1) A purchaser of a legal estate from trustees for sale shall not be concerned with the trusts affecting the proceeds of sale of land subject to a trust for sale . . . or affecting the rents and profits of the land until sale . . . d

(2) Notwithstanding anything to the contrary in the instrument (if any) creating a trust for sale of land or in the settlement of the net proceeds, the proceeds of sale or other capital money shall not be paid to or applied by the direction of fewer than two persons as trustees for sale, except where the trustee is a trust corporation . . . ' e

By s 205(1)(xxi) of the 1925 Act the expression 'purchaser' as used in ss 27 and 28 includes a chargee by way of legal mortgage, and the sum of £37,500 advanced by the appellants to the Maxwell-Browns was capital money within the meaning of s 27(2) and was duly paid to two persons as trustees for sale. f

By s 28(1) of the Law of Property Act 1925, read in conjunction with s 71 of the Settled Land Act 1925, trustees for sale of land have powers to mortgage the land and—

'all capital money arising under the said powers shall, unless paid or applied for any purpose authorised by the Settled Land Act, 1925, be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale.' g

Section 17 of the Trustee Act 1925 provides:

'No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.' h

Thus the appellants advancing money in good faith to two trustees for sale on the security of a charge by way of legal mortgage of Bleak House were not concerned with the trusts affecting the proceeds of sale of Bleak House or with the propriety of the trustees entering into the legal charge. As a result of the legal charge the interests of the beneficiaries in Bleak House pending sale were transferred to the equity of redemption vested in the Maxwell-Browns and to the sum of £37,500 received by the Maxwell-Browns from the appellants in consideration for the grant of the legal charge. The Maxwell-Browns did not account to the respondents for any part of the sum of £37,500 and defaulted in the performance of their obligations to the appellants under the legal charge. The appellants seek possession of Bleak House with a view to enforcing its security. j

a The respondents resist the claim of the appellants to possession of Bleak House and rely on s 14 of the Law of Property Act 1925. Sections 27 and 28 of that Act, which overreach the interests of the respondents under the trust for sale of Bleak House, are to be found in Pt I of the Act. Section 14 provides:

b ‘This Part of this Act shall not prejudicially affect the interest of any person in possession or in actual occupation of land to which he may be entitled in right of such possession or occupation.’

The respondents were in actual occupation of Bleak House at the date of the legal charge. It is argued that their beneficial interests under the trust for sale were not overreached by the legal charge or that the respondents were entitled to remain in occupation after the legal charge and against the appellants despite the overreaching of their interests.

c My Lords, the respondents were entitled to occupy Bleak House by virtue of their beneficial interests in Bleak House and its rents and profits pending the execution of the trust for sale. Their beneficial interests were overreached by the legal charge and were transferred to the equity of redemption held by the Maxwell-Browns and to the sum advanced by the appellants in consideration of the grant of the legal charge and received by the Maxwell-Browns. After the legal charge the respondents were only entitled to
d continue in occupation of Bleak House by virtue of their beneficial interests in the equity of redemption of Bleak House and that equity of redemption is subject to the right of the appellants as mortgagees to take possession. Sections 27 and 28 did not ‘prejudicially’ affect the interests of the respondents, who were, indeed, prejudiced but by the subsequent failure of the trustees for sale to account to their beneficiaries for capital money received by the trustees. A beneficiary who is entitled to share in the proceeds of
e sale of land held on trust for sale relies on the trustees. Section 26(3) of the Act (as amended) requires trustees for sale to consult their beneficiaries and to give effect to the wishes of the majority of the beneficiaries ‘but a purchaser shall not be concerned to see that the provisions of this subsection have been complied with’. If the argument for the respondents is correct, a purchaser from trustees for sale must ensure that a beneficiary
f in actual occupation is not only consulted but consents to the sale. Section 14 of the Law of Property Act 1925 is not apt to confer on a tenant in common of land held on trust for sale, who happens to be in occupation, rights which are different from and superior to the rights of tenants in common, who are not in occupation on the date when the interests of all tenants in common are overreached by a sale or mortgage by trustees for sale.

g The Maxwell-Browns registered their title to Bleak House under the Land Registration Act 1925 with title absolute for a legal estate in fee simple in possession. They continued to hold Bleak House on trust for sale and to stand possessed of the net proceeds of sale and rents and profits until sale on trust for the Maxwell-Browns and the respondents as tenants in common. By s 74:

h ‘... neither the registrar nor any person dealing with a registered estate or charge shall be affected with notice of a trust express implied or constructive, and references to trusts shall, so far as possible, be excluded from the register.’

By ss 2 and 18 proprietors of registered land may dispose of the land by transfer or by the creation of a legal estate including the grant of a legal charge by way of mortgage. Section 20(1) provides as follows:

j ‘In the case of a freehold estate registered with an absolute title, a disposition of the registered land or of a legal estate therein, including a lease thereof, for valuable consideration shall, when registered, confer on the transferee or grantee an estate in fee simple or the term of years absolute or other legal estate expressed to be created in the land dealt with ... subject—(a) to the incumbrances and other entries, if any,

appearing on the register . . . and (b) unless the contrary is expressed on the register, to the overriding interests, if any, affecting the estate transferred or created, but free from all other estates and interests whatsoever . . . and the disposition shall operate in like manner as if the registered transferor or grantor were (subject to any entry to the contrary in the register) entitled to the registered land in fee simple in possession for his own benefit.' a

Amongst the 'other estates and interests' which do not affect the legal estate transferred or created are 'minor interests' defined by s 3(xv) as: b

'... the interests not capable of being disposed of or created by registered dispositions and capable of being overridden (whether or not a purchaser has notice thereof) by the proprietors unless protected as provided by this Act, and all rights and interests which are not registered or protected on the register and are not overriding interests, and include—(a) in the case of land held on trust for sale, all interests and powers which are under the Law of Property Act, 1925, capable of being overridden by the trustees for sale, whether or not such interests and powers are so protected . . . ' c

It follows that, when the legal charge in the present case is registered, the appellants will take free from all the interests of the beneficiaries interested under the trust for sale in the proceeds of sale and rents and profits until sale of Bleak House but subject to any overriding interest. d

Section 70(1) of the Land Registration Act 1925 defines overriding interests, which include:

'(g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed.' e

In my view the object of s 70 was to reproduce for registered land the same limitations as s 14 of the Law of Property Act 1925 produced for land whether registered or unregistered. The respondents claim to be entitled to overriding interests because they were in actual occupation of Bleak House on the date of the legal charge. But the interests of the respondents cannot at one and the same time be overreached and overridden and at the same time be overriding interests. The appellants cannot at one and the same time take free from all the interests of the respondents yet at the same time be subject to some of those interests. The right of the respondents to be and remain in actual occupation of Bleak House ceased when the respondents' interests were overreached by the legal charge save in so far as their rights were transferred to the equity of redemption. As persons interested under the trust for sale the respondents had no right to possession as against the appellants and the fact that the respondents were in actual occupation at the date of the legal charge did not create a new right or transfer an old right so as to make the right enforceable against the appellants. f

One of the main objects of the legislation of 1925 was to effect a compromise between, on the one hand, the interests of the public in securing that land held in trust is freely marketable and, on the other hand, the interests of the beneficiaries in preserving their rights under the trusts. By the Settled Land Act 1925 a tenant for life may convey the settled land discharged from all the trusts, powers and provisions of the settlement. By the Law of Property Act 1925 trustees for sale may convey land held on trust for sale discharged from the trusts affecting the proceeds of sale and rents and profits until sale. Under both forms of trust the protection and the only protection of the beneficiaries is that capital money must be paid to at least two trustees or a trust corporation. Section 14 of the Law of Property Act 1925 and s 70 of the Land Registration Act 1925 cannot have been intended to frustrate this compromise and to subject the purchaser to some beneficial interests but not others depending on the waywardness of actual occupation. g h j

The Court of Appeal took a different view, largely in reliance on the decision of this House in *Williams & Glyn's Bank Ltd v Boland* [1980] 2 All ER 408, [1981] AC 487. In that case the sole proprietor of registered land held the land as sole trustee on trust for sale and to stand possessed of the net proceeds of sale and rents and profits until sale on trust for himself and his wife as tenants in common. This House held that the wife's beneficial interest coupled with actual possession by her constituted an overriding interest and that a mortgagee from the husband, despite the concluding words of s 20(1), took subject to the wife's overriding interest. But in that case the interest of the wife was not overreached or overridden because the mortgagee advanced capital moneys to a sole trustee. If the wife's interest had been overreached by the mortgagee advancing capital moneys to two trustees there would have been nothing to justify the wife in remaining in occupation as against the mortgagee. There must be a combination of an interest which justifies continuing occupation plus actual occupation to constitute an overriding interest. Actual occupation is not an interest in itself.

For these reasons and for the reasons to be given by my noble and learned friend Lord Oliver, I would allow this appeal and restore the order of his Honour Judge Thomas, who ordered the respondents to deliver up Bleak House to the appellants.

LORD MACKAY OF CLASHFERN. My Lords, I have had the privilege of reading in draft the speeches prepared by my noble and learned friends Lord Templeman and Lord Oliver. I agree with them that the appeal should be allowed for the reasons that they have given.

LORD OLIVER OF AYLERTON. My Lords, on 12 January 1982 the appellant society, in the ordinary course of its business, lent to Mr and Mrs Maxwell-Brown a sum of £37,500. The Maxwell-Browns were the registered proprietors with title absolute of a freehold property known as Bleak House, Grange Road, Gillingham, Kent, registered at the Land Registry under title no K467866. That property had been acquired by them by a conveyance dated 18 October 1977 at a price of £34,000 and the conveyance expressly provided that they were to hold the property on trust for sale for themselves as joint tenants beneficially and that, during the period of 21 years from the death of the survivor of them, the trustees should have all the powers of an absolute owner. There was no subsisting restriction entered on the proprietorship register at the date of the appellants' loan to the Maxwell-Browns and nothing on the registered title to suggest to the appellants that they were anything other than what they appeared to be, that is to say joint tenants absolutely and beneficially entitled. In fact they were not. They were respectively the son-in-law and the daughter of the respondents, Mr and Mrs Flegg, and, as between the four of them, it is beyond dispute that Mr and Mrs Flegg had an equitable interest in the proceeds of the property, which was, to a substantial extent, purchased with the proceeds of a bungalow at Rainham which they sold in 1977 and which, for some 28 years before that, had been their home. In the summer of 1977 they decided in conjunction with their daughter and son-in-law, to buy Bleak House, a larger house in which it was the intention that all four of them should live. The respondents provided the deposit of £3,400 and paid a further sum of £14,600 out of the proceeds of their bungalow towards the purchase price of the property. At the trial of the action giving rise to this appeal, the judge, his Honour Judge Thomas, found as a fact that it was always the intention of the respondents and of Mr and Mrs Maxwell-Brown that the balance of the purchase price should be raised by means of a mortgage and this was in fact done, the money being raised by Mr and Mrs Maxwell-Brown alone on the security of a legal charge on the property in favour of the Hastings and Thanet Building Society. The respondents were professionally advised in connection with this transaction and the judge found as a fact that their solicitor had advised them that the conveyance of the property should be taken in the names of all four of them. They were, however, unwilling personally to assume any liability for repayment of the mortgage and the

property was in fact conveyed to Mr and Mrs Maxwell-Brown alone and charged by them to the building society. The conveyance contains no reference whatever to any interest of the respondents. It was, as already mentioned, a simple conveyance to Mr and Mrs Maxwell-Brown as joint tenants beneficially and they were subsequently registered as proprietors with title absolute at the Land Registry without any restriction being entered on the register. a

From a date shortly after the completion of the purchase the respondents occupied the property in common with their daughter and son-in-law and they spent considerable further sums on improving the property. By the end of 1981, however, Mr and Mrs Maxwell-Brown were in financial difficulties and have since been adjudicated bankrupt. They had already, without the knowledge or consent of the respondents, borrowed further sums on the security of charges on the property and on 12 January 1982 they executed yet another charge by way of legal mortgage in favour of the appellants to secure a sum of £37,500. Some £26,199 of this was applied to discharging the mortgage in favour of the Hastings and Thanet Building Society and the balance for other purposes including the discharge of the further charges on the property which they had executed. Before advancing the money the appellants caused a search to be made at the Land Registry and an official certificate of search, giving priority until 14 January 1982, was issued on 30 November 1981. The legal charge was duly executed and the money advanced on 12 January 1982, but the deed was not in fact lodged for registration until 26 January 1982, by which time the priority period had expired. Although the judge found as a fact that the respondents knew nothing of this charge and would not have consented to it if they had known, it seems clear that they must at least have entertained a suspicion that their daughter and son-in-law were contemplating some sort of dealing with the land, because on 7 December 1981 they applied for the entry of a caution on the register. In the result the appellants' charge has not yet been registered. b
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Inevitably Mr and Mrs Maxwell-Brown defaulted in paying the instalments of principal and interest due under the legal charge and the appellants commenced proceedings to have the caution removed and for possession. Those proceedings were defended by the respondents on the ground that, as persons beneficially entitled under a resulting trust in their favour to a share in the property or its proceeds of sale and as persons in actual occupation of the property at the date of the execution of the legal charge, they had an overriding interest which took priority to the interest of the appellants under the charge. The judge accepted that, following the decision of this House in *Williams & Glyn's Bank Ltd v Boland* [1980] 2 All ER 408, [1981] AC 487, the respondents had, immediately prior to the advance by the appellants, an overriding interest pursuant to s 70(1)(g) of the Land Registration Act 1925 by virtue of their occupation of the property in common with the respondents, but he held that the charge by Mr and Mrs Maxwell-Brown, as the only two trustees of the property, had, under the provisions of the Law of Property Act 1925, the effect of overreaching any interest conferred on or preserved for the respondents by their occupation and that the overreaching of that interest was not affected by s 14 of that Act. From this decision the respondents appealed to the Court of Appeal, which, on 4 December 1985, unanimously allowed the appeal, holding that the case was substantially indistinguishable from *Boland's* case and that, in any event, s 14 of the Law of Property Act 1925 had the effect of preventing the interest of the tenant in common in actual occupation of the land from being overreached without his consent (see [1986] 1 All ER 989, [1986] Ch 605). f
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My Lords, ever since *Boland's* case it has been widely assumed by those called on to advise banks and building societies that, so long as capital moneys arising from an exercise of their powers by trustees for sale holding on the statutory trusts have been paid in accordance with the statutory provisions to not less than two trustees or a trust corporation pursuant to the provisions of s 27 of the Law of Property Act 1925, a purchaser need not concern himself with the beneficial interests in the property even where one or more of the beneficiaries is or are in actual occupation of the property at j

- the time of the transaction. That assumption was shared by the Law Commission in their
- a Report on the Implications of *Williams & Glyn's Bank Ltd v Boland* (Law Com no 115) para 42. This appeal is, therefore, of very considerable importance not only to conveyancers but to anyone proposing to lend on the security of property in respect of which there is any possibility of the existence of beneficial interests which have not been disclosed by the apparent absolute owner. If it be the case, as the Court of Appeal held, that the payment by the appellants in the instant case to two properly constituted trustees for sale,
- b holding on the statutory trusts, provides no sensible distinction from the ratio of the decision of this House in *Boland's* case, the legislative policy of the 1925 legislation of keeping the interests of beneficiaries behind the curtain and confining the investigation of title to the devolution of the legal estate will have been substantially reversed by judicial decision and financial institutions advancing money on the security of land will face hitherto unsuspected hazards, whether they are dealing with registered or
- c unregistered land.

- My Lords, I propose to approach the problems raised by this appeal in four stages: first, by considering briefly the position of tenants in common of real estate prior to 1926 and, in particular, their rights in relation to occupation; second, by considering the effect which the 1925 property legislation had on that position and the policy behind such legislation; third, by considering what would have been the result on the facts of the
- d instant case if the land concerned had, throughout, been unregistered land; and, finally, by considering the impact on that result of the provisions of the Land Registration Act 1925.

- Prior to 1926 the interest of a tenant in common, unless taking effect under a trust, was a legal estate and devolved as such. The one essential feature which tenants in common shared with joint tenants was unity of possession. Thus each co-owner was as
- e much entitled to every part of the land as were his co-tenants and he had the right to occupy the land concurrently with them. If they were unable to agree, their remedy lay in partition under the Partition Acts of 1539, 1540 and 1697 (31 Hen 8 c 1, 32 Hen 8 c 32 and 8 & 9 Will 3 c 31) or, after the Partition Act 1868, in obtaining from the court an order for sale of the property. The inconvenience of this is manifest. If the land was
- f partitioned, the result was the fragmentation of estates into small holdings. If it was sold without partitioning, the purchasers were compelled to investigate the title of each co-owner. The 1925 legislation achieved a measure of simplification by providing (in s 1(6) of the Law of Property Act 1925) that a legal estate should no longer be capable of subsisting or being created in an undivided share in land and by imposing in all cases in which undivided shares existed or were created the statutory trusts set out in s 35 of that
- g Act. The whole philosophy of the Act in relation to undivided shares was that a purchaser of the legal estate (which, by s 205(1)(xxi), includes a mortgagee) should not be concerned with the beneficial interests of the tenants in common, which were shifted to the proceeds of sale. This is familiar material for conveyancers and it is unnecessary to do more than cite a few of the sections of the Act which have an immediate bearing on the problem raised by this appeal. Sections 34 and 36 deal with express limitations in
- h undivided shares or to persons as joint tenants respectively, but there is no section dealing specifically with the case where, as here, land becomes held beneficially for tenants in common by means of a resulting trust. Nevertheless, s 34(1) provides that an undivided share shall not be capable of being created except as provided by the Settled Land Act 1925 or as thereafter mentioned and s 36(4) of the Settled Land Act 1925 provides in terms that an undivided share in land shall not be capable of being created except under
- j a trust instrument or under the Law of Property Act 1925, and shall then only take effect behind a trust for sale. Having thus established the trust for sale as the conveyancing machinery through which effect is given to the interests of owners in undivided shares, those interests are, by virtue of the equitable doctrine of conversion, transferred to the proceeds of sale and the net rents and profits pending sale, although, pending the exercise of the trustees' powers, they retain, by judicial construction, some of the incidents of the

legal interests which they replaced. The Act, however, contains elaborate provisions for overreaching equitable interests and for exonerating purchasers from being concerned with them. Section 2(1) provides that a conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice of it, if, inter alia—

'(ii) the conveyance is made by trustees for sale and the equitable interest or power is at the date of the conveyance capable of being overreached by such trustees . . . and the statutory requirements respecting the payment of capital money arising under a disposition upon trust for sale are complied with . . .'

Under s 205(1)(ii) 'conveyance' includes a mortgage. Section 26(3), whilst obliging trustees for sale so far as practicable to consult the persons for the time being interested in possession in the rents and profits, specifically exonerates a purchaser from being concerned to see that the provisions of the subsection have been complied with. Similarly, s 27(1) provides that a purchaser is not to be concerned with the trusts affecting the proceeds of sale or the rents and profits until sale. Subsection (2) of the same section contains a mandatory requirement that (subject to an exception in the case of the sole personal representative) the proceeds of sale or other capital money shall not be paid to or applied by the direction of fewer than two persons as trustees for sale, except where the trustee is a trust corporation. Section 28(1) confers on trustees for sale the powers of the tenant life under the Settled Land Act 1925 and goes on to provide that those powers when exercised—

'shall operate to overreach any equitable interests or powers which are by virtue of this Act or otherwise made to attach to the net proceeds of sale as if created by a trust affecting those proceeds.'

Thus the trustees for sale are empowered to exercise the powers of a tenant for life to mortgage the land which are contained in s 71 of the Settled Land Act 1925. At the same time s 17 of the Trustee Act 1925 provides:

'No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.'

Thus far it is tolerably clear that the scheme of the Act is to enable a purchaser or mortgagee, so long as he pays the proceeds of sale or other capital moneys to not less than two trustees or to a trust corporation, to accept a conveyance or mortgage without reference at all to the beneficial interests of co-owners interested only in the proceeds of sale and rents and profits until sale, which are kept behind the curtain and do not require to be investigated. There are, however, a number of cases in which the question has arisen between beneficiary and trustee as to the rights of the beneficiary in occupation, either alone or in common with his or her co-beneficiary, of the trust property pending sale, particularly where the property has been purchased with a view to its being occupied, for instance, as the matrimonial home of the parties. In *Bull v Bull* [1955] 1 All ER 253, [1955] 1 QB 234, where a mother and son had together purchased as their residence a house which had been conveyed into the son's name alone, the Court of Appeal upheld the decision of a county court judge who had dismissed the son's claim for possession. Denning LJ gave the leading judgment, in which he quoted the following passage from the judgment of Maugham J in *Re Warren, Warren v Warren* [1932] 1 Ch 42 at 47, [1931] All ER Rep 702 at 704:

'There is no doubt that, since the coming into force of the Law of Property Act, 1925, the position of undivided owners is different from what it was before. That Act, for the purpose of simplifying the law, has introduced provisions for undivided shares, and has made partition actions unnecessary and obsolete. But in substance

a the beneficial interests of the undivided owners in regard to enjoyment so long as the land remains unsold have not been altered, and it is true to say that the ordinary layman possessed of an undivided share in land would be quite unaware of any alteration in his rights as the result of the Act.'

Denning LJ continued ([1955] 1 All ER 253 at 255, [1955] 1 QB 234 at 238):

b 'My conclusion, therefore, is that, when there are two equitable tenants in common, then, until the property is sold, each of them is entitled concurrently with the other to the possession of the land and to the use and enjoyment of it in a proper manner; and that neither of them is entitled to evict the other.'

c That, of course, was sufficient to dispose of the case, which was a simple action for possession, and it was on that ground that the appeal was dismissed. Denning LJ, however, went on to consider the way in which the mother was entitled to exercise her equitable interest in the following passage ([1955] 1 All ER 253 at 256, [1955] 1 QB 234 at 238):

d 'The mother is entitled to rely on her equitable interest as tenant in common which is preserved by two sections of the Law of Property Act, 1925. The first is s. 14 which says that the Act "... shall not prejudicially affect the interest of any person in possession or in actual occupation of land to which he may be entitled in right of such possession or occupation." The second is s. 35 which says that the trust for sale is "... subject to such ... provisions, as may be requisite for giving effect to the rights of the persons ... interested in the land ..." In this case the mother is in possession and in actual occupation as equitable co-owner and by virtue of that interest cannot be evicted by the trustees except with her consent. If the trustees wished in these circumstances to sell with vacant possession the only thing they could do would be apply to the court under s. 30 of the Law of Property Act, 1925, on the ground that the mother's consent could not be obtained. The court could then make such order as it thought fit and this would include, I think, an order to turn the mother out if it was right and proper for such an order to be made (compare *Re Buchanan-Wollaston's Conveyance* ([1939] 2 All ER 302, [1939] Ch 738), and *Re Hyde's Conveyance* ((1952) 102 LJo 58). My conclusion is, therefore, that the son, although he is the legal owner of the house, has no right to turn his mother out. She has an equitable interest which entitles her to remain in the house as tenant in common with him until the house is sold.'

j In the Court of Appeal in the instant case Dillon LJ followed and adopted this passage and held that, quite apart from the provisions of the Land Registration Act 1925, the respondents had an equitable interest in the property protected by occupation which took priority over the appellants' mortgage by virtue of s 14 of the Law of Property Act 1925. My Lords, the ambit of s 14 is a matter which has puzzled conveyancers ever since the Law of Property Act was enacted. It has been suggested that its purpose was to make it clear that the provisions of Pt I were not prejudicially to affect the rights of occupiers of the land who either had or, by virtue of their occupation, were in the process of acquiring title by adverse possession. If so, the section seems unnecessary. Another suggestion canvassed during the course of the argument was that it might have been intended to preserve the right of, for instance, a statutory tenant under the Rent Acts whose status could quite properly be said to arise 'in right of' his occupation. For my part, I think that it is unnecessary for present purposes to seek to resolve the conundrum. What s 14 does not do, on any analysis, is to enlarge or add to whatever interest it is that the occupant has 'in right of his occupation' and in my judgment the argument that places reliance on it in the instant case founds itself on an assumption about the nature of the occupying co-owners' interest that cannot in fact be substantiated. The section cannot of itself create an interest which survives the execution of the trust under which it arises or answer the logically anterior question of what, if any, interest in the land is conferred

by the possession or occupation. It is suggested in *Wolstenholme and Cherry's Conveyancing Statutes* (13th edn, 1972) vol 1, p 69 that s 14 was designed to preserve the principle, exemplified by *Hunt v Luck* [1902] 1 Ch 428, [1900-3] All ER Rep 295, that a purchaser will have constructive notice of any rights reasonably discoverable from inspection of the property and, in particular, from inquiry of any occupier as to his interest and the terms on which he holds it. With that I respectfully agree. Leaving aside, however, the question whether the words 'in right of such possession or occupation' have, as the judge thought and as the appellants have argued before your Lordships, the effect of limiting the interests to which the section applies to those which are conferred by the preceding fact of possession or occupation or whether, as the Court of Appeal held in effect, they mean merely 'in respect of' or 'associated with' possession or occupation, the section cannot, in my judgment, have the effect of preserving, as equitable interests in the land, interests which are overreached by the exercise of the trustees' powers or of bringing on to the title which the purchaser from trustees for sale is required to investigate the equitable interest of every beneficiary who happens to be in occupation of the land. That would be to defeat the manifest purpose of the legislature in enacting the sections to which reference has already been made. Looking at the interest of the tenant in common in actual occupation and considering for the moment only the position in relation to unregistered land, one has, as it seems to me, to bear in mind always the distinction between his rights as against his co-beneficiaries or against the trustee or trustees in whom the legal estate is vested and his rights against a purchaser of the legal estate from the trustees for sale. His interest is overreached and the purchaser is absolved from inquiry only if the statutory requirements respecting the payment of capital money arising under a disposition on trust for sale are complied with (see ss 2(1)(ii) and 27). Until that occurs, he remains entitled to assert against the trustees and, indeed, against any purchaser from the trustees who has not complied with the statutory requirements all the incidents of his beneficial interest in the proceeds of sale of the property and in the net rents and profits until the sale. One of the incidents of that beneficial interest is, or may be according to the agreement between the beneficiaries or to the purpose for which the trust was originally created, the enjoyment of the property in specie either alone or concurrently with other beneficiaries. But the enjoyment in specie, whilst it may serve to give notice to third parties of the occupier's interest under the trust, is not a separate and severable right which can be regarded as, as it were, free standing. It is and has to be referable to the trust from which, and from which alone, it arises. It is the beneficial interest in the rents and profits pending sale that is the foundation of that enjoyment and there is nothing in the statute or in the cases, leaving aside, for the moment, the *Boland* case [1980] 2 All ER 408, [1981] AC 487, which I shall have to come to a little later, to suggest that the enjoyment of the property in specie of itself confers some independent right which will survive the operation of the overreaching provisions of the Law of Property Act 1925. Indeed, the framers of that legislation would, I think, have been shocked and surprised to hear it asserted that a purchaser in proper form from the trustees of the statutory trusts was required to investigate the purposes for which the trust property had been acquired by the trustees or the terms of some private and unwritten agreement or understanding between the beneficiaries inter se or between one or more of the beneficiaries and the trustees. *Bull v Bull* [1955] 1 All ER 253, [1955] 1 QB 234 was, of course, a case where the only question was whether a sole trustee was entitled to an order for possession against a beneficiary with a subsisting interest in the trust property who had been permitted to occupy it. In dealing with the occupying beneficiary's rights Denning LJ was at pains to say that the entitlement to retain possession which he held to exist was 'until the place is sold'. The mother had, he said, 'an equitable interest which entitled her to remain in the house as tenant in common with him until the house is sold' (see [1955] 1 All ER 253 at 256, [1955] 1 QB 234 at 239). *Waller v Waller* [1967] 1 All ER 305, [1967] 1 WLR 451 and *Barclay v Barclay* [1970] 2 All ER 676, [1970] 2 QB 677 were again cases where the question arose prior to sale between the

sole trustee and an occupying beneficial tenant in common. Clearly when the question is whether the trustee or trustees shall execute the trust by selling or exercising their power to postpone, as, for instance, in *Re Buchanan-Wollaston's Conveyance* [1939] 3 All ER 302, [1939] Ch 738, a court called on to adjudicate at the instance of an opposing beneficiary or trustee is concerned to investigate all the circumstances with a view to considering whether a party opposing sale has some equity which renders an immediate execution of the trust unfair or unjust. But that is not because such a person has, by virtue of his occupation, some interest in the land which is incapable of being overreached but precisely because, in the absence of some intervention of the court, the effect of a sale in accordance with the statutory provisions will be to overreach it, the whole question being whether that would be an equitable result. The position of the occupying tenant in common of unregistered land is, in my judgment, lucidly and accurately summarised in *Irani Finance Ltd v Singh* [1969] 3 All ER 1455, [1971] Ch 59; *affd* [1970] 3 All ER 199, [1971] Ch 59, CA, a decision which was treated by the Court of Appeal in *Boland's case* [1979] 2 All ER 697, [1979] Ch 313 with perhaps rather less respect than it deserved having regard to the fact that it was both binding on it and was a decision of four judges of unrivalled experience in the law of real property (Buckley J at first instance and Russell, Widgery and Cross LJ in the Court of Appeal). The question at issue was whether the interest of an occupying tenant in common (the joint tenancy having been severed) was an 'interest in land' which could be made the subject matter of a charging order under s 35(1) of the Administration of Justice Act 1956. Although the actual decision was confined to the meaning of the words 'interest in land' in the particular context of the 1956 Act and is therefore less than helpful in the context of the present inquiry, the case contains a useful general analysis of the rights of a beneficiary under the statutory trusts and I do not think that I can do better than to quote verbatim the following passage from the judgment of the Court of Appeal delivered by Cross LJ ([1970] 3 All ER 199 at 203, [1971] Ch 59 at 79–80):

"The words 'interest in land' are no doubt capable in an appropriate context of including interests under trusts for sale of land, and although there is no need for us to express a concluded opinion on the point, we certainly do not wish to be taken to be casting any doubt on the correctness of the dicta in *Cooper v Critchley* [1955] 1 All ER 520, [1955] Ch 431, but for 100 years before 1956 the words, or equivalent words, have been held in this field not to include interests arising under trusts for sale . . . To turn finally to *Bull v Bull* [1955] 1 All ER 253, [1955] 1 QB 234 and *Barclay v Barclay* [1970] 2 All ER 676, [1970] 2 QB 677, in the judgments in *Bull v Bull*, and in *Cook v Cook* [1962] 2 All ER 811, [1962] P 235 in which the principle laid down in *Bull v Bull* was applied, the beneficiaries are in places described as 'equitable tenants in common' of the house in question. But the use of these words—which are apt enough to describe the physical situation—does not, we think, necessarily imply that the court considered that the interests of the beneficiaries were interests in realty and not interests in personality. It is true that in his judgment in *Barclay v Barclay* [1970] 2 All ER 676 at 678, [1970] 2 QB 677 at 684 Lord Denning MR referred to the interests of the beneficiaries in *Bull v Bull* as equitable interests in land, but that expression of opinion was not necessary to the decision in any of the cases and, with respect, we cannot agree with it. No doubt such tenants in common are interested in the land in a general sense, as was remarked by Russell LJ in *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268 at 292, [1929] All ER Rep 495 at 501. But that is not the same thing as their being owners of equitable interests in the realty. The whole purpose of the trust for sale is to make sure, by shifting the equitable interests away from the land and into the proceeds of sale, that a purchaser of the land takes free from the equitable interests. To hold these to be equitable interests in the land itself would be to frustrate this purpose. Even to hold that they have equitable interests in the land for a limited

period, namely until the land is sold, would, we think, be inconsistent with the trust for sale being an "immediate" trust for sale working an immediate conversion, which is what the Law of Property Act 1925 envisages (see s 205(1)(xxix)); although of course, it is not in fact only such a limited interest that the plaintiff company is seeking to charge.'

If this is right, as I believe that it is, the reason why a purchaser of the legal estate (whether by way of outright sale or by way of mortgage) from a single proprietor takes subject to the rights of the occupying beneficiary is not because s 14 of the Act confers on the latter some interest in land which is incapable of being overreached but because, having constructive notice of the trust as a result of the beneficiary's occupation, he steps into the shoes of the vendor or mortgagor and takes the estate subject to the same equities as those to which it was subject in the latter's hands, those equities and their accompanying incidents not having been overreached by the sale under the provisions of ss 2(1) and 27 of the Act. Where the purchase has taken effect in accordance with those provisions, it is quite clear from the terms of the statute both that the purchaser, even with express notice, is not concerned with the beneficiary's interest in the proceeds of sale or the net rents and profits until sale and that that interest is overreached. The beneficiary's possession or occupation is no more than a method of enjoying in specie the rents and profits pending sale in which he is entitled to share. It derives from and is, as counsel for the appellants has graphically put it, fathered by the interests under the trust for sale. Once that goes, as it does on the execution of the trust for sale, then the foundation of the occupation goes and the beneficiary has no longer any 'interest . . . to which he may be entitled in right of such . . . occupation'. We are, of course, concerned here not with the execution of the trust by a sale of the land by the trustees, but with the exercise by the trustees of their power to raise capital money by creating a charge on the land. But the same principle must, in my judgment, apply, the 'overreaching' in this case consisting in the creation by the trustees of a legal estate and of powers incidental thereto (including the mortgagee's power of sale) which have an absolute priority over the beneficial interests, although, no doubt, those beneficial interests and their accompanying incidents continue as against the equity of redemption which remains vested in the trustees. If I may say so respectfully, the reasoning of the Court of Appeal in the instant case starts at the wrong end by assuming that there is an interest conferred by occupation which, were it not for s 14, would be in some way prejudiced by the provisions of Pt I of the Act, whereas in fact the occupier's interest in this instance is one which stems from, depends on and is coterminous with the interest in the rents and profits arising under those very provisions and which is displaced by the execution of the trust or the exercise of the trustees' powers to the same extent as that interest. For my part, I have found myself unable to accept the reasoning in this part of the judgment of Dillon LJ. If this were a case concerned solely with unregistered land, I am of opinion that the appellants' charge would take effect in priority to the respondents' interest, which would be pro tanto overreached and which, so far as it can properly be considered as an equitable interest in land, would continue to subsist only in the equity of redemption.

So to conclude, however, resolves only part of the question, for the land concerned was at the material time registered land and there remain to be considered two questions, viz, first, how do the provisions of the Land Registration Act 1925 fit with the provisions of the Law of Property Act 1925 and, second, does the decision of this House in *Boland's case* [1980] 2 All ER 408, [1981] AC 487, which was concerned with a transaction between a mortgagee and a sole individual trustee, falsify or otherwise affect the conclusion just stated?

My Lords, the Land Registration Act 1925 was by no means the first attempt to introduce into English conveyancing a system of land registration. Previous attempts in the Land Registry Act 1862, the Land Transfer Act 1875 and the Land Transfer Act 1897 had not proved wholly popular or successful, although the 1897 Act introduced for the

first time the concept of compulsory registration and a system of registration had in fact been operative in the county of London from the turn of the century. The 1925 Act was introduced as part and parcel of the overall property legislation enacted in that year and it introduced for the first time, in s 120, a power in the central government to designate areas in which registered conveyancing would be compulsory. Initially, however, there was built in a ten-year delay on the exercise of this power (s 120(2)) with the object of providing an experimental period during which it could be seen how a system of registered conveyancing operated alongside the amended system of unregistered conveyancing and which system it would be preferable to adopt over the country as a whole. Thus the philosophy behind both the Land Registration Act 1925 and the Law of Property Act 1925 was that they should operate in parallel and it would, therefore, be surprising if it were found that the two systems were not constructed so as to dovetail into one another. In fact they do. The Land Registration Act 1925 came into operation on 1 January 1926 but was (by s 148(2)) deemed to come into operation immediately after the remainder of the 1925 property legislation so that it operates against the background of the alterations effected by that legislation and, in particular, those relating to interests in common. Section 3 incorporates many of the definitions from the Law of Property Act 1925 but the important definitions for present purposes are those contained in s 3(xi) (legal estates), (xv) (minor interests) and (xvi) (overriding interests). These are, so far as material, as follows:

(xi) "Legal Estates" mean the estates interests and charges in or over land subsisting or creating at law which are by the Law of Property Act, 1925, authorised to subsist or to be created at law; and "Equitable interests" mean all the other interests and charges in or over land or in the proceeds of sale thereof . . . (xv) "Minor interests" mean the interests not capable of being disposed of or created by registered dispositions and capable of being overridden (whether or not a purchaser has notice thereof) by the proprietors unless protected as provided by this Act, and all rights and interests which are not registered or protected on the register and are not overriding interests, and include—(a) in the case of land held on trust for sale, all interests and powers which are under the Law of Property Act, 1925, capable of being overridden by the trustees for sale, whether or not such interests and powers are so protected [plainly here 'overridden' is used as embracing interests which are overreached under the provisions of s 2 of the Law of Property Act 1925] . . . (xvi) "Overriding interests" mean all the incumbrances, interests, rights, and powers not entered on the register but subject to which registered dispositions are by this Act to take effect . . .

It should perhaps also be mentioned that a charge by way of legal mortgage, with which this appeal is concerned, is defined by reference to the Law of Property Act 1925. Section 2 delimits the estates which are capable of being registered and is, so far as material, in the following terms:

(1) After the commencement of this Act, estates capable of subsisting as legal estates shall be the only interests in land in respect of which a proprietor can be registered and all other interests in registered land (except overriding interests and interests entered on the register at or before such commencement) shall take effect in equity as minor interests, but all interests (except undivided shares in land) entered on the register at such commencement which are not legal estates shall be capable of being dealt with under this Act . . .

There can be seen in the definition of minor interests the same philosophy as is apparent in the Law of Property Act of keeping behind the curtain those interests which are overreached by dispositions by the registered owner. This is again reflected in s 74, which is in the following terms:

'Subject to the provisions of this Act as to settled land, neither the registrar nor any person dealing with a registered estate or charge shall be affected with notice of a trust express implied or constructive, and references to trusts shall, so far as possible, be excluded from the register.'

Again, s 103(1) contains provisions for compelling the registered proprietor to give effect to dispositions which create minor interests capable, if registered, of taking effect as legal estates but subject to the following proviso:

'... (b) So long as the proprietor holds the land on trust for sale, no estate or charge shall be registered in respect of an interest which, under the Law of Property Act, 1925, or otherwise, ought to remain liable to be overridden on the execution of the trust for sale ...'

Section 25 of the Act confers on the registered proprietor the ability to charge the land by way of legal mortgage and the effect of a registered disposition is set out in s 20, which, so far as relevant, is in the following terms:

'(1) In the case of a freehold estate registered with an absolute title, a disposition of the registered land or of a legal estate therein, including a lease thereof, for valuable consideration shall, when registered, confer on the transferee or grantee an estate in fee simple or the term of years absolute or other legal estate expressed to be created in the land dealt with, together with all rights privileges, and appurtenances belonging or appurtenant thereto, including (subject to any entry to the contrary in the register) the appropriate rights and interests which would, under the Law of Property Act, 1925, have been transferred if the land had not been registered, subject—(a) to the incumbrances and other entries, if any, appearing on the register; and (b) unless the contrary is expressed on the register, to the overriding interests, if any, affecting the estate transferred or created, but free from all other estates and interests whatsoever, including estates and interests of His Majesty, and the disposition shall operate in like manner as if the registered transferor or grantor were (subject to any entry to the contrary in the register) entitled to the registered land in fee simple in possession for his own benefit.'

Finally, overriding interests are defined by s 70, which provides, for relevant purposes:

'(1) All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act, (that is to say) ... (g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed ...'

The respondents' submission, which succeeded in the Court of Appeal, is a very simple one. What is said is that the decision of this House in *Boland's* case [1980] 2 All ER 408, [1981] AC 487 established the proposition that the interest of a tenant in common in occupation of registered land is, by reason of such occupation, an interest incapable of being overreached by a sale or other disposition of the land, save with the consent of the occupier, that s 70 makes that interest an overriding one and that, accordingly, the disposition by the registered proprietors in favour of the appellants takes effect subject to the right of the respondents to remain in occupation of the house indefinitely notwithstanding that (a) the appellants were specifically exonerated from inquiry into the trusts affecting the rents and profits of land pending sale by s 27 of the Law of Property Act 1925 and (b) the capital moneys raised by the registered proprietors were paid to two trustees in accordance with s 27(2). My Lords, if the first step in this composite proposition be correct, then the remainder follows as a matter of unassailable

logic. The Court of Appeal concluded that it was correct by reference to an analysis of the speech of Lord Wilberforce in *Boland's* case. Dillon LJ accepted that Lord Wilberforce's observations were made in the context of a case where the dealing which was claimed as being subject to an overriding interest in the occupying beneficiary was with a single trustee and would not therefore overreach the beneficiary's interest. But in his view the reasoning did not depend on the fact that in *Boland's* case there was only one registered proprietor of the land and therefore only one trustee for sale. It concentrated simply on the distinction between a minor interest and an overriding interest, the mere fact of occupation converting what would otherwise be a minor interest into an overriding interest. Thus he found the instant case indistinguishable from *Boland's* case in any material respect. The proposition is encapsulated in the following short passage from his judgment ([1986] 1 All ER 989 at 994-995, [1986] Ch 605 at 617):

'... the reasoning of Lord Wilberforce concentrates on the distinction between the minor interest and the overriding interest. This necessarily covers the case where there are two registered proprietors and so two trustees for sale, because the wording in the definition of "minor interests" in s 3(xv) of the Land Registration Act 1925—"... in the case of land held on trust for sale, all interests and powers which are under the Law of Property Act, 1925, capable of being overridden by the trustees for sale..." must refer to the case where there are two trustees for sale; indeed, only where there are two (or three or four) trustees for sale would the interests of the beneficiaries be overridden under the Law of Property Act 1925. On a sale what would otherwise have been a minor interest capable of being overridden under the Law of Property Act 1925 by two trustees for sale is, if protected by the fact of actual occupation of the land, elevated to the status of an overriding interest. In my judgment, therefore, the reasoning in *Boland* covers entirely the position of the Fleggs in the present case. As no inquiry was made of the Fleggs before the plaintiffs took their mortgage on the property, the Fleggs have an overriding interest in the property which binds the plaintiffs.'

The fundamental criticism of this advanced by the appellants is that it fails to analyse the incidents of and limitations on the interest which the court held to override the interest of the appellants. What s 70(1)(g) does is to define as an overriding interest the rights (whatever they may be) of every person in actual occupation and to subject the registered land to such overriding interests 'as may be for the time being subsisting in reference thereto'. It does not create or enlarge rights but merely operates, to use the words of Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472 at 502, [1965] AC 1175 at 1260-1261—

'to adapt the system of registration, and the modified form of enquiry which is appropriate to that system, to the same kind of right as under the general law would affect a purchaser finding a person in occupation of his land.'

One may, quoting again from the speech of Lord Wilberforce in the same case ([1965] 2 All ER 472 at 503, [1965] AC 1175 at 1261)—

'have to accept that there is a difference between unregistered land and registered land as regards what kind of notice binds a purchaser, or what kind of enquiries a purchaser has to make. But there is no warrant in the terms of this paragraph or elsewhere in the Act for supposing that the nature of the rights which are to bind a purchaser is to be different, excluding personal rights in one case, including them in another. The whole frame of s. 70, with the list that it gives of interests, or rights, which are overriding, shows that it is made against a background of interests or rights whose nature and whose transmissible character is known, or ascertainable, aliunde, i.e., under other statutes or under the common law.'

With this preliminary caution in mind, therefore, I turn to consider whether, in fact,

the decision of this House in *Boland's* case does lead to the conclusion that the occupying co-owner's interest under the statutory trusts is, by reason of his occupation, one which is incapable of being overreached. It has, I think, to be borne in mind when reading both the judgments in the Court of Appeal in that case and the speeches in this House that they were prepared and delivered against a background of fact which precluded any argument that the interests of Mrs Boland and Mrs Brown had been overreached under the provisions of the Law of Property Act 1925. Equally, the holding, contrary to the argument of the mortgagees, that Mrs Boland and Mrs Brown were in actual occupation ruled out any question of the mortgagees having taken their interest without notice of the occupier's rights, whatever those rights were. The mortgagees in that case were, therefore, quite simply purchasers from the owner of the legal estate with notice of the existence of whatever equitable rights the occupier was entitled to claim. Their claim to take free from them accordingly rested simply and solely on the fact that the land charged happened to be registered land, a feature which enabled them to claim, if they could substantiate it, that the beneficiaries' interests were minor interests and so overridden by a disposition by the registered proprietor. Thus, in the argument for the mortgagees before the Court of Appeal, it was contended that the argument for the appellants involved the proposition that even if two trustees or a trust corporation received the purchase money there would still be an overriding interest (see [1979] Ch 312 at 319). In the argument in reply this was countered by counsel for the appellants who pointed out that the rights of beneficiaries are not overreached by a sale by one trustee. In such a case, s 199 of the Law of Property Act 1925 (relating to notice) applies. Counsel emphasised in this context that there was no inconsistency between the Law of Property Act and the Land Registration Act and went on to point out that the powers of management in s 28 of the Law of Property Act (and, in particular, the power to mortgage contained in s 71 of the Settled Land Act 1925) do not apply to one trustee, who would have no power to borrow money. It is in the light of these arguments that one finds in the judgments of the Court of Appeal specific references to the fact that the transactions there in question were transactions in which the capital money was received by one trustee only, so that the beneficiaries' rights were not overreached (see [1979] 2 All ER 697 at 703-704, 707, 710, 712-713, [1979] Ch 312 at 330, 334, 337, 340-341 per Lord Denning MR, Ormrod and Browne LJ). Dillon LJ in the Court of Appeal regarded these references as merely part of the narrative but I am, for my part, unable to agree. They were, as it seems to me, an essential part of the reasoning on which the judgments were based, for it was a critical feature of the appellants' argument that their interests were not overreached but were kept alive as against the purchaser, by notice in the case of unregistered land or by being overriding interests in the case of registered land. In the argument before your Lordships' House, one finds the same underlying thesis in the respondents' argument and the appellants' argument in reply (see [1981] AC 487 at 498-499, 501). It was, indeed, this feature, namely that in each case the mortgage was effected by a single registered proprietor, which compelled the mortgagees to argue that the beneficiaries' interests in that case fell within the definition of minor interests, that 'minor interests' and 'overriding interests' were mutually exclusive categories and that an interest under a trust for sale was incapable of constituting an overriding interest. They could not deny that they had constructive notice, so that if they were to succeed at all it could only be because the land was registered land and the provisions of s 20(1) of the Act enabled them to take free from minor interests. It is this argument to which the relevant part of Lord Wilberforce's speech was directed and he pointed out at the inception, in considering whether the provisions of s 70(1)(g) could afford protection to the interests of the tenant in common in equity, that the effect of a disposition by two trustees or a trust corporation would be to overreach the trusts, with the result that a purchaser would take free from them, whether or not he had notice (see [1980] 2 All ER 408 at 411, [1981] AC 487 at 503). Thus, the only question, it being common ground that there had not, in fact, been any overreaching, was whether the respondents' interests, although capable of being

a overreached by appropriate machinery and so within the definition of minor interests, could also be overriding interests by reason of the beneficiaries' occupation of the land. That question is answered by Lord Wilberforce in the following passage in his speech ([1980] 2 All ER 408 at 414, [1981] AC 487 at 507):

b 'How then are these various rights to be fitted into the scheme of the Land Registration Act 1925? It is clear, at least, that the interests of the co-owners under the "statutory trusts" are minor interests: this fits with the definition in s 3(xv). But I can see no reason why, if these interests, or that of any one of them, are or is protected by "actual occupation" they should remain merely as "minor interests". On the contrary, I see every reason why, in that event, they should acquire the status of overriding interests. And, moreover, I find it easy to accept that they satisfy the opening, and governing, words of s 70, namely, interests subsisting in reference to the land.'

c My Lords, if I may respectfully say so, this is plainly right, but it has to be read in the context of the facts in *Boland's* case. Quite clearly the interests of the respondents in that case were subsisting. Nothing had occurred which had the effect of overreaching them. I cannot, however, for my part, read Lord Wilberforce's words as applying to a case which was not before the House where the effect of the transaction in question was precisely d that to which he himself had alluded in his outline of the legal framework within which the appeals before the House fell to be decided, that is to say a conveyance by two trustees involving the consequence that the purchaser took free from the trusts regardless of notice.

e Considered in the context of a transaction complying with the statutory requirements of the Law of Property Act 1925 the question of the effect of s 70(1)(g) of the Land Registration Act 1925 must, in my judgment, be approached by asking, first, what are the 'rights' of the person in occupation and whether they are, at the material time, subsisting in reference to the land. In the instant case the exercise by the registered proprietors of the powers conferred on trustees for sale by s 28(1) of the Law of Property Act 1925 had the effect of overreaching the interests of the respondents under the f statutory trusts on which depended their right to continue in occupation of the land. The appellants took free from those trusts (s 27) and were not, in any event, concerned to see that the respondents' consent to the transaction was obtained (s 26). If, then, one asks what were the subsisting rights of the respondents referable to their occupation, the answer must, in my judgment, be that they were rights which, vis-à-vis the appellants, were, eo instanti with the creation of the charge, overreached and therefore subsisted g only in relation to the equity of redemption. I do not, for my part, find in *Boland's* case anything which compels a contrary conclusion. Granted that the interest of a co-owner pending the execution of the statutory trust for sale is, despite the equitable doctrine of conversion, an interest subsisting in reference to the land the subject matter of the trust and granted also that *Boland's* case establishes that such an interest, although falling h within the definition of the minor interest and so liable to be overridden by a registered disposition, will, so long as it subsists, be elevated to the status of an overriding interest if there exists also the additional element of occupation by the co-owner, I cannot for my part accept that, once what I may call the parent interest, by which alone the occupation can be justified, has been overreached and thus subordinated to a legal estate properly created by the trustees under their statutory powers, it can, in relation to the proprietor of the legal estate so created, be any longer said to be a right 'for the time being subsisting'.

j Section 70(1)(g) protects only the rights in reference to the land of the occupier whatever they are at the material time: in the instant case the right to enjoy in specie the rents and profits of the land held in trust for him. Once the beneficiary's rights have been shifted from the land to capital moneys in the hands of the trustees, there is no longer an interest in the land to which the occupation can be referred or which it can protect. If the trustees sell in accordance with the statutory provisions and so overreach the beneficial interests

in reference to the land, nothing remains to which a right of occupation can attach, and the same result must, in my judgment, follow vis-à-vis a chargee by way of legal mortgage so long as the transaction is carried out in the manner prescribed by the Law of Property Act 1925, overreaching the beneficial interests by subordinating them to the estate of the chargee, which is no longer 'affected' by them so as to become subject to them on registration pursuant to s 20(1) of the Land Registration Act. In the instant case, therefore, I would, for my part, hold that the charge created in favour of the appellants overreached the beneficial interests of the respondents and that there is nothing in s 70(1)(g) of the Land Registration Act 1925 or in *Boland's* case which has the effect of preserving against the appellants any rights of the respondents to occupy the land by virtue of their beneficial interests in the equity of redemption which remains vested in the trustees. a
b

There is a further point which was argued before your Lordships. As already mentioned, the appellants' charge, although executed within the protected period provided by the official search, was not in fact lodged for registration until 26 January 1982, by which time the respondents' caution had been entered on the register. As a result, the appellants have still not been registered as the proprietors of the legal charge in the charges registered. It is submitted on behalf of the respondents that since, under s 20(1) of the Land Registration Act 1925, the legal estate is conferred on a purchaser only when registered, the present position is that there is a contest between two competing equities in which the respondents, as the first in time, are entitled to prevail. I am not persuaded by this argument. The fact is that, whether or not the respondents had an overriding interest, the appellants were and are entitled to be registered. The trustees' power to mortgage the land was exercised when the charge was executed and the money was advanced and it was, under s 28 of the Law of Property Act 1925, at this point that the interests of the appellants was overreached. c
d
e

I would therefore allow the appeal and restore the order for possession in favour of the appellants made by his Honour Judge Thomas in the Chancery Division.

LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Templeman and Lord Oliver. I agree with them and for the reasons they give I too would allow the appeal and restore the order of his Honour Judge Thomas. f

Appeal allowed.

Solicitors: *Tucker Turner Kingsley Wood & Co* (for the appellants); *John Morley & Co*, Rainham, Kent (for the respondents). g

Mary Rose Plummer Barrister.

Attia v British Gas plc

COURT OF APPEAL, CIVIL DIVISION

DILLON, WOOLF AND BINGHAM LJ

5, 26 JUNE 1987

a Damages – Personal injury – Psychiatric damage – Nervous shock caused by damage to property – Plaintiff suffering nervous shock caused by seeing her house on fire – Fire caused by defendants' negligence – Whether defendants liable for plaintiff's psychiatric damage.

b Practice – Preliminary point of law – Question of far-reaching legal principle – Assumed facts – Unsuitability of procedure.

c The plaintiff engaged the defendants to install central heating in her house. While the defendants were carrying out the work the plaintiff returned home one afternoon to see smoke pouring from the loft of the house. She telephoned the fire brigade but by the time they arrived the whole house was on fire and by the time the fire was brought under control over four hours later the house and contents were extensively damaged. The defendants admitted liability for the fire and settled the plaintiff's claim for damage to the house and contents. The plaintiff also claimed damages for nervous shock and psychological reaction caused by seeing her house on fire. The defendants disputed that claim and when the plaintiff issued a writ the question whether the plaintiff's claim gave rise to cause of action sounding in damages was tried as a preliminary issue. The defendants contended (i) that damages for nervous shock could only be recovered, as a matter of law and public policy, if the shock was caused by fear of death or injury to a person closely related to the plaintiff and could not be recovered if the shock was caused merely by damage to property and (ii) that the plaintiff's nervous shock was not reasonably foreseeable as being a direct consequence of the defendants' negligence. The judge gave judgment for the defendants and the plaintiff appealed.

f **Held** – Damages for nervous shock or psychiatric damage resulting from witnessing the consequences of the defendant's negligence were not limited to psychiatric damage caused by witnessing a personal injury but could be recovered where the plaintiff witnessed the destruction of property, such as his home and possessions, as a result of the defendant's negligence, eg in starting a fire, provided the plaintiff proved psychiatric damage and not merely grief, sorrow or emotional distress and provided that his psychiatric damage was reasonably foreseeable. Whether the plaintiff's psychiatric damage was a reasonably foreseeable consequence of the defendants' negligence was a question of fact to be decided at the trial. The plaintiff's appeal would therefore be allowed (see p 458 c to f h j, p 459 a b, p 461 f to p 462 a, p 463 g, p 464 g to j and p 465 a to c, post).

g *Hay (or Bourhill) v Young* [1942] 2 All ER 396 and *McLoughlin v O'Brian* [1982] 2 All ER 298 considered.

h Per curiam. Questions of far-reaching legal principle, such as the conditions in which damages can or cannot be recovered as matter of public policy, are not suitable to be determined as preliminary issues on assumed facts (see p 457 h, p 462 a b h to p 463 a, post).

j Per Bingham LJ. 'Nervous shock' is a misleading and inaccurate term; it is preferable to use the term 'psychiatric damage' as comprehending all relevant forms of mental illness, neurosis and personality change (see p 462 d, post).

Notes

For liability for nervous shock, see 34 Halsbury's Laws (4th edn) para 8, and for cases on the subject, see 17 Digest (Reissue) 145–147, 377–391.

For the trial of preliminary points of law, see 37 Halsbury's Laws (4th edn) para 484, and for cases on the subject, see 37 Digest (Reissue) 86–90 3377–3393.

Cases referred to in judgments

Donoghue (or M'Alister) v Stevenson [1932] AC 562, [1932] All ER Rep 1, HL. a

Dorset Yacht Co Ltd v Home Office [1970] 2 All ER 294, [1970] AC 1004, [1970] 2 WLR 1140, HL.

Hay (or Bourhill) v Young [1942] 2 All ER 396, [1943] AC 92, HL.

Heron II, The, Koufos v C Czarnikow Ltd [1967] 3 All ER 686, [1969] 1 AC 350, [1967] 3 WLR 1491, HL. b

Jaensch v Coffey (1984) 54 ALR 417, Aust HC.

King v Phillips [1953] 1 All ER 617, [1953] 1 QB 429, [1953] 2 WLR 526, CA.

McLoughlin v O'Brian [1982] 2 All ER 298, [1983] 1 AC 410, [1982] 2 WLR 982, HL.

Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound (No 1) [1961] 1 All ER 404, [1961] AC 388, [1961] 2 WLR 126, PC.

Owens v Liverpool Corp [1938] 4 All ER 727, [1939] 1 KB 394, CA. c

Appeal

The plaintiff, Madiha Attia, appealed against the decision of Sir Douglas Frank QC, sitting as a deputy judge of the High Court on 19 December 1986, by which he gave judgment for the defendants, British Gas plc, on the trial of a preliminary issue, namely: 'Can the plaintiff recover damages for nervous shock caused by witnessing her home and possessions damaged and/or destroyed by a fire caused by the defendants' negligence while installing central heating in the plaintiff's home?' The facts are set out in the judgment of Dillon LJ. d

David Tucker for the plaintiff.

Janet Turner for the defendants. e

Cur adv vult

26 June. The following judgments were delivered.

DILLON LJ. This is an appeal by the plaintiff in the action against a decision of Sir Douglas Frank QC, sitting as a deputy judge of the High Court in the Queen's Bench Division, which was given on 19 December 1986 by way of the determination of a preliminary issue in the action. f

As to the facts, in the summer of 1981 the plaintiff, lived (as I apprehend she still does) at 11 Leaver Gardens, Greenford, Middlesex and the defendants, British Gas, were engaged to install central heating there. When she was returning home at about 4 pm on 1 July 1981 she saw smoke coming from the loft of the house. She telephoned the fire brigade but, by the time the firemen arrived, the whole house was on fire and it took the firemen over four hours to get the fire under control. Obviously the house and its contents were extensively damaged. g

The defendants admit that the fire was caused by their negligence, i.e. by the carelessness of their employees who were working at the house, and we were told that the plaintiff's claims for damage to the house itself and its contents have been settled. In this action the plaintiff's only claim is for a different type of damage, namely damages for nervous shock; by this is meant that, although she did not suffer any physical injury, the plaintiff, as the result of seeing her home and its contents ablaze, has suffered a psychiatric or mental illness, the effects of which are set out in some detail in her statement of claim. h

The defendants dispute this claim of the plaintiffs, but in order to save costs, especially as the plaintiff has legal aid, the parties agreed, and the master ordered, that the following question should be set down for determination as a preliminary issue, namely: i

'Can the plaintiff recover damages for nervous shock caused by witnessing her home and possessions damaged and/or destroyed by a fire caused by the defendants' negligence while installing central heating in the plaintiff's home?'

For the purpose of this preliminary issue, the facts alleged in the statement of claim are to be assumed to be true; in particular it is to be assumed that the plaintiff has suffered a psychiatric illness which was caused by the shock of seeing her home and its contents ablaze. Causation does not therefore have to be considered on the preliminary issue, although it will have to be considered at the trial if the preliminary issue is not answered in the negative, as the defendants would wish. The defendants say on the preliminary issue that the plaintiff cannot succeed in this action for either of two reasons, namely

- (1) that it was not reasonably foreseeable that the plaintiff might suffer any psychiatric illness as a result of the defendants' negligence in starting the fire or
- (2) that, even if it was reasonably foreseeable that the plaintiff might suffer psychiatric illness, damages for 'nervous shock' can, as a matter of law and public policy, only be recovered if the shock was caused by the death or injury of a person, or by fear of the death or injury of a person, normally a person closely related to the plaintiff, and cannot be recovered if it was merely caused by injury to property.

The preliminary issue was raised to test these two contentions of the defendants. The deputy judge decided in favour of the defendants on the first contention and therefore dismissed the action. The plaintiff now appeals.

The law as to 'nervous shock' has recently been considered very carefully and helpfully by the House of Lords in *McLoughlin v O'Brian* [1982] 2 All ER 298, [1983] 1 AC 410 and by the High Court of Australia in *Jaensch v Coffey* (1984) 54 ALR 417. In *McLoughlin v O'Brian* [1982] 2 All ER 298 at 311, [1983] 1 AC 410 at 431 Lord Bridge said:

'The common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured. Anxiety and depression are normal human emotions. Yet an anxiety neurosis or a reactive depression may be recognisable psychiatric illnesses, with or without psychosomatic symptoms. So, the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness.'

The plaintiff accepts this statement of the law, and accordingly it is claimed that what she has suffered, as described in the statement of claim, amounts to a positive psychiatric illness. Where exactly the line is to be drawn between possibly extravagant grief, distress or other normal emotion and a positive psychiatric illness may perhaps be difficult to discern in what may for all I know be a matter of degree; but that is a matter for the trial and does not arise on the preliminary issue.

In the next place it is to be assumed that the plaintiff is of a normal disposition or toughness, possessing, as it has been put in the cases, 'the customary phlegm'. Whatever the position may be at the trial, on this preliminary issue we are not concerned with the possibility of it being shown that she has suffered psychiatric illness because, although the defendants did not know and she herself may not have known, she was particularly or 'abnormally' susceptible to some form of psychiatric illness.

A third point which emerges from the cases cited is that damage for 'nervous shock', ie for psychiatric illness occasioned by shock, is regarded as a separate head of damage, distinct, for example, from damage for personal injury. The law has developed step by step and is still developing. In those circumstances I would be particularly reluctant to lay down any general rule as to the conditions in which such damages can or cannot be recovered as a matter of public policy. For that reason the procedure of a preliminary issue on assumed facts, somewhat briefly stated, has disadvantages where what is under consideration is how the law should develop in a matter of some general importance.

That said, however, as appears from the speeches in *McLoughlin v O'Brian* and the judgments in *Jaensch v Coffey*, a great deal of the difficulty which has been felt over the development of the law as to damages for 'nervous shock' has arisen in relation to what, in the terminology of the tort of negligence, is described as the question of proximity. How far is it right that the law should allow a claim for damages against a wrongdoer, where the wrong done by the wrongdoer was primarily a wrong done to someone other

than the claimant, and the claimant is a person of whom, at the relevant time, the wrongdoer had no knowledge and who may then have been far away from the scene of the wrongdoer's act? This difficulty is particularly concerned with whether the wrongdoer owed any duty of care to the claimant. But that difficulty does not arise in the present case because in the present case there is no problem of proximity. The defendants knew about the plaintiff and unquestionably owed a duty of care to her not to start a fire in her house. If her claims for damage to the house and contents had not been settled, she would have brought the one action against the defendants in which she would have pleaded the negligence of the defendants in starting the fire and would have gone on to assert that, by reason thereof, she had suffered and was suffering damage and loss, which would be put under two headings, namely (1) damage to the house and contents and (2) damage for nervous shock. The issues at the trial, assuming the facts pleaded, including the psychiatric illness, were proved, would have been (a) causation and (b) foreseeability of the damage as a question of remoteness. I can see no good reason why, in such a context, the law should have refused to allow her damages for 'nervous shock' if she could get over the hurdles of causation and foreseeability as an aspect of remoteness. It cannot make any difference that in the event her claim for damage to the house and contents has been settled; the duty was none the less there.

I am not therefore prepared to hold that the fact that the shock which caused the plaintiff's assumed psychiatric illness was caused by damage to property must preclude her from recovering damages for 'nervous shock' even if it was reasonably foreseeable that she might suffer psychiatric illness as a consequence of the defendants' negligence in causing the fire in her house.

Are the defendants right, then, in asserting a priori that it was not reasonably foreseeable that the plaintiff might suffer any psychiatric illness as a result of their negligence in starting the fire? It is not necessary that any particular psychiatric illness should have been foreseen.

Whether it was reasonably foreseeable to the reasonable man, whether a reasonable onlooker, or, in the context of the present case, a reasonable gas fitter employed by the defendants to work in the plaintiff's house, is to be decided, not on the evidence of psychiatrists as to the degree of probability that the particular cause would produce the particular effect in a person of normal disposition or customary phlegm, but by the judge, relying on his own opinion of the operation of cause and effect in psychiatric medicine, treating himself as the reasonable man, and forming his own view from the primary facts as to whether the chain of cause and effect was reasonably foreseeable (see *McLoughlin v O'Brian* [1982] 2 All ER 298 at 312, [1983] 1 AC 410 at 432 per Lord Bridge). The good sense of the judge is, it would seem, to be enlightened by progressive awareness of mental illness ([1982] 2 All ER 298 at 320, [1983] 1 AC 410 at 443 per Lord Bridge). One consequence of this approach is, however, that the view of the courts as to what is reasonably foreseeable is, in this field, likely to lag behind informed medical opinion. Another consequence is that a view which finds favour with the courts at one time may well be considered unacceptable and out of date a few years later when progressive awareness has progressed further.

The question which the deputy judge asked himself in the present case was whether it was readily foreseeable by the defendants that the ordinary householder exposed to the experience undergone by the plaintiff might break down under the shock of the event and suffer psychiatric illness as opposed to grief and sorrow at losing one's home. If 'reasonably' is substituted for 'readily', as the judge probably intended, I would for my part indorse that as a correct direction. It is not, however, a test of probability as opposed to possibility.

Was the damage, in the way of psychiatric illness from shock, although of a different kind from the damage to the house itself and contents most obviously foreseeable, none the less itself foreseeable? Would the reasonable man, endowed with appropriately progressive awareness of mental illness, have regarded the danger of psychiatric illness from shock as so fantastic or far-fetched that he would have paid no attention to it or

would he have thought that it was something that the plaintiff might suffer from seeing her house and its contents in flames?

a That, if the house caught fire from the defendants' workmen's fault, the plaintiff would see and hear it burning was foreseeable. But how much she saw and heard, and how extensive was the damage to or destruction of the house and contents by the fire we are left to guess at on this preliminary issue. We are asked to say, in effect, that psychiatric illness caused by the shock can never, as a matter of fact rather than law, be a foreseeable consequence when a woman sees her home and its contents burning down. I am not prepared to make any such general a priori ruling on such scanty material. Whether the plaintiff's assumed illness caused by the shock was or was not a foreseeable consequence of the defendants' negligence must depend on the actual evidence given at the trial.

b Accordingly, I would allow this appeal, set aside the order of the deputy judge and leave this action to proceed to trial.

c It follows that the attempt to decide this action on a preliminary issue has, in my judgment, failed. But, in view of the expense and delays of litigation at the present time and of the difficult position of a defendant who is not legally aided when sued by a legally-aided plaintiff, I would not for my part criticise the parties' advisers at all for making the attempt.

d **WOOLF LJ.** There have now been a series of decisions by courts of the highest authority both in this country and in the Commonwealth dealing with the problems created by actions for damages where the plaintiff is seeking to recover compensation for psychiatric illness due to what has been colloquially called 'nervous shock'. On this appeal counsel on both sides relied on two of these decisions, namely the decision of the House of Lords in *McLoughlin v O'Brian* [1982] 2 All ER 298, [1983] AC 410 and the decision of the High Court of Australia in *Jaensch v Coffey* (1984) 54 ALR 417. However, the circumstances giving rise to the preliminary issue with which this appeal is concerned differ from the circumstances of those two decisions in two significant respects.

e The first difference is that in those two decisions the plaintiff was contending that she suffered her injuries because she had learnt that members of her family had been involved in a serious accident as a result of which they had either been killed or seriously injured while in this case no one had suffered any personal injury. The plaintiff alleges that her injury was caused in consequence of her seeing her home, of which she was proud, on fire, a fire which continued to burn for over four hours before the fire was brought under control by the fire brigade.

f The second difference is that in both of the earlier decisions the plaintiff had not witnessed the accident which caused the injuries to their respective families and the judgments therefore focused on the question as to whether the plaintiffs were owed a duty of care by the defendants, it being contended by both defendants that it could not be foreseen that their acts could injure the plaintiffs. However, in this case undoubtedly the defendants owed a duty of care to the plaintiff in respect of the damage which was caused to her home and indeed she has been compensated for this damage. Furthermore, g if the plaintiff, who entered the house to telephone the fire brigade, had been physically injured, as could have happened, then in relation to that physical injury the defendants would have owed her a duty of care and she would be entitled to be compensated by them for that injury. The problem raised by the preliminary issue is therefore whether the damage actually alleged to have been suffered by the plaintiff is too remote and is not whether there was a breach of a duty of care. The distinction between the two situations was discussed in eloquent terms by Denning LJ in *King v Phillips* [1953] 1 All ER 617 at 622-623, [1953] 1 QB 429 at 439:

'What is the reasoning which admits a cause of action for negligence if the injured person is actually struck, but declines it if he only suffers from shock? I cannot see why the duty of a driver should differ according to the nature of the injury. I should have thought that every driver was under a plain duty which he owed to everyone

in the vicinity. He ought to drive with reasonable care. If he drives negligently with the result that a bystander is injured, then his breach of duty is the same, no matter whether the injury is a wound or is emotional shock. Only the damage is different. The bystander may be so close as to be put in fear for himself, or he may be just a little way off and be shocked by fear for the safety of others. In either case he has been injured by the driver's negligence. If you view the duty of care in this way, and yet refuse to allow a bystander to recover for shock, it is not because there was no duty owed to him, nor because it was not caused by the negligence of the driver, but simply because it is too remote to be admitted as a head of damage. A different result is reached by viewing the driver's duty differently. Instead of saying simply that his duty is to drive with reasonable care, you say that his duty is to avoid injury which he can reasonably foresee, or, rather, to use reasonable care to avoid it. Then you draw a distinction between physical injury and emotional injury, and impose a different duty on him in regard to each kind of injury, with the inevitable result that you are driven to say there are two different torts, one tort when he can foresee physical injury, another tort when he can foresee emotional injury. I do not think that is right. There is one wrong only, the wrong of negligence. I know that damage to person and damage to property are for historical reasons regarded as different torts, but that does not apply to physical injury and emotional injury. LORD WRIGHT clearly treated impact and shock as one cause of action when he said in *Hay (or Bourhill) v. Young* ([1942] 2 All ER 405, [1943] AC 92 at 109): "The man who negligently allows a horse to bolt, or a car to run at large down a steep street, or a savage beast to escape is committing a breach of duty towards every person who comes within the range of foreseeable danger, whether by impact or shock . . ." The true principle, as I see it, is this. Every driver can and should foresee that, if he drives negligently, he may injure somebody in the vicinity in some way or other, and he must be responsible for all the injuries which he does in fact cause by his negligence to anyone in the vicinity, whether they are wounds or shocks, unless they are too remote in law to be recovered. If he does by his negligence in fact cause injury by shock, then he should be liable for it unless he is exempted on the ground of remoteness.'

The position must be the same if, instead of causing a traffic accident, what is being considered is causing a fire at someone's home. Later in the same judgment Denning LJ went on to say that whether the issue was one of duty of care or remoteness of damage, 'since *Hay (or Bourhill) v. Young* the test of liability for shock is foreseeability of injury by shock'. This dictum was expressly indorsed by Viscount Simonds when giving the judgment of the House of Lords in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound (No 1)* [1961] 1 All ER 404 at 415, [1961] AC 388 at 426.

However, notwithstanding the fact that the test both in the case of breach of duty and remoteness is foreseeability, it is helpful to identify the true nature of the problem in considering the two reasons relied on by the defendants for saying that it is possible on this preliminary issue to decide that the plaintiff cannot succeed in her action. Those reasons are (1) that the defendants could not reasonably foresee that, as a result of their being responsible for starting the fire, the plaintiff would suffer psychiatric injury and (2) that in any event as a matter of policy the law does not allow damages for psychiatric injury to be recovered in the absence of personal injury either to the plaintiff or a member of her family.

In *Jaensch v Coffey* (1984) 54 ALR 417 at 427 Brennan J, in a judgment in which he helpfully analysed virtually all the authorities on recovering damages for 'nervous shock', with regard to the test of foreseeability referred to the present rule in negligence as being that stated by Lord Reid in *The Heron II, Koufos v C Czarnikow Ltd* [1967] 3 All ER 686, [1969] 1 AC 350. In that case Lord Reid was considering foreseeability in the context of remoteness of damage. He said ([1967] 3 All ER 686 at 692, [1969] 1 AC 350 at 385):

a 'The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it ...'

In the same case a similar approach was adopted by Lord Upjohn, who said ([1967] 3 All ER 686 at 715-716, [1969] 1 AC 350 at 422):

b 'The test in tort, as now developed in the authorities, is that the tortfeasor is liable for any damage which he can reasonably foresee may happen as a result of the breach however unlikely it may be, unless it can be brushed aside as far fetched.'

In deciding the preliminary issue in favour of the defendants Sir Douglas Frank (before whom the issue was argued, as it was before this court, on the basis that it raised a question of duty of care) said:

c 'It is widely recognised that the burning of one's home can be a frightening experience and can give rise to a sense of grief and sorrow at the loss of all that is embodied in the word "home" and of one's possessions. It can result in great inconvenience and sometimes hardship. Nevertheless, the loss of possessions from various causes happens to a large proportion of the population. A burglary can not only result in the loss of valued and irreplaceable possessions but to some people it is a traumatic and frightening experience. Nevertheless, in my judgment the ordinary householder endures such incidents and the shock of them without suffering mental illness. I think that the same applies to nervous shock caused by a fire, albeit in one's own house, unless the fire caused injury which in turn triggered off the nervous shock. That is where I would draw the line. In my judgment, therefore, it was not reasonably foreseeable that the plaintiff would suffer mental illness as a result of the defendants' negligence and this action fails.'

Especially if the question of foreseeability is approached in the manner indicated by Lord Reid, as I consider it should be, the deputy judge was not entitled to come to this conclusion. I can conceive of circumstances where it would be readily foreseeable that f intense distress would be caused to an 'ordinary householder' who saw her home being destroyed by fire particularly if the process was as protracted as it appears to have been on the basis of the facts set out in the statement of claim, which for the purpose of the determination of the issue have to be assumed to be true. Such distress could well be of the order of the 'acute emotional trauma [which], like a physical trauma, can well cause a psychiatric illness in a wide range of circumstances and in a wide range of individuals' g (see Lord Bridge in *McLoughlin v O'Brian* [1982] 2 All ER 298 at 312, [1983] 1 AC 410 at 433).

It appears from the passage which I have quoted that the deputy judge came to his decision in favour of the defendants not only on the basis of foreseeability but also as a matter of policy in accordance with the second ground relied on by the defendants. With regard to this part of Sir Douglas Frank's judgment, differing views were taken by the members of the House of Lords in *McLoughlin v O'Brian* and by the members of the High Court of Australia in *Jaensch v Coffey* on the question whether, if the injury was foreseeable, liability could be excluded as a matter of policy. Fortunately, for the purposes of this appeal I do not consider that it is necessary to resolve this divergence of opinion. Even assuming that the test is not confined to being one of foreseeability, I cannot conceive that, if the injury which the plaintiff alleges that she suffered was a foreseeable consequence of the defendants' negligence, there could be any overriding policy reason for preventing her recovering damages. As I have already pointed out, she could well have sustained physical injuries as well as the psychiatric injuries of which she complains when she would have been entitled to damages and in my view there can be no reason of policy for distinguishing between the two types of injury.

In agreement therefore with the judgments of Dillon and Bingham LJ, which I have had the advantage of seeing in draft, I would allow this appeal. I would also not determine finally the preliminary issue in favour of the plaintiff on the facts before this court. Like Dillon and Bingham LJ, I consider that it is preferable that an issue of this sort should only be determined after the court has had an opportunity of exploring all the relevant facts as to liability. The statement of claim which contains the only facts before this court only indicates in outline the circumstances in which the plaintiff sustained her injuries. While the facts which are before this court do not disclose a situation where as a matter of law the plaintiff cannot succeed, whether she is entitled to succeed should only be finally determined after a trial.

BINGHAM LJ. The plaintiff's claim pleaded in this action is a simple one. She alleges that the defendants were installing central heating in her house and that a fire occurred as a result of the defendants' negligent work. This the defendants admit. The plaintiff further pleads that she returned home to see smoke coming from the loft of the house and then witnessed the burning of the house for over four hours until the fire was brought under control. This experience, she alleges, caused her 'nervous shock in the form of a serious psychological reaction evidenced by an anxiety state and depression'.

Her claim is accordingly one for what have in the authorities and the literature been called damages for nervous shock. Judges have in recent years become increasingly reticent at the use of this misleading and inaccurate expression, and I shall use the general expression 'psychiatric damage', intending to comprehend within it all relevant forms of mental illness, neurosis and personality change. But the train of events (all of which must be causally related) with which this action, like its predecessors, is concerned remains unchanged: careless conduct on the part of the defendant causing actual or apprehended injury to the plaintiff or a person other than the defendant; the suffering of acute mental or emotional trauma by the plaintiff on witnessing or apprehending that injury or witnessing its aftermath; psychiatric damage suffered by the plaintiff.

There is, however, one respect in which this case differs from all the decided cases, or almost all: *Owens v Liverpool Corp* [1938] 4 All ER 727, [1939] 1 KB 394 would appear to be an exception. Although the plaintiff suffered injury in that her home and presumably her possessions were burned and damaged, it is not said that she was at any time in fear for her own personal safety or that of anyone else, nor is it said that physical injury (as opposed to the psychiatric damage of which she complains) was suffered by anyone. It was no doubt this singular feature of the case which led the parties to agree to the trial of a preliminary issue:

'Can the plaintiff recover damages for nervous shock caused by witnessing her home and possessions damaged and/or destroyed by a fire caused by the defendants' negligence while installing central heating in the plaintiff's home?'

The parties are not to be criticised for adopting a procedure which they conscientiously believed would save costs and time. But it would, I think, have been better if the action had proceeded to trial, at any rate on liability, perhaps leaving the assessing of damages, if any, to a later date. For I think that there are, within the issue set down for trial, two distinct questions. One is a question of far-reaching legal principle: is a claim for damages for psychiatric damage suffered by one who has witnessed the destruction of her property, in the absence of any actual or apprehended physical injury, one that must necessarily fail as a matter of law? In the light of such illustrious precedents as *Donoghue (or M'Alister) v Stevenson* [1932] AC 562, [1932] All ER Rep 1 and *Dorset Yacht Co Ltd v Home Office* [1970] 2 All ER 294, [1970] AC 1004, questions such as this cannot be regarded as unsuitable for determination on (in effect) demurrer. But there is in this case a special feature to which I shall return, namely a pre-existing relationship between the defendants as contractors and the plaintiff as occupant of a house in which they were working. I would be happier deciding even this legal question against a background of full and

- a proven, rather than outline and assumed, facts. The second question is much more limited. It is whether on the facts pleaded it was reasonably foreseeable by the defendants that careless performance of their work might cause psychiatric damage to the plaintiff. This is a question of fact which, for reasons I shall give, cannot in my view be fairly decided at this stage.

The question of principle

- b As Lord Russell pointed out in *Hay (or Bourhill) v Young* [1942] 2 All ER 396 at 401, [1943] AC 92 at 101, what the defendant ought to have contemplated as a reasonable man is relevant both to testing the existence of a duty as the foundation of alleged negligence and to the question of remoteness of damage. The leading cases on psychiatric damage have very largely concentrated on examining what was reasonably foreseeable by the defendant in order to determine whether the careless defendant owed a duty of care to the particular plaintiff at all. This is understandable and perhaps inevitable. A defendant, however careless, cannot owe a duty of care towards the whole world. It is accordingly necessary to apply the tests of proximity and foreseeability derived from Lord Atkin's classic statement in *Donoghue v Stevenson* in order to define the class to whom the defendant owes a duty and decide whether the plaintiff falls within it. This is a particularly necessary exercise in the psychiatric damage cases, where the defendant will ordinarily have no awareness of the plaintiff as an individual before the act of carelessness occurs. Unless, therefore, it can be shown that the plaintiff is a person who is so closely and directly affected by the defendant's act that he ought reasonably to have him or her in contemplation as being so affected when he directs his mind to the acts or omissions which are called in question, the plaintiff cannot surmount the first hurdle which confronts any plaintiff in negligence, that of establishing a duty of care.
- e In this case the problem is somewhat different. Since the defendants were working in the house where the plaintiff lived, it must have been obvious to them that she would be so closely and directly affected by their performance of their work that they ought reasonably to have had her in contemplation as being so affected when they carried out the work. It is not, I think, contested that the defendants owed her a duty to take reasonable care to carry out the work so as to avoid damaging her home and property.
- f But it is said that the defendants owed her no duty to take reasonable care to carry out the work so as to avoid causing her psychiatric damage. This analytical approach cannot, I think, be said to be wrong, but it seems to me to be preferable, where a duty of care undeniably exists, to treat the question as one of remoteness and ask whether the plaintiff's psychiatric damage is too remote to be recoverable because it was not reasonably foreseeable as a consequence of the defendants' careless conduct. The test of reasonable foreseeability is, as I understand it, the same in both contexts, and the result should be the same on either approach. So the question in any case such as this, applying the ordinary test of remoteness in tort, is whether the defendant should reasonably have contemplated psychiatric damage to the plaintiff as a real, even if unlikely, result of careless conduct on his part.
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- h *McLoughlin v O'Brian* [1982] 2 All ER 298, [1983] AC 410 is the most recent House of Lords authority on psychiatric damage and the ratio of that decision is of course binding upon us. All members of the House were agreed that for the plaintiff in that case to succeed it was necessary for her to show that the psychiatric damage which she in fact suffered was a reasonably foreseeable result of the defendant's careless driving. A minority of the House (Lord Scarman and Lord Bridge) held that that, if causation was established,
- j was all that the plaintiff need show and that it was not for the courts on policy grounds to limit a right to recover for reasonably foreseeable psychiatric damage caused by the defendant. Lord Wilberforce and Lord Edmund-Davies, although agreeing in the result, rejected the contention that reasonable foreseeability was the sole test of liability for the consequences of wrongdoing. It was, they held, proper for the courts to limit on grounds of policy, within the larger class of those to whom psychiatric damage was reasonably

foreseeable, the class of those to whom a duty of care should be held to be owed. Lord Russell accepted policy as something which might in an appropriate case feature in a judicial decision, but saw no policy requirement to restrict the plaintiff's right to recover on the facts of that case. The majority ratio of this decision is, therefore, if I have correctly understood their Lordships' speeches, that reasonable foreseeability of psychiatric damage to the plaintiff is a necessary condition of a successful claim, but that even where reasonable foreseeability of such damage is shown a right to recover may be denied on grounds of policy.

Whether the psychiatric damage suffered by this plaintiff as a result of the carelessness of the defendants was reasonably foreseeable is not something which can be decided as a question of law. In considering the present question of principle reasonable foreseeability must for the present be assumed in the plaintiff's favour. So the question is whether, assuming everything else in the plaintiff's favour, this court should hold this claim to be bad in law because the mental or emotional trauma which precipitated the plaintiff's psychiatric damage was caused by her witnessing the destruction of her home and property rather than apprehending or witnessing personal injury or the consequences of personal injury.

It is submitted, I think rightly, that this claim breaks new ground. No analogous claim has ever, to my knowledge, been upheld or even advanced. If, therefore, it were proper to erect a doctrinal boundary stone at the point which the onward march of recorded decisions has so far reached, we should answer the question of principle in the negative and dismiss the plaintiff's action, as the deputy judge did. But I should for my part erect the boundary stone with a strong presentiment that it would not be long before a case would arise so compelling on its facts as to cause the stone to be moved to a new and more distant resting place. The suggested boundary line is not, moreover, one that commends itself to me as either fair or convenient. Examples which arose in argument illustrate the point. Suppose, for example, that a scholar's life's work of research or composition were destroyed before his eyes as a result of a defendant's careless conduct, causing the scholar to suffer reasonably foreseeable psychiatric damage. Or suppose that a householder returned home to find that his most cherished possessions had been destroyed through the carelessness of an intruder in starting a fire or leaving a tap running, causing reasonably foreseeable psychiatric damage to the owner. I do not think a legal principle which forbade recovery in these circumstances could be supported. The only policy argument relied on as justifying or requiring such a restriction was the need to prevent a proliferation of claims, the familiar floodgates argument. This is not an argument to be automatically discounted. But nor is it, I think, an argument which can claim a very impressive record of success. All depends on one's judgment of the likely result of a particular extension of the law. I do not myself think that refusal by this court to lay down the legal principle for which the defendants contend, or (put positively) our acceptance that a claim such as the plaintiff's may in principle succeed, will lead to a flood of claims or actions, let alone a flood of successful claims or actions. Insistence that psychiatric damage must be reasonably foreseeable, coupled with clear recognition that a plaintiff must prove psychiatric damage as I have defined it, and not merely grief, sorrow or emotional distress, will in my view enable the good sense of the judge to ensure (adopting Lord Wright's language in *Hay (or Bourhill) v Young* [1942] 2 All ER 396 at 405-406, [1943] AC 92 at 110) that the thing stops at the appropriate point. His good sense provides a better, because more flexible, mechanism of control than a necessarily arbitrary rule of law.

I would therefore answer this broad question of principle in favour of the plaintiff.

The question of fact

We were asked to determine, assuming the truth of the facts pleaded, whether psychiatric damage to the plaintiff was reasonably foreseeable by the defendants. This might fairly have been done in *McLoughlin v O'Brian*, where the plaintiff was the mother,

or in *Jaensch v Coffey* (1984) 54 ALR 417, where the plaintiff was the wife, of the alleged tortfeasor's immediate victim, although in each of those cases there was a full trial. But one must be very cautious in determining questions of fact on assumed facts, and the risk of doing so unfairly to one side or the other is increased where, as here, the parties were by no means strangers to each other before the careless act occurred. In deciding what the defendants should reasonably have foreseen I would wish to have a much fuller picture than pleadings can give of the plaintiff's personality and circumstances as manifested to, and known by, the defendants. I therefore decline to answer this question because I do not think it is fairly answerable on existing materials at this stage.

I am accordingly of opinion that this appeal should be allowed. The case should be remitted to a judge for trial of all live issues related to reasonable foreseeability, causation and damage on the footing that, if the plaintiff succeeds on all these issues, her claim may in principle be upheld. Whether the parties wish to defer the assessment of damages, if any, is a question for them.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Fremont & Co* (for the plaintiff); *P H Deacon*, Staines (for the defendants).

Vivian Horvath Barrister.

Business Computers International Ltd v Registrar of Companies and others

CHANCERY DIVISION

SCOTT J

18, 19 JUNE 1987

Negligence – Duty to take care – Litigation – Conduct of litigation – Defendant serving winding-up petition on company – Petition served at wrong address – Company wound up without knowing of winding-up proceedings – Company subsequently incurring costs in setting aside order and suffering damage to reputation – Company claiming damages for defendant's negligence in serving petition at wrong address – Whether defendant owing duty of care to company in relation to service of petition – Whether litigant owing duty of care to another litigant in conduct of litigation.

The second defendant, which claimed to be the assignee of a debt owed by the plaintiff company, presented a petition to wind up the plaintiff company based on its failure to pay the alleged debt. The petition was duly advertised but served at the wrong address, so that the plaintiff company was unaware of it. The petition came before the Companies Court and a winding-up order was made. When the plaintiff discovered that the winding-up order had been made, it applied to have it set aside. The plaintiff then claimed damages against, inter alios, the second defendant for negligence in serving the petition at the incorrect address and subsequently advertising a petition which had not been duly served. The plaintiff alleged that the second defendant, as petitioner, owed it a duty to take reasonable care to ensure that the registered office of the plaintiff was correctly stated in the petition, that the matters in the petition were properly verified and that the petition was properly served at the plaintiff's registered office. The plaintiff claimed damages, including costs of over £8,000 incurred in having the winding-up order set aside, expenditure of over £90,000 in promoting its existing name or alternatively devising, promoting and publicising another trading name by reason of having to

abandon its existing name, and damages for loss of goodwill in its existing name. The second defendant applied to have the claim struck out as disclosing no reasonable cause of action. a

Held – A litigant did not owe a duty of care to another litigant regarding the manner in which the litigation was conducted, whether in regard to service of process or any other step in the proceedings, since the safeguards against impropriety in the conduct of litigation were to be found in the rules and procedure that controlled litigation rather than tortious remedies. Since the damage suffered by the plaintiff was caused by the legal process instituted by the defendant and the winding-up order of the court, such damage was not remediable in an action based on negligence, and the statement of claim would be struck out as disclosing no reasonable cause of action against the second defendant (see p 472 f to j and p 473 e to h, post). b

Dicta of Lord Keith in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER at 534 and of Sir John Donaldson MR in *Orchard v South Eastern Electricity Board* [1987] 1 All ER at 99 applied. c

Yuen Kun-yeu v A-G of Hong Kong [1987] 2 All ER 705 considered.

Marrinan v Vibart [1962] 3 All ER 380 and *Rondel v Worsley* [1967] 3 All ER 993 distinguished. d

Notes

For the duty to take care, see 34 Halsbury's Laws (4th edn) paras 5–6 and for cases on the subject, see 36(1) digest (Reissue) 17–32, 34–103.

Cases referred to in judgment

Ann's v Merton London Borough [1977] 2 All ER 492, [1978] AC 728, [1977] 2 WLR 1024, HL. e

Cabassi v Vila (1940) 64 CLR 130, Aust HC.

Donoghue (or M'Alister) v Stevenson [1932] AC 562, [1932] All ER Rep 1, HL.

Hill v Chief Constable of West Yorkshire [1987] 1 All ER 1173, [1987] 2 WLR 1126, CA.

Home Office v Dorset Yacht Co Ltd [1970] 2 All ER 294, [1970] AC 1004, [1970] 2 WLR 1140, HL. f

Kelly v London Transport Executive [1982] 2 All ER 842, [1982] 1 WLR 1055, CA.

Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon [1986] 2 All ER 145, [1986] AC 785, [1986] 2 WLR 902, HL.

McLoughlin v O'Brian [1982] 2 All ER 298, [1983] 1 AC 410, [1982] 2 WLR 982, HL.

Marrinan v Vibart [1962] 3 All ER 380, [1963] 1 QB 528, [1962] 3 WLR 912, CA; *affg* [1962] 1 All ER 869, [1963] 1 QB 234, [1962] 2 WLR 1224. g

Myers v Elman [1939] 4 All ER 484, [1940] AC 282, HL.

Orchard v South Eastern Electricity Board [1987] 1 All ER 95, [1987] QB 565, [1987] 2 WLR 102, CA.

Peabody Donation Fund (Governors) v Sir Lindsay Parkinson & Co Ltd [1984] 3 All ER 529, [1985] AC 210, [1984] 3 WLR 953, HL. h

Radiojevic v LR Industries Ltd [1984] CA Transcript 514.

Rondel v Worsley [1967] 3 All ER 993, [1969] 1 AC 191, [1967] 3 WLR 1666, HL.

Watson v M'Ewan, Watson v Jones [1905] AC 480, [1904–7] All ER Rep 1, HL.

Yuen Kun-yeu v A-G of Hong Kong [1987] 2 All ER 705, [1987] 3 WLR 776, PC.

Motion

By writ of summons issued on 4 February 1987 the plaintiff, the Business Computers International Ltd, claimed damages for negligence against the defendants, the Registrar of Companies, Alex Lawrie Factors Ltd, Monorell Ltd, Noleen Mullins and ICC Information Group Ltd. By notice of motion dated 10 April 1987 the second defendant applied to the court for an order that the plaintiff's claim against it be struck out on the ground that it disclosed no reasonable cause of action. The facts are set out in the judgment. i

Michael F Harris for the second defendant.

a John Martineau for the plaintiff.

The other defendants did not appear or were not represented.

Cur adv vult

b

19 June. The following judgment was delivered.

SCOTT J. I have before me an application by the second defendant, Alex Lawrie Factors Ltd, that the claim made against it by the plaintiff, Business Computers International Ltd, be struck out on the ground that the claim discloses no reasonable cause of action.

c

The circumstances which give rise to the claim are unusual. The second defendant claimed to be the assignee of a debt owed by the plaintiff. On 11 June 1986 the second defendant presented a petition to wind up the plaintiff. The petition was based on the plaintiff's failure to pay the alleged debt. In the petition the plaintiff's registered office was stated to be '65, Castleton Avenue, Wembley'. The second defendant served the

d

petition at 65 Castleton Avenue, Wembley. Subsequently the petition was advertised. On 21 July 1986 the petition came before the Companies Court. Nobody appeared for the plaintiff, and the usual winding-up order was made. 65 Castleton Avenue was not in fact the registered office of the plaintiff. The plaintiff's registered office was at 5-7 Singer Street, London EC2. The circumstances which gave rise to the error in the petition and to the service of the petition at 65 Castleton Avenue are not relevant to the application

e

before me. Suffice it to say that the other defendants in the plaintiff's action include the Registrar of Companies, Monorell Ltd, whose registered office was at the material time 65 Castleton Avenue, and one of the directors of Monorell Ltd.

Having learnt of the winding-up order the plaintiff at once applied to the Companies Court for the order to be set aside. The order was set aside. The plaintiff contends that it has suffered damage caused by the winding-up order.

f

The writ in this action was issued on 4 February 1987 and was accompanied by a statement of claim. I will read the paragraphs of the statement of claim that plead the plaintiff's case against the second defendant:

g

'4(a) On or about 26th June 1985 the Plaintiff duly presented to the Registrar Form 4A dated 26th June 1985 notifying the Registrar that its registered office was 5/7 Singer Street, London EC2 (being the office of the Plaintiff's accountants). . . Such forms were all duly recorded by the Registrar. . . 9 The Second Defendant is

h

and was at all material times a company engaged in the business of debt factoring. 10 At the material time the Second Defendant believed that there had been assigned to it by Trinitec Limited a debt owed to Trinitec by the Plaintiff. (The Plaintiff disputes that the debt to Trinitec was in fact owed by the Plaintiff but such dispute is not material to these proceedings). 11 On a date unknown to the Plaintiff, the Second Defendant acting by itself or its agent, searched in the Plaintiff's Register at the Companies Registry and recorded the registered office of the Plaintiff as being 65 Castleton Avenue, Wembley, Middlesex. . . 13 On the 11 June 1986 the Second Defendant presented a Petition for the compulsory winding up of the Plaintiff,

j

based upon the aforesaid alleged debt. In so doing, the Second Defendant owed a duty to the Plaintiff to take reasonable steps to ensure that the registered office of the Plaintiff was correctly stated in the Petition, that the matters alleged in the Petition could be conscientiously verified and that the Petition was properly served on the Plaintiff's registered office. 14 In the Petition it was falsely alleged that the Plaintiff's registered office was 65 Castleton Street. The Second Defendant then purported to serve the Petition at 65 Castleton Avenue aforesaid and subsequently advertised the Petition. 15 The Petition did not come to the notice of the Plaintiff prior to its hearing in High Court of Justice on 21st July 1986 at which hearing it

was ordered, in the absence of the Plaintiff, that the Plaintiff should be compulsorily wound up. 16 On 23rd July 1986 the Plaintiff first became aware of the Petition and that a winding up order had been made against it when it was so informed by the Official Receiver acting as provisional liquidator of the Plaintiff. . . 20 In acting as pleaded in para 14 above the Second Defendant acted negligently and in breach of its duty pleaded in Para 13 above . . .

Particulars of Negligence

(1) If the Second Defendant made its only search prior to 21st May 1986, failing to search the Register at a time immediately before presentation of the Petition (at which time the Plaintiff's registered office was correct). (2) If the Second Defendant made its only or any search after 21st May 1986, recording or confirming the Plaintiff's registered office incorrectly from Form 9B instead of from the then correct Form 4A, alternatively failing to appreciate that the Plaintiff's Registered Office was 5-7 Singer Street. (3) Whenever the Second Defendant searched, failing to observe that the registered office of 65 Castleton Avenue was for a company with a completely different name from the Plaintiff's, without any change of name having been registered, and to query the correctness of the supposed registered office. (4) Whenever the Second Defendant searched, failing to observe the inconsistencies in the documentation on the Plaintiff's Register and to query the correctness of the supposed registered office. (5) In any event verifying the Petition in the circumstances mentioned above. (6) In any event and in all the circumstances serving the Petition on an address which was not even purportedly the Plaintiff's registered office and had not been since 21st May 1986, either at all, or alternatively without a fresh search, or alternatively without enquiry or notification to the address previously shown as the Plaintiff's registered office namely 5-7 Singer Street.

21 By reason of the negligence of the Registrar or of the Second, Third, Fourth and/or Fifth Defendants or some one or more of them, the Plaintiff has suffered loss and damage including at least the following items.

Particulars of Damage

(1) Costs incurred in connection with application to prevent perfection of the winding up order and to rescind the same, including legal fees and accountant's fees, amounting to not less than £8,197.50. (2) Wasted expenditure on promoting and publicising the name of "Business Computers International", alternatively expenditure incurred in devising, promoting and publicising an alternative trading name to "Business Computers International", by reason of having to abandon such name through damage to its reputation, amounting to not less than £93,134.00. (3) Loss of goodwill in the name "Business Computers International Limited". The Plaintiff will supply further particulars of damage upon the enquiry as to damages which it will ask the Court to order.

The prayer for relief claims damages for negligence.

The plaintiff's action against the second defendant is, therefore, an action in negligence. The alleged negligent conduct was the inclusion of the incorrect address in the winding-up petition, the service of that petition at the incorrect address and the advertisement of a petition which had, in the event, never been properly served.

The second defendant's application to strike out was dated 10 April 1987.

The question for decision is whether the pleading that I have read discloses a reasonably arguable cause of action against the second defendant.

Counsel for the second defendant has presented an attractively simple argument. The alleged negligence was negligence in the presentation and prosecution of a winding-up petition. A claim based on the improper commencement or prosecution of legal proceedings can only be entertained as an action for malicious prosecution: malice is required. Negligence does not suffice. A tortious duty of care is not owed by one litigant to another.

Counsel supported these propositions by references to authority. In *Radivojevic v LR*

Industries Ltd [1984] CA Transcript 514 the first instance judge had dismissed the plaintiff's claim for damages against the defendants for maliciously bankrupting him. The Court of Appeal dismissed the plaintiff's appeal. I have been supplied with a transcript of the judgments in the Court of Appeal. May LJ said:

'Although such a claim does not come frequently before the courts, an action does lie in respect of injury to reputation caused by maliciously and unreasonably commencing liquidation proceedings against a company, or bankruptcy proceedings against an individual. It is necessary to show, first, that the proceedings terminated favourably in favour of the plaintiffs; secondly that there was absence of reasonable and probable cause for bringing them; and thirdly, that there was malice or improper motive'.

It is implicit in the decision that the commencement of bankruptcy proceedings or the presentation of a winding-up petition cannot found an action in damages unless associated with malice.

It is clear also that a civil action can never be based on the falsity of evidence given in judicial proceedings. In *Marrinan v Vibart* [1962] 3 All ER 380, [1963] 1 QB 528 the plaintiff alleged that two police officers had conspired to give false evidence about him, firstly, in a report to the Director of Public Prosecutions, secondly at a trial at the Central Criminal Court and thirdly at an inquiry before the benchers of his Inn of Court. Salmon J held that the statement of claim disclosed no cause of action. The Court of Appeal dismissed the plaintiff's appeal. Sellers LJ cited with approval the following passage from the judgment of Starke J in *Cabassi v Vila* (1940) 64 CLR 130 at 140:

'No action lies in respect of evidence given by witnesses in the course of judicial proceedings, however false and malicious it may be, any more than it lies against judges, advocates or parties in respect of words used by them in the course of such proceedings or against juries in respect of their verdicts . . . the rule of law is that no action lies against witnesses in respect of evidence prepared (*Watson v. M'Ewan*, *Watson v. Jones* ([1905] AC 480, [1904-7] All ER Rep 1)), given, adduced or procured by them in the course of legal proceedings. The law protects witnesses and others, not for their benefit, but for a higher interest, namely, the advancement of public justice.'

(See [1962] 3 All ER 380 at 383-384, [1963] 1 QB 528 at 536.)

In the present case the winding-up petition must have been verified by an affidavit sworn on behalf of the second defendant. That affidavit must, therefore, have verified 65 Castleton Avenue as the registered office of the plaintiff. There must also have been an affidavit deposing to service of the petition on the plaintiff at its registered office. Both these affidavits must, if the plaintiff's pleaded case is right, have been negligently false. *Marrinan v Vibart* establishes that an action cannot be based on the falsity of these affidavits.

Counsel for the second defendant referred me also to *Rondel v Worsley* [1967] 3 All ER 993, [1969] 1 AC 191 in support of his submission that the negligent prosecution of an action cannot be made the basis of an action in damages for negligence. The facts of the case are too well known to need rehearsing. Lord Pearce said ([1967] 3 All ER 993 at 1024-1025, [1969] 1 AC 191 at 268):

'It is a hardship that a man who has done no wrong should be subjected by a plaintiff to a baseless charge, in meeting which he will incur large expense. The charge may be reported largely in newspapers and injure his reputation . . . But the basic hardship is inevitable and will always remain, namely, that any plaintiff can use the legal machine as a sounding board for untruthful allegations and cause harm, trouble and expense to an innocent defendant, and yet the law holds him (and the press who report the case) immune from paying damages for their untruth. Yet to remove this immunity would create a great injury to justice. Without it, the

honest litigant might not dare to bring an honest claim for fear that if he fails he might be sued for damages.' a

Counsel for the plaintiff emphasised that the plaintiff's claim in negligence against the second defendant was not based on the incorrect statement in the petition of the plaintiff's registered office and was not based on the falsity of the affidavit verifying the petition or on the falsity of the affidavit of service. He accepted that a claim so based would be barred by the authorities on which counsel for the second defendant relied. The plaintiff's claim, he said, was based on the second defendant's negligent failure to serve the petition on the plaintiff. That failure had deprived the plaintiff of the opportunity of taking steps to prevent the advertisement of the petition and the making of the winding-up order. The need for a petitioner to take care that his winding-up petition was properly served on the respondent company was, counsel submitted, manifest. The potential damage to the respondent company if care were not taken demonstrated the need. Counsel for the plaintiff distinguished *Marrinan v Vibart* as being concerned only with the position of witnesses. He distinguished *Rondel v Worsley* as being concerned with a claim arising out of the conduct of a trial. There was, he submitted, no authority which prevented a duty of care in regard to proper service of proceedings from being imposed on petitioners. b c

As to counsel for the second defendant's malicious prosecution point, the requirement of malice for malicious prosecution was, submitted counsel for the plaintiff, no more of a bar to the plaintiff's negligence action than the requirement of dishonesty in an action for deceit was a bar to an action for negligent mis-statement. d

I accept that both *Marrinan v Vibart* and *Rondel v Worsley* are distinguishable on their facts. And I accept that the availability of an action for malicious prosecution where malice can be shown is not a conclusive answer to the plaintiff's negligence action.

The propriety of the plaintiff's negligence action against the second defendant depends, in my judgment, on the proposition that a person who institutes legal process owes a duty of care to the respondent or defendant in regard to service of the proceedings. Naturally enough counsel for the plaintiff confined his submissions to winding-up petitions. He accepted that bankruptcy petitions would be on all fours with winding-up petitions. But he did not accept that the same principles would necessarily apply to ordinary actions. For my part, I can see no reasonable ground of distinction. Any and every inter partes originating process is capable of leading to an order against the defendant. If a defendant does not appear an order may be made against him in his absence. No doubt an affidavit of service would be required before the order was made. But if the affidavit was in regular form the court would not usually question whether the address given for service was the correct address. If the originating process gave the wrong address for the defendant and the service thereof was made at the wrong address, an order might well be made against the absent defendant. The order might cause considerable damage before it could be set aside. The damage could be said to have been caused by the negligent default of the plaintiff in correctly identifying the address of the defendant and in serving the originating process at that correct address. e f g

In my view, if the second defendant owed a duty of care as alleged in the present case, every petitioner or plaintiff would have a like duty. h

There is, as counsel for the plaintiff pointed out, no authority which establishes that an action for damage caused to a defendant by the negligent failure of a plaintiff to effect proper service on him of the originating process cannot be brought. Equally, there is no authority which establishes that such an action can be brought. Counsel relied, therefore, on the *Donoghue v Stevenson* neighbour principle (see *Donoghue (or M'Alister) v Stevenson* [1932] AC 562, [1932] All ER Rep 1). It is foreseeable, he submitted, that failure to serve at the right address may result in damage to the defendant. So, he submitted, the neighbour principle established by *Donoghue v Stevenson* justifies imposing on plaintiffs and petitioners a duty to take reasonable care to serve at the correct address. In my judgment, however, this argument is too superficial. A number of recent cases in the House of Lords and the Privy Council have established that foreseeability of harm does j

a not of itself automatically lead to the imposition of a duty of care. In *Anns v Merton London Borough* [1977] 2 All ER 492 at 498, [1978] AC 728 at 751 Lord Wilberforce said:

b '... the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ...'

In *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529 at 533, [1985] AC 210 at 239 Lord Keith said:

d 'Lord Atkin's famous enunciation of the general principles on which the law of negligence is founded, in *Donoghue v Stevenson* [1932] AC 562 at 580, [1932] All ER Rep 1 at 11, has long been recognised as not intended to afford a comprehensive definition, to the effect that every situation which is capable of falling within the terms of the utterance and which results in loss automatically affords a remedy in damages.'

e Lord Keith then referred to *Home Office v Dorset Yacht Co* [1970] 2 All ER 294, [1970] AC 1004 and to Lord Wilberforce's remarks in *Anns v Merton London Borough* and went on to say [1984] 3 All ER 529 at 534, [1985] AC 210 at 240):

f 'There has been a tendency in some recent cases to treat these passages as being themselves of a definitive character. This is a temptation which should be resisted. The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case ... So in determining whether or not a duty of care of particular scope was incumbent on a defendant it is material to take into consideration whether it is just and reasonable that it should be so.'

g In *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] 2 All ER 145 at 153, [1986] AC 785 at 815 Lord Brandon said this about Lord Wilberforce's remarks in *Anns v Merton London Borough*:

h 'Lord Wilberforce was dealing, as is clear from what he said, with the approach to the questions of the existence and scope of a duty of care in a novel type of factual situation which was not analogous to any factual situation in which the existence of such a duty had already been held to exist.'

The present case involves, I think, that novel type of factual situation.

j The most recent decision is that of the Privy Council in *Yuen Kun-yeu v A-G of Hong Kong* [1987] 2 All ER 705, [1987] 3 WLR 776. Lord Keith said this of Lord Wilberforce's dictum in *Anns v Merton London Borough*:

'... there are two possible views of what Lord Wilberforce meant. The first view ... is that he meant to test the sufficiency of proximity simply by the reasonable contemplation of likely harm. The second view ... is that Lord Wilberforce meant the expression "proximity or neighbourhood" to be a composite

one, importing the whole concept of necessary relationship between plaintiff and defendant described by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at 580, [1932] All ER Rep 1 at 11. In their Lordships' opinion the second view is the correct one. As Lord Wilberforce himself observed in *McLoughlin v O'Brian* [1982] 2 All ER 298 at 303, [1983] 1 AC 410 at 420, it is clear that foreseeability does not of itself, and automatically, lead to a duty of care . . . Foreseeability of harm is a necessary ingredient of such a relationship, but it is not the only one.' a

(See [1987] 2 All ER 705 at 710, [1987] 3 WLR 776 at 783.) Then a little further on Lord Keith said ([1987] 2 All ER 705 at 712, [1987] 3 WLR 776 at 785): b

'The second stage of Lord Wilberforce's test is one which will rarely have to be applied. It can arise only in a limited category of cases where, notwithstanding that a case of negligence is made out on the proximity basis, public policy requires that there should be no liability. One of the rare cases where that has been held to be so is *Rondel v Worsley* [1967] 3 All ER 993, [1969] 1 AC 191, dealing with the liability of a barrister for negligence in the conduct of proceedings in court. Such a policy consideration was invoked in *Hill v Chief Constable of West Yorkshire* [1987] 1 All ER 1173, [1987] 2 WLR 1126 . . . In view of the direction in which the law has since been developing, their Lordships consider that for the future it should be recognised that the two-stage test in *Anns* is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.' c

In the present case counsel for the plaintiff is contending for 'a duty of care in a novel type of factual situation which [is] not analogous to any factual situation in which the existence of such a duty had already been held to exist' (per Lord Brandon in *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] 2 All ER 145 at 153, [1986] AC 785 at 815). So, as Lord Keith observed in the *Yuen Kun-yeu* case, the second stage of Lord Wilberforce's test becomes relevant. The right approach is, I think, summarily expressed by Lord Keith's dictum in the *Peabody* case [1984] 3 All ER 529 at 534, [1985] AC 210 at 241 that 'in determining whether or not a duty of care of particular scope was incumbent on a defendant it is material to take into consideration whether it is just and reasonable that it should be so'. d

Is it just and reasonable that a plaintiff should owe a duty of care to a defendant in regard to service of the originating process? I do not think that it is. The plaintiff and the defendant, the petitioner and the respondent, are antagonists. The plaintiff, or the petitioner, is seeking a legal remedy in an adversarial system. The system stipulates the rules and requirements that must be observed by the two parties. The plaintiff must issue his process and must serve it on the defendant. If there is default in service the process may be struck out. If an order is obtained without the prescribed rules or regulations having been observed, the order may be discharged or set aside, sometimes by an application at first instance, sometimes on appeal. The prosecution of the action or of the petition is subject throughout its career from institution to final judgment to judicial control. Service of process is a step, and usually an essential step, in the prosecution. It must usually be proved before an order can be obtained against an absent defendant. The proposition that a duty of care is owed by one litigant to another and can be superimposed on the checks and safeguards that the legal system itself provides is, to my mind, conceptually odd. The safeguards against ineffective service of process ought to be, and I think must be, found in the rules and procedures that govern litigation. The rules and procedures require that, save on ex parte applications, proof of service be shown before an order is made against an absent party. If the proof of service is false, be it through negligence or design, an order may be made that should not have been made. The injured party's remedy is to have the order set aside. An action for damages cannot be based on the falsity of the proof of service. Nor, in my judgment, can the adequacy of the efforts made to effect service be subjected to a tortious duty of care. e
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a It would, I suppose, be possible for an undertaking in damages to be required to be given by every plaintiff or petitioner who obtained a final order against an absent defendant or respondent in case the proof of service of process turned out to be false. If that were ever to become the practice it would protect parties in the position of the plaintiff. The practice would become part of the rules and regulations governing the prosecution of actions and would represent an additional safeguard against the damage that might be caused to a defendant by inadequate efforts by a plaintiff to effect proper service. But there is no such practice.

b In *Kelly v London Transport Executive* [1982] 2 All ER 842 at 850–851, [1982] 1 WLR 1055 at 1064–1065 Lord Denning MR, in an obiter passage, suggested that a tortious duty of care might be owed by the solicitors of a legally aided party to the other party. This passage was commented on by Sir John Donaldson MR in *Orchard v South Eastern Electricity Board* [1987] 1 All ER 95 at 99, [1987] QB 565 at 571. He pointed out that Lord Denning MR's remarks were not supported by the other two members of the court, and then said:

d 'I have quoted from the judgment [of Lord Denning] at some length for two reasons. First, because it provides a useful summary of the duties of a solicitor acting for a legally-aided client. Whether that duty is owed to the opposing party is open to considerable doubt, at least where the solicitor is acting with the authority of his client and is not carrying on the litigation on his own account. However, the duty is undoubtedly owed to the court (see *Myers v Elman* [1939] 4 All ER 484 at 497, [1940] AC 282 at 302 per Lord Atkin) the duty being to conduct the litigation with due propriety, and the court may, in the exercise of its traditional jurisdiction over its own officers, order the solicitor to compensate the opposing party where the solicitor is in breach of that duty to the court.'

e I take this passage from Sir John Donaldson MR's judgment as supporting the view that I have endeavoured to express, namely that control of litigation and of the various steps taken in prosecuting litigation lies in the court and the rules and procedures that govern litigation and cannot be sought via a tortious duty of care imposed on one party for the benefit of the other.

f This view is not, in my opinion, undermined but is reinforced by the facts of the present case. Counsel for the plaintiff has submitted forcefully that the plaintiff has been damnified, through no fault of its own, and that, on the plaintiff's pleaded case, the damage would not have happened had the second defendant exercised proper care in ascertaining the correct address of the plaintiff's registered office. All this I am prepared to accept. But the damage of which the plaintiff complains was caused by the legal process instituted by the second defendant and by the winding-up order made by the court. Damage of this character is not, in my judgment, apt to be remediable in an action based on tortious negligence.

g In my judgment, there is no duty of care owed by one litigant to another as to the manner in which the litigation is conducted, whether in regard to service of process or in regard to any other step in the proceedings. The safeguards against impropriety are to be found in the rules and procedure that control the litigation and not in tort.

h I am therefore of opinion that the plaintiff's statement of claim does not disclose a reasonable cause of action against the second defendant and ought to be struck out.

Action dismissed as against second defendant. Leave to appeal granted.

j Solicitors: *Sweepstone Walsh & Son* (for the second defendant); *Barry Posner Pentol & Co* (for the plaintiff).

Jacqueline Metcalfe Barrister.

Wandsworth London Borough Council v Fadayomi and another

COURT OF APPEAL, CIVIL DIVISION
PARKER LJ AND SIR GEORGE WALLER
10 JULY 1987

Rent restriction – Possession – Action for possession – Parties – Tenant's family – Husband and wife living in council flat but separated pending divorce – Council obtaining possession of flat by consent order made against husband – Council required to provide alternative accommodation for tenant and family – Whether wife entitled to separate alternative accommodation – Whether wife entitled to be joined as party to possession proceedings – Whether consent order void – Housing Act 1985, s 84(2)(b), Sch 2, Pt II, ground 10, Pt IV, para 1.

The husband and wife were secure tenants of a council flat which was in the husband's name and which they occupied with two of their daughters. The marriage broke down and divorce proceedings were instituted but before they were concluded the council brought proceedings against the husband claiming possession of the flat under ground 10^a in Pt II of Sch 2 to the Housing Act 1985 in order to carry out repairs and alterations. Under s 84(2)(b)^b of the 1985 Act the court was required, before making a possession order, to be satisfied that 'suitable accommodation', within para 1^c of Pt IV of Sch 2, would be available for the tenant and his family when the order took effect. At the hearing of the council's application the registrar refused an application by the wife to be joined as a party to the possession action and made an order for possession against the husband by consent. An appeal by the wife to the county court was dismissed and she appealed to the Court of Appeal, contending that she was entitled to be heard in the possession proceedings because, in view of the divorce proceedings, suitable accommodation for the tenant and his family meant in her case separate suitable accommodation for herself and her daughters.

Held – Since the court could not make an order for possession under s 84(2)(b) of the 1985 Act unless it was satisfied, as required by para 1 of Pt IV of Sch 2 to that Act, that suitable accommodation would be available for 'the tenant and his family' it followed that every member of the tenant's family living in the premises was a person with a potential interest in any possession proceedings and was entitled to be joined as a party to those proceedings. Furthermore, the court had no jurisdiction to make a possession order simply by consent; the matters specified in s 84 had to be established or express admissions of fact made before such an order could be made by consent. Since the wife clearly had an interest in the possession proceedings and ought to be allowed to present her case the appeal would be allowed and the possession order set aside (see p 478 c to e, p 479 c f g j and p 480 a b d, post).

Notes

For possession of a dwelling house let under a secure tenancy and the meaning of 'suitable accommodation', see 27 Halsbury's Laws (4th edn) paras 877, 879.

For the Housing Act 1985, s 84, Sch 2, Pts II, IV, see 21 Halsbury's Statutes (4th edn) 108, 505, 508.

Cases referred to in judgments

Barton v Fincham [1921] 2 KB 291, [1921] All ER Rep 87, CA.

^a Ground 10 is set out at p 477 g h, post

^b Section 84(2), so far as material, is set out at p 477 f, post

^c Paragraph 1 is set out at p 477 j to p 478 a, post

Plaschkes v Jones (1982) 9 HLR 110, CA.

- a *R v Bloomsbury and Marylebone County Court, ex p Blackburne* (1984) 14 HLR 56; *affd* [1985] 2 EGLR 157, CA.

Thorne v Smith [1947] 1 All ER 39, [1947] KB 307, CA.

Case also cited

- b *Sheehan v Cutler* [1946] KB 339, CA.

Appeal

- c Florence Abiowa Fadayomi (the wife) appealed against the decision of Mr Brian Atchley sitting as an assistant recorder in the Wandsworth County Court on 15 May 1987 whereby he dismissed an appeal by the wife against the decision of Mr Registrar Price given on 29 April 1987 dismissing her application to intervene in possession proceedings regarding the property at 92 Arthur Court, Charlotte Despard Avenue, London SW11, brought by the Wandsworth London Borough Council against Emmanuel Iranola Fadayomi (the husband) and refusing to set aside a possession order made on 25 March 1987. The facts are set out in the judgment of Parker LJ.

- d *Lincoln Crawford* for the wife.
David Medhurst for the council.
David Watkinson for the husband.

- e **PARKER LJ.** This is an appeal from the refusal on 15 May 1987 of Mr Brian Atchley sitting as an assistant recorder to allow an appeal by the present appellant, Mrs Fadayomi, from a refusal by Mr Registrar Price on 29 April 1987 to allow her to intervene in a possession action brought by the respondents, Wandsworth London Borough Council, against Mr Fadayomi in respect of flat 92, Arthur Court, Battersea. She now appeals to this court seeking to be given leave to intervene or to join as a defendant and for the possession order to be set aside.

- f The history of the proceedings and, indeed, the occupation of 92 Arthur Court needs to be set out in a little detail. Mr and Mrs Fadayomi, who have four daughters, first went to live in 92 Arthur Court in 1971. They are, or were until the possession order was made, secure tenants of the flat. The two eldest daughters have now left and have accommodation of their own, but the flat remained in the occupation of Mr and Mrs Fadayomi and the two youngest daughters up to the time of the possession order. From about 1985 the council have wished to obtain possession of flat 92 in order that they might carry out certain works which are alleged to fall within ground 10 in Pt II of Sch 2 to the Housing Act 1985.

- g A number of offers of alternative accommodation were made to the family as one unit up until August 1986, when, owing to the fact that the marriage had to a large extent broken down, Mr and Mrs Fadayomi requested that the alternative accommodation should consist of two units, one for Mr Fadayomi and the other for Mrs Fadayomi and her two daughters. In August 1986 the council initiated the preliminary steps which are required before possession can be obtained under the Housing Act 1985. Notwithstanding that, since August 1986 they have made four offers of accommodation to Mr and Mrs Fadayomi, in each case the offer having been of separate accommodation for him on the one side and for her and her two children on the other. All offers of accommodation have been refused for one reason or another and it is not for this court to consider whether the reasons why they were refused were good or bad. The reason for the desire to have separate accommodation is because, the marriage having broken down, Mr Fadayomi at any rate finds it to all intents and purposes intolerable to continue to live with his wife and children. Therefore, both sides wish to separate and have separate accommodation.

Mrs Fadayomi has been the breadwinner throughout the period, Mr Fadayomi being

disabled, and, in some cases at least, the refusal of alternative accommodation has been on the basis that it involved climbing the stairs, which was unsuitable for him. a

In December 1986 the council launched their possession action claiming possession on the basis of ground 10 in Pt II of Sch 2. Mr Fadayomi filed a defence in which everything was put in issue, and on 22 January of this year there was a pre-trial review which was attended by Mrs Fadayomi and her solicitor as well as the other parties. She at that time took no part in the proceedings. The action was ordered to be tried on 25 March and on that day it came on for hearing and an order for possession was made. The original order, unfortunately, has gone astray. No file copy has been found but a note was taken of the judgment by the council's solicitors which has been agreed to be correct. This is in the following terms: b

'Registrar refused to consider letter from Hanne & Co. Not on record and no locus standi. Consent order agreed for possession on Mr. F.'s undertaking to allow family to move with him. *Order*: On Defendant's undertaking to allow all members of family presently living with him at 92 Arthur Court to move with him to 56 Arthur Court. Defendant to give possession of whole premises at 92 Arthur Court on or before 6/4/87.' c

On the occasion that that order was made Mrs Fadayomi was present and her solicitor was in the building. The letter at which the registrar refused to look is in the following terms: d

'We are advising Florence Abiowa Fadayomi under the Green Form Scheme. Mrs. Fadayomi is the wife of the Defendant and has occupied the property with the parties' five children at all material times. Although the Tenancy is in the sole name of Mr. Fadayomi, our client is clearly an interested party since she and her children will be affected by the Court's decision. Mrs. Fadayomi is unable to be present at Court because she is on Jury Service. We are writing on her behalf to apply:—(a) for her to be joined as Second Defendant in the proceedings as a person with an interest in the property and (b) for an adjournment of the proceedings to enable her to apply for Emergency Legal Aid for representation and to be represented. Our client is aware that a number of offers of alternative accommodation have been made to the Defendant. These are not suitable for her needs and those of the children. Her marriage to the Defendant has broken down and the parties have lived separate lives under the same roof for the past four or five years. There are Divorce proceedings pending between the parties in the Divorce Registry . . . and we are advised by the Defendant's solicitors in those proceedings that he has consented to a Decree being granted on the basis of two years separation and consent. The Plaintiffs have been kept informed of the progress of the Divorce proceedings, following the last hearing in this matter on the 23rd of January 1987, informed us through their representative Mr. Harvey that a further offer of accommodation would be made to Mrs. Fadayomi for herself and the children and an offer of separate accommodation made to the Defendant. On the 23rd March 1987 we were advised by the Plaintiffs representative . . . that no such further offer of accommodation had been made to Mrs. Fadayomi by the Plaintiffs because nothing suitable had come up. In our submission, it is common ground between all the parties that the Plaintiffs have an obligation to re-house the Defendant, Mrs. Fadayomi and her children. The Court must be satisfied that the offer of accommodation is, in all the circumstances, reasonable before making an order for possession on the grounds sought by the Plaintiffs. It is our submission that it would be quite unreasonable for the Court to consider an offer of accommodation to the family as a single unit as being satisfactory given that there are Divorce proceedings being actively pursued between the parents. In our further submission it would be quite unreasonable for the Court to make a possession order in the circumstances of this case without allowing Mrs. Fadayomi to be joined as a e
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a party to the action and to have separate representation. Our client quite appreciates that various contractors works are being carried out on the Estate where the demised premises are, and that vacant possession of her flat is urgently required by the Plaintiffs if the progress of these works is not to be impeded. In our submission the onus is clearly on the Plaintiffs to make a suitable offer of accommodation to our client, reasonable in all the circumstances. A number of offers of separate accommodation were made by the Plaintiffs to our client prior to the last hearing of this matter in January 1987 but the further offer promised after that hearing has not materialised and our client remains happy to consider such further offer as may be made.'

c The reason why the registrar refused to look at that letter was apparently because, as appeared from the reference to the green form scheme at the head of the letter, the solicitors supposed to be acting for Mrs Fadayomi were not yet on the record and not yet entitled to represent her in court. On the other hand, that letter contained information which, had it been before the court, could scarcely have failed to result in Mrs Fadayomi being joined in accordance with the rules and the matter being fully investigated. As it was, the order was made, as is recited and accepted on all sides, by consent.

d It is at this stage necessary to look at the Housing Act 1985 but, before doing so, I should mention that the divorce proceedings have not yet progressed to a state even of decree nisi, there apparently being some dispute about the grounds on which it should proceed. Counsel for the wife in his notice of appeal takes a number of points, mostly going to the merits with which this court finds it unnecessary to deal. His principal point is that the order should not have been made by consent, the court lacked jurisdiction to do so and the order should therefore be set aside and, that having been set aside, his client e should be joined as a defendant.

The point which is taken with regard to the consent order arises out of the provisions of s 84 of the Housing Act 1985, which is in the following terms:

f '(1) The court shall not make an order for the possession of a dwelling-house let under a secure tenancy except on one or more of the grounds set out in Schedule 2.

(2) The court shall not make an order for possession . . . (b) on the grounds set out in Part II of that Schedule (grounds 9 to 11), unless it is satisfied that suitable accommodation will be available for the tenant when the order takes effect . . . and Part IV of that Schedule has effect for determining whether suitable accommodation will be available for a tenant . . .'

g If one then turns to the schedule, one finds that ground 10 is in the following terms:

'The landlord intends, within a reasonable time of obtaining possession of the dwelling-house—(a) to demolish or reconstruct the building or part of the building comprising the dwelling-house, or (b) to carry out work on that building or on land let together with, and thus treated as part of, the dwelling-house, and cannot reasonably do so without obtaining possession of the dwelling-house.'

h Put in its shortest form, the alterations which the council desire to carry out are alleged on powerful grounds, and possibly even wholly unassailable grounds, to fall within ground 10. Part IV, which is referred to in s 84, deals with the suitability of accommodation. It provides:

i '1. For the purposes of section 84(2)(b) and (c) (case in which court is not to make an order for possession unless satisfied that suitable accommodation will be available) accommodation is suitable if it consists of premises—(a) which are to be let as a separate dwelling under a secure tenancy, or (b) which are to be let as a separate dwelling under a protected tenancy, not being a tenancy under which the landlord might recover possession under one of the Cases in Part II of Schedule 15 to the Rent

Act 1977 (cases where court must order possession), and, in the opinion of the court, the accommodation is reasonably suitable to the needs of the tenant and his family. a

2. In determining whether the accommodation is reasonably suitable to the needs of the tenant and his family, regard shall be had to . . .

and then a number of matters are set out. They may be summarised as follows: the nature of the accommodation which the landlord allocates in such circumstances; the distance of the accommodation available from the place of work or education of the tenant or any member of his family; its distance from the home of any member of the tenant's family if proximity to it is essential for the member's or the tenant's well-being; the needs, as regards extent of accommodation, and means of the tenant and his family; and the terms on which the accommodation is available and the terms of the secure tenancy. Then there is a provision in relation to furniture which is not immediately relevant. b

It is apparent from that, in my view, that every member of the tenant's family living in the premises is a person with a potential interest in any possession proceedings. He may not in many cases desire to advance any such interest, but it is abundantly apparent, in view of the terms of this provision, that any member of the family who considers that the accommodation is unsuitable because it is too far from his place of work or too far from some other member of the family to whom it is essential he should live in close proximity may be able to advance that if he so wishes. It might well be the case that the tenant himself does not wish to raise the matter, and this section can only work in the event that the tenant does not wish to raise it if the person who has the potential right, on the wording of these provisions, himself is allowed to be joined in order to raise it. c

So far as consent is concerned, we were referred to four cases. The first is *R v Bloomsbury and Marylebone County Court, ex p Blackburne* (1984) 14 HLR 56, a decision of Glidewell J. d
It is unnecessary to read more than a few words of the introduction to the report. It says:

'Under the Rent Act 1977, and by analogy under the Housing Act 1980, the powers of the court to make an order for possession are restricted. . . .'

Then there is a reference to s 98 of the Rent Act 1977 and s 34 of the Housing Act 1980, which, in all material respects, is identical with s 84 of the Housing Act 1985. Then there are set out the words 'a court shall not make an order for possession unless . . .'. The remainder of the first paragraph it is unnecessary to read. There is then a reference, amongst other things, to a decision of this court in *Plaschkes v Jones* (1982) 9 HLR 110. e

Both those cases indicate, but do not specifically decide, that a consent order purely as a consent order is beyond the jurisdiction of the court in the face of the express prohibition in s 84 against making an order for possession unless certain specific matters are established to the satisfaction of the court. f

We were also referred to two earlier authorities which are of importance. First, we were referred to *Barton v Fincham* [1921] 2 KB 291, [1921] All ER Rep 87. I only need read the last paragraph of the headnote in which the finding of the court is set out ([1921] 2 KB 291): g

'Held, that the jurisdiction of the Court to make an order for possession is restricted by the above enactment [namely s 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, which was a prohibition substantially in the same terms as s 85]; that if the conditions upon which alone an order can be made are not fulfilled, an order cannot be made in invitum notwithstanding any agreement of the parties to the contrary; and that consequently the landlord could not recover.' h

The passage to which we were referred principally was in the last judgment, that of Atkin LJ, where he said ([1921] 2 KB 291 at 299, [1921] All ER Rep 87 at 91): i

'I agree with the other members of the Court in thinking that the express provisions of s. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act,

1920, make it impossible to uphold the decision of the learned county court judge. The section appears to me to limit definitely the jurisdiction of the Courts in making ejectment orders in the case of premises to which the Act applies. Parties cannot by agreement give the Courts jurisdiction which the Legislature has enacted they are not to have. If the parties before the Court admit that one of the events has happened which give the Court jurisdiction, and there is no reason to doubt the bona fides of the admission, the Court is under no obligation to make further inquiry as to the question of fact; but apart from such an admission the Court cannot give effect to an agreement, whether by way of compromise or otherwise, inconsistent with the provisions of the Act.'

It therefore appears that, in order to justify an order being made without an investigation of the facts, what is required is not a mere consent to the making of the order but an express admission of facts which, if they had been proved, would give the court jurisdiction to make the order.

The other case which was referred to is *Thorne v Smith* [1947] 1 All ER 39, [1947] KB 307. That case does not appear to me to take the matter any further. The only matter which is relied on is the last paragraph in the judgment of Somervell LJ, where he said ([1947] 1 All ER 39 at 44, [1947] KB 307 at 315):

'The other point arises from the use of the word "consent" as applied to the order made herein. The expression "a consent order" may suggest some compromise or arrangement which might be inconsistent with the provisions of the Acts. When the defendant is agreeing to submit to judgment because he is satisfied that the plaintiff can establish his right to an order under the Acts, it might be advisable to avoid the use of the word "consent", which may have a wider meaning and cover cases where the "consent" was the result of an arrangement which could not properly be made the basis of an order.'

It may very well be that, if the matter had been gone into, express admissions of fact might have been made by Mr Fadayomi. They might not have been made by Mrs Fadayomi. But, in truth, no investigation of any sort took place and, in my judgment, that order was an order which was made in defiance of the prohibition in s 84. Therefore, it was made without jurisdiction and it is inevitable that it must be set aside.

In my judgment, it is also clear that Mrs Fadayomi has an interest in these proceedings and should have an opportunity to present her case and, accordingly, she must have leave to intervene. It may be necessary to hear counsel on the matter, but the most convenient way to do it appears to me that she should be joined as a defendant rather than to have her, as sometimes happens, lurking in the action without any specific title.

I would only add this. The result of the order which I propose would inevitably be that the action would go forward and there would be some delay. It might well be that, at the end of that delay, the same result is achieved as has been achieved so far. It is not possible for this court, and undesirable for this court, to make any pronouncement on the various issues which have arisen. If this order was made without an investigation of the merits there is nothing for this court to determine with regard to the merits but, having seen as much as we have, it appears to me that the council may have a strong case. That being so, if a further offer of accommodation were made to Mrs Fadayomi, it may well be that a quicker result would be achieved, and she should bear well in mind that if a further offer were made and it were to be turned down that would be unlikely, unless turned down on cogent grounds, to further her interest when the matter came on for trial.

I mention these matters because litigation is always an expensive matter and very often the same result can be achieved without the time and expense involved in pursuing the matter before the court.

I would allow this appeal and make the order which I have already mentioned.

I would only add this. The council are clearly not open to any criticism in this case. They have tried very hard to accommodate Mr and Mrs Fadayomi over a long period and I would not wish it to be thought that, because there was a slip-up at the time when the possession order was made, their conduct has been otherwise than it should have been. a

SIR GEORGE WALLER. I entirely agree. I would only add this. It does seem most unfortunate that Mrs Fadayomi was not made a party at the earliest stage. The assistant recorder was no doubt misled by the apparent agreement of Mr Fadayomi and perhaps saying something else which gave a different impression from that which was intended. b
So it follows that, when the application was renewed to the registrar again, it was unfortunate that he did not feel that it was right to make her a party, and likewise when it came before the assistant recorder. Here were parties whose marriage had broken down. The wife and children had lived in the flat for some 16 years (indeed, it is said that she was really the breadwinner) and, if the information had been put before the court, it was clear that she had a major interest in the disposition of this property, and it probably would have saved a great deal of time if she had been made a party at the earliest date. c
That, as Parker LJ has said, does not necessarily mean that she will be more successful in the proceedings eventually, but it does at least give time for arrangements to be made.

I agree that this appeal should be allowed and that she should be made a party to the action. d

Appeal allowed.

Solicitors: *H C L Hanne & Co* (for the wife); *Susan G Smith* (for the council); *Helen M Tyrrell* (for the husband).

Mary Rose Plummer Barrister.

R v Mason

COURT OF APPEAL, CRIMINAL DIVISION

WATKINS LJ, MARS-JONES AND HENRY JJ

21 MAY 1987

b Criminal evidence – Admissions and confessions – Confession – Confession obtained by deceit – Whether confession ‘evidence’ put forward by prosecution – Whether confession can be excluded even though not obtained by oppression nor likely to be unreliable – Police and Criminal Evidence Act 1984, ss 76, 78(1).

c The appellant was arrested and questioned regarding an offence of arson. The police had no direct evidence associating the appellant with the crime but they falsely told him and his solicitor that they had found near the scene of the crime a fragment of a bottle which had contained inflammable liquid and that the appellant’s fingerprint was on the fragment. The appellant then told the police that he had filled the bottles with the liquid and had asked a friend to commit the offence. At his trial he challenged the admissibility of the confession. The trial judge considered whether, ‘having regard to all the circumstances, including the circumstances in which the evidence was obtained’, the confession should be excluded under s 78(1)^a of the Police and Criminal Evidence Act 1984 and decided that it would not be unfair to admit it. The appellant appealed against the judge’s decision to admit the confession. At the hearing of the appeal the Crown contended, *inter alia*, that s 78 did not apply to confessions since they were expressly dealt with by s 76^b, which provided that a confession could only be excluded if it had been obtained by oppression or was likely to be unreliable.

d **Held** – For the purpose of s 78 of the 1984 Act ‘evidence’ included all evidence, including a confession, that might be introduced by the prosecution at the trial, notwithstanding that confessions were expressly dealt with in s 76. Accordingly, the trial judge could exclude a confession under s 78 if it would have an adverse effect on the fairness of the trial, even though it had not been obtained by oppression nor was likely to be unreliable. On the facts, the trial judge had wrongly exercised his discretion because he had failed to consider the deceit practised on the appellant and his solicitor and if he had done so he would have been bound to exclude the confession. The appeal would be allowed and, there being no other evidence produced by the prosecution, the conviction would be quashed (see p 484 *f g j* to p 485 *a*, post).

g Notes

For admissibility of confessions, see 11 Halsbury’s Laws (4th edn) para 410, and for cases on the subject, see 14(2) Digest (Reissue) 549–552, 4494–4517.

h For the Police and Criminal Evidence Act 1984, ss 76, 78, see 17 Halsbury’s Statutes (4th edn) 213, 215.

Case referred to in judgment

R v Sang [1979] 2 All ER 1222, [1980] AC 402, [1979] 3 WLR 263, HL.

Cases also cited

R v Fulling [1987] 2 All ER 65, [1987] QB 426, CA.

R v H [1987] Crim LR 47, Crown Ct.

R v Kwabena Poku [1978] Crim LR 488, CCC.

R v Miller [1986] 3 All ER 119, [1986] 1 WLR 1191, CA.

a Section 78(1) is set out at p 484 *d*, post

b Section 76, so far as material, is set out at p 484 *a b*, post

Appeal against conviction

Carl James Mason appealed against his conviction in the Crown Court at Newcastle upon Tyne before his Honour Judge Percy and a jury on 20 March 1987 of arson for which he was sentenced to two years' youth custody. The facts are set out in the judgment of the court. a

Christopher Knox (assigned by the Registrar of Criminal Appeal) for the appellant.
Richard Lowden for the Crown. b

WATKINS LJ delivered the following judgment of the court. On 26 February 1987 in the Crown Court at Newcastle upon Tyne before his Honour Judge Percy the appellant was convicted of arson and on 20 March sentenced for that to two years' youth custody. He appeals against conviction by way of a certificate from the trial judge. The point of law certified by him is thus stated: c

'A point of law arose concerning the admissibility of evidence which it was submitted ought to have been excluded under the Police and Criminal Evidence Act 1984, sections 76 and 78.'

It is as well we think to preface the remainder of this judgment by observing that on the evidence this is an appeal without merit, but the point of law raised is one of real substance. d

The facts are that on 1 July 1986 a motor car belonging to a Mr Askew was set on fire. It was very badly damaged. The cost of repairing the damage was something in the region of £1,000. It was obvious to those who later went on to inspect the damage that the fire had been caused by an inflammable liquid thrown against the car and ignited. e

Before that incident there had been bad feeling between the appellant, who is 20 years of age, and Mr Askew. Mr Askew has a daughter who is 18 years of age. The appellant and this young lady had been going out together. She became pregnant by him. She was not willing to bear his child. She decided to have an abortion and she did. She also broke off her relationship with the appellant. He did not take that at all well. His erstwhile girlfriend's father and mother did not look on what had happened with any great favour either; nor did they feel any pleasure in seeing the appellant any more. They began to receive midnight telephone calls. On each occasion they answered the telephone, whoever was at the other end put the receiver down. They suspected the appellant of making those calls. It may be that their suspicions were well founded. f

At two o'clock in the morning of 1 July 1986 Mr Askew while in bed was woken up a by a screech of tyres on the road outside his house. He thought no more of it then and went back to sleep, but a few minutes later he was again woken up, this time it was by a telephone call from a neighbour. As a result of that he ran to a window and saw that his motor car, which was parked outside, was on fire. There was nobody near the car. He had a foam fire extinguisher handy and with that he succeeded in putting out the fire. There were other parked cars nearby. If Mr Askew had not succeeded in putting out the fire, it may well have been if the fire in his car had spread to the petrol tank that the petrol in it would have ignited and the fire spread to the other cars. g
h

When the police came to the scene there was a lot of broken glass, as they discovered, about the place near the car. It was soon found that an inflammable liquid had been used, probably a combination of petrol and paint thinners. About 12 hours or so later the police paid a visit to the appellant. He denied having been involved in setting fire to the car. On 10 July he was arrested. Be it noted that on arrest the police had in their possession no evidence at all to associate him with the cause of the fire. Before arrest one or more police officers decided to invent evidence and to acquaint the appellant of that so-called evidence as though it was genuinely possessed. What they decided to do was to tell the appellant that a fingerprint of his had been found in a very telling place. As to that Det Con Gunton said: j

a 'Detective Constable Walton and I set out deliberately to make the defendant believe we had a fingerprint on some of the glass fragments from the bottle that was used to perpetrate this crime. I agreed with the detective constable to this playing and it was a trick. The bottle, or the fragments of it, had not even been sent for fingerprint testing at that stage. We set about "conning" the defendant. We had a suspicion, but only suspicion against him and we realised that we needed more proof . . . I felt the only way to get the truth from him was to do this.'

b Having been told by these police officers, falsely, that a fingerprint of his had been found on a fragment of glass from the bottle, the appellant saw his solicitor and told him his version of what had happened. The solicitor asked Det Con Gunton to confirm the fact, as the police were asserting, that they had found a fingerprint on a fragment of glass at the scene of the crime. He confirmed to the solicitor that that was so. That was a deliberate falsehood. When giving evidence Det Con Gunton said as to this:

c 'My motive . . . was because if the defendant had had nothing to do with this glass bottle there was no way he would produce a confession. If he . . . knew very well he had handled . . . the bottle and been active in the preparation, of course, he would begin to doubt himself and whether or not he was going to be discovered.'

d The solicitor, influenced by what he had been told by the police as to the fingerprint, advised the appellant to answer their questions and to give his explanation of any involvement he had had in the incident. What he told the police as a consequence of that was that he was not present when the car was set alight. He had asked a friend, whom he refused to name, if he would do it. This was because Mr Askew had been threatening e him, and setting fire to his car would frighten Mr Askew away from repeating conduct of that kind. The only involvement which he (the appellant) had in the incident was to fill the bottles which were used, one with petrol and the other with paint thinners. That was done at his home. The bottles were then taken away by the friend and the fire started.

f The appellant did not give evidence at the trial. Before the end of the prosecution case and when the confession (because that is what it amounted to) was sought to be put in evidence by counsel for the Crown, objection to its admissibility was made by counsel for the appellant. The judge heard argument in the absence of the jury and heard some evidence from the police as to how the confession had been obtained. He decided that the confession was, in his discretion, admissible. He was referred in the course of argument to ss 76 and 78 of the Police and Criminal Evidence Act 1984. He gave a ruling g at the conclusion of argument and then said he would allow the prosecution to adduce that evidence. He dealt with what he believed to be the effects of ss 76 and 78, and went on to say, with the provisions of s 78 in mind:

h 'I have no doubt that this defendant was well aware of his right to remain silent and could have remained silent, with his solicitor being present, had he so chosen that alternative. But he did not choose that alternative; he chose to give the interview, listen to the questions and decide individually which questions he was going to answer. In fact, he answered all of them. I see nothing in his doing that which adversely affects the fairness of the proceedings.'

j It is contended here by counsel for the appellant that the judge exercised his discretion wrongly. Counsel for the Crown, who also appeared in the court below, has argued that the judge undoubtedly had a discretion and that in exercising it he took account of all the matters which it was necessary for him to take into account and did not give thought to any impermissible matter in coming to his conclusion. He has also submitted that there is no authority for the proposition that s 78 of the 1984 Act refers to confessions and admissions, seeing that they are especially dealt with in s 76.

Section 76, so far as relevant, states:

'(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section. ^a

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—(a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him . . . ' ^b

It is to be observed of those provisions that whilst a confession made by an accused person may generally speaking be given in evidence (sub-s (1)), the court is obliged to rule out that confession if it finds to exist any one or more of the circumstances referred to in sub-s (2). ^c

Section 78(1) states:

'In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.' ^d

It is submitted that, when a comparison is made between the provisions of those two sections and reference made to *R v Sang* [1979] 2 All ER 1222, [1980] AC 402, it was not the intention of Parliament that s 78 be understood as though the word 'evidence' includes evidence of confessions and admissions. We see no reason whatsoever to put that in our view extremely strained construction on the plain words used in this section. In our judgment on a proper construction of it the word 'evidence' includes all the evidence which may be introduced by the prosecution into a trial. Thus it is that regardless of whether the admissibility of a confession falls to be considered under s 76(2), a trial judge has a discretion to deal with the admissibility of a confession under s 78 which, in our opinion, does no more than to restate the power which judges had at common law before the 1984 Act was passed. That power gave a trial judge a discretion whether solely in the interests of the fairness of a trial he would permit the prosecution to introduce admissible evidence sought to be relied on, especially that of a confession or an admission. That being so, we now return to the circumstances of the present case. ^e

It is obvious from the undisputed evidence that the police practised a deceit not only on the appellant, which is bad enough, but also on the solicitor whose duty it was to advise him. In effect, they hoodwinked both solicitor and client. That was a most reprehensible thing to do. It is not however because we regard as misbehaviour of a serious kind conduct of that nature that we have come to the decision soon to be made plain. This is not the place to discipline the police. That has been made clear here on a number of previous occasions. We are concerned with the application of the proper law. The law is, as I have already said, that a trial judge has a discretion to be exercised, of course on right principles, to reject admissible evidence in the interests of a defendant having a fair trial. The judge in the present case appreciated that, as the quotation from his ruling shows. So the only question to be answered by this court is whether, having regard to the way the police behaved, the judge exercised that discretion correctly. In our judgment he did not. He omitted a vital factor from his consideration, namely the deceit practised on the appellant's solicitor. If he had included that in his consideration of the matter we have not the slightest doubt that he would have been driven to an opposite conclusion, namely that the confession be ruled out and the jury not permitted therefore ^f ^g ^h ^j

- to hear of it. If that had been done, an acquittal would have followed for there was no other evidence in the possession of the prosecution.

For those reasons we have no alternative but to quash this conviction.

- Before parting with this case, despite what I have said about the role of the court in relation to disciplining the police, we think we ought to say that we hope never again to hear of deceit such as this being practised on an accused person, and more particularly possibly on a solicitor whose duty it is to advise him, unfettered by false information from the police.

Solicitors: *Crown Prosecution Service*, Newcastle upon Tyne.

Patricia Hargrove Barrister.

Goldsmith and another v Pressdram Ltd and others

- d COURT OF APPEAL, CIVIL DIVISION

LAWTON, KERR AND SLADE LJJ

18, 19, 20, 21 SEPTEMBER 1984

Practice – Trial – Trial by jury – Libel – Trial of action requiring prolonged examination of documents and accounts – Trial by judge alone – Discretion of court to order trial by jury even if prolonged examination of documents likely – Libel alleging illegal share dealings by public figure – Prolonged examination of documents likely – Whether trial should be by jury or judge alone – Supreme Court Act 1981, s 69(1)(3).

- The first plaintiff was the chairman or director of a number of large international companies, including the second plaintiff. The defendants published an article in their satirical magazine alleging that the first plaintiff had been involved in secret dealings in the shares of the second plaintiff in breach of s 27 of the Companies Act 1967. The plaintiffs brought an action for libel against the defendants in respect of the article. The defendants pleaded justification and the master ordered trial by jury. The defendants subsequently came into possession of detailed information concerning the first plaintiff's business affairs with the result that the particulars of their defence involved detailed documentation of complex multiple transactions carried out by the first plaintiff in the shares of his interlocking companies. The defendants applied to the judge for an order under s 69(1)(b)^a of the Supreme Court Act 1981 for trial by a judge alone, on the ground that the trial of the action would require 'prolonged examination of documents . . . which cannot conveniently be made with a jury'. The plaintiffs, in order to pursue a claim for aggravated damages, sought discovery from the defendants of some 2,500 documents which formed the working papers on which articles about the plaintiffs were based. However, the plaintiffs resisted the application for trial by a judge alone on the ground, inter alia, that even if a prolonged examination of documents would be required, the judge ought nevertheless to exercise his discretion under s 69(3)^b to order trial by a

- j a Section 69(1), so far as material, provides: 'Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue . . . (b) a claim in respect of libel [or] slander . . . the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts . . . which cannot conveniently be made with a jury.'

(b) Section 69(3) is set out at p 490 b, post

jury, because the reputation and integrity of the first plaintiff, who was a public figure, would be in question. The judge ordered trial by a judge alone. The plaintiffs appealed against that order. a

Held – Under s 69(1) of the 1981 Act a plaintiff in a libel action had an absolute right to trial of the action by a jury unless the trial required a prolonged examination of documents which could not conveniently be made with a jury because it would be less efficient and practical to use a jury. However, if the trial would require prolonged examination of documents which could not conveniently be made with a jury there was a clear presumption in s 69(3) that the trial should be without a jury and only in rare cases of public importance should the judge exercise his discretion under s 69(3) to order trial by jury notwithstanding that prolonged and inconvenient examination of documents would be required. The judge had been right to order trial by a judge alone because, notwithstanding the imputations against the first defendant's reputation and integrity, prolonged and constant examination of very complex documents would be required and there were not sufficient grounds for the exercise of the discretion under s 69(3) to order trial by a jury. The appeal would therefore be dismissed (see p 490 c, p 491 c d, p 492 e f h j, p 483 d to g, p 494 b to e, p 495 b to d g to j, p 496 a to e h and p 497 g j to p 498 b d to f, post). b c

Rothermere v Times Newspapers Ltd [1973] 1 All ER 1013 considered. d

Notes

For the mode of trial in a libel action, see 28 Halsbury's Laws (4th edn) para 195.

For the Supreme Court Act 1981, s 69, see 11 Halsbury's Statutes (4th edn) 824.

Cases referred to in judgments e

Rothermere v Times Newspapers Ltd [1973] 1 All ER 1013, [1973] 1 WLR 448, CA.

Williams v Beesley [1973] 3 All ER 144, [1973] 1 WLR 1295, HL.

Interlocutory appeal

The plaintiffs, Sir James Goldsmith and Cavenham Ltd, appealed against the order of Jupp J made on 12 March 1984 varying the order of Master Creightmore that the plaintiffs' libel action against the defendants, Pressdram Ltd, Richard Ingrams and Michael Gillard, should be tried by a judge and jury, and ordering that the action be tried by a judge alone. The facts are set out in the judgment of Lawton LJ. f

Lord Rawlinson QC and *James Price* for the plaintiffs.

Desmond Browne for the defendants. g

LAWTON LJ. This is an appeal by the plaintiffs, Sir James Goldsmith and Cavenham Ltd against an order made by Jupp J on 12 March 1984 whereby he varied the mode of trial of a libel action brought by the plaintiffs against the three defendants. In 1982, Master Creightmore had ordered, without opposition from the defendants, trial by jury. Jupp J ordered that the case should be tried by a judge alone. h

In order to make clear what arises in this appeal it is necessary to say something about the parties. The first plaintiff, Sir James Goldsmith, in an affidavit which is before the court, described himself as follows:

'I am Chairman or Director of a number of large international companies based, inter alia, in Paris, New York, Hong Kong and London employing tens of thousands of people and having numerous subsidiary companies'. j

One of the companies in which he is interested, and in which he is a large shareholder, is the second plaintiff, Cavenham Ltd. The first defendants are the publishers of the fortnightly magazine called 'Private Eye'. The second defendant is the editor of that

magazine. The third defendant, Mr Gillard, is an investigative journalist specialising in looking into the affairs of companies. He is a regular contributor to *Private Eye*. He writes under the pen name of 'Slicker'. In almost every edition of *Private Eye* for some years past, there has been an article by Mr Gillard revealing aspects of company affairs which he seems to think merit critical comment. For some years now Sir James Goldsmith and *Private Eye* have been at odds with one another. It is said in this case that regularly, over a period of about four years before 1980, *Private Eye* had made derogatory remarks about Sir James, and from time to time had made defamatory remarks about him. These comments, on occasions, have angered Sir James. It is part of the background history of this case that on two occasions, the last of which was in 1983, Sir James has sued *Private Eye* for libel; the cases never came to trial: they were settled by the payment of substantial sums of money to Sir James, either on account of his costs or on account of costs and damages. Mr Gillard, too, has sued Sir James for libel. Sir James pleaded justification for what he had said about Mr Gillard. The case came on for trial. Mr Gillard's claim failed.

It has been submitted in this court that this libel action has been made necessary because of the alleged campaign of vilification and derogation which has been waged against Sir James by *Private Eye* for so long.

The publications in *Private Eye* relating to Sir James before the issue of the writ in this action, which was on 10 September 1980, are not the subject matter of complaint in this action, but Lord Rawlinson, on behalf of the plaintiffs, has said that the early history is relevant because it may justify the award of aggravated damages. Indeed, so enthusiastic are the plaintiffs about that aspect of the case that they obtained from Jupp J, on 12 March 1984, an order for further discovery of documents consisting of Mr Gillard's working papers which, before September 1980, had formed the basis of the articles he had written about Sir James and his companies. We have been told by counsel who has appeared on behalf of all three defendants, that that order for further discovery will probably lead to something like 2,500 pages of documents being disclosed.

On 9 September there appeared on the bookstalls an edition of *Private Eye* which was dated 12 September 1980. In that edition there was an article written by Mr Gillard about Sir James. It is unnecessary to reproduce the article in this judgment. It suffices to say that it came to this: that the Department of Trade were investigating the way in which Sir James had dealt with shares in Cavenham Ltd in relation to the parent company of Cavenham Ltd, Generale Occidentale. The suggestion in the article was that Sir James had hidden from the public, in breach of s 27 of the Companies Act 1967, his dealings in those shares and his interests in Generale Occidentale and other companies. Sir James resented this suggestion because his case is, as he has revealed in an affidavit before the court, that although dealings in his shares were not recorded in Cavenham Ltd's register as they should have been, he did not himself know about those dealings at the time when the entries in the register should have been made and, further, in respect of some dealings, he had been advised by his lawyers that he could claim exemption from revealing them.

It is necessary now to say a few words about s 27 of the Companies Act 1967. Before 1967 it had been a fairly common practice for persons interested in companies to hide their interests by means of nominee shareholdings and subsidiary companies. In 1967 Parliament decided that that kind of activity was not in the public interest. Section 27 of the 1967 Act provided that for the future directors of companies who had shares in other companies should reveal in writing to the secretary of the companies what their holdings were, and they should also reveal in writing any events which affected their interests in other companies. The Act provided that the notifications should be made within five days of either the acquisitions of the shares or the occurrence of the events which affected holdings in shares. Failure to comply with s 27 was to be a criminal offence, punishable with imprisonment.

By s 28 there was a deeming provision, the effect of which was that a person was

deemed to have an interest in shares either if a company was normally in the practice of acting on his directions or he held more than a specified proportion of the shares in that company. a

The effect, so Sir James alleged, of the article written by Mr Gillard was to suggest that he was in the habit of hiding from the public his interest in various companies, and as Sir James himself has admitted in the affidavit to which I referred he has interests in a large number of companies and it is clear that they are inter-locking companies. He has interests in shares in a complex group of companies. b

As I have already stated, the writ was issued on 10 September 1980. By January 1981 the defendants had delivered a defence which included a plea of justification. That plea had a large number of sub-paragraphs setting out various matters which the defendants intended relying on in support of the allegations contained in the alleged defamatory article. The litigation did not proceed very rapidly. There may have been good reason for that. Counsel for the plaintiffs says there was. But we do know, as I have already recounted, that in 1982 Master Creightmore made an order for the trial of the action by a jury. In 1983, however, the defendants came into possession of more information about Sir James's dealings in shares and, as a result, they decided to apply for leave to amend their particulars of justification by adding more allegations. They were also of the opinion that, having regard to the new particulars of justification and the complexity of the action, the case was not one which could conveniently be tried with a jury. That was what came before Jupp J on 12 March. By this time the plaintiffs had decided that they wanted to amend their statement of claim. Sir James was of the opinion that the way that the case had been pleaded in the statement of claim delivered when the action started did not specify his real complaint against the defendants. In this statement of claim the article was set out in extenso and then, following the modern practice, the pleader set out what he alleged were the ordinary and natural meanings of the words. No innuendo was pleaded. Later, I think it was in 1982, it was decided that it would be prudent to plead an innuendo. An application was made to Master Creightmore for leave to amend the statement of claim in order to do so. Master Creightmore refused the application and, so far as I can judge, one reason at least for so refusing was that the innuendo had not been pleaded in accordance with RSC Ord 82, r 3. c
d
e

The matter was allowed to rest there until the hearing before Jupp J in March 1984. When the defendants' application for varying the mode of trial was before him the plaintiffs asked for an adjournment so that they could take further instructions from Sir James as to what he wanted and then amend their statement of claim. Jupp J refused an adjournment. f

After he had made the order which is the subject matter of this appeal the plaintiffs took out a summons which, in the ordinary way, would have been heard next week, for leave to amend their statement of claim. When this was brought to our attention by counsel for the plaintiffs we formed the opinion that as we had to consider the mode of trial, and the mode of trial necessarily involved our considering the issues in the case, it would be sensible for us to deal with the application to amend the statement of claim. In my opinion we had jurisdiction under RSC Ord 59 to do what we thought was sensible; but it was unnecessary for us to invoke that jurisdiction because counsel on both sides agreed that it would be convenient for us to deal with the application for leave to amend. We heard that application and we gave leave to amend. g
h

It is now necessary to call attention to the material parts of the amendment. What the plaintiffs were asking for, in their application for leave to amend, was leave to plead an innuendo; and they did it in this way. They said: 'The said words in their natural and ordinary meaning and/or by innuendo meant and were understood to mean that ...'. They left in two of the original alleged natural and ordinary meanings, and they went on as follows: j

'That the first plaintiff operated a deliberate policy of making false claims for

a exemption from the disclosure requirements of local laws so as thereby to suppress information about his business in various parts of the world.'

The reference to 'local laws' arose in this way. There was a suggestion in the particulars of justification that not only had Sir James failed to comply with s 27 of the Companies Act 1967 but he had also failed to comply with the requirements of the Securities Exchange Commission (the SEC) in the United States.

b The proposed amendment went on to allege, as to meaning:

'The Department of Trade has initiated a formal investigation under the Companies Act as to the first plaintiff's failure or refusal to comply with his statutory disclosure obligations and accordingly the first plaintiff's failure or refusal to disclose his shareholdings was potentially a very grave matter and such as to give rise to serious public concern.'

c Before us, counsel for the plaintiffs agreed, after the words 'a formal investigation', to insert 'with inspectors'. After discussion with counsel, and hearing counsel for the defendants' opposition to the amendment, we agreed that it should be allowed.

It is against that background, on the pleadings, that we have to consider what should be the proper mode of trial.

d It is necessary now to refer to the statutory provisions relating to mode of trial in libel actions. Before 1933, with a few exceptions, actions in the Queen's Bench Division could, at the choice of the parties, be tried with a jury. In 1933 Parliament decided that there should be some limitation on trial with a jury. The restriction was contained in the Administration of Justice (Miscellaneous Provisions) Act 1933, s 6(1). That was slightly amended in 1970 by the Law Reform (Miscellaneous Provisions) Act, s 7, Sch. The material part of the law as it was after 1970 was in these terms:

e '... if, on the application of any party to an action to be tried in the King's Bench Division of the High Court ... the Court or a judge is satisfied that—(a) a charge of fraud against that party; or (b) a claim in respect of libel, slander, malicious prosecution, false imprisonment [or] seduction, is in issue the action shall be ordered to be tried with a jury unless the Court or judge is of opinion that the trial thereof requires any prolonged examination of documents or accounts ... which cannot conveniently be made with a jury. ...'

f Then there came a proviso:

'but, save as aforesaid, any action to be tried in that Division may, in the discretion of the Court or a judge, be ordered to be tried either with or without a jury ...'

g My understanding of that provision is this, that in the ordinary way a libel action would be tried with a jury, but if the action required any prolonged examination of documents or accounts which could not conveniently be made with a jury then there need not necessarily be a trial with a jury; it should normally be tried by a judge alone. But there was, at the end, as I have already recounted, further provision that even if the action did require prolonged examination of documents nevertheless the court could order a trial with a jury.

h Those provisions were considered by this court in *Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013, [1973] 1 WLR 448. In my judgment the headnote ([1973] 1 WLR 448) accurately sets out the way in which the 1933 provisions, as amended, should be applied. By a majority it was held that although the trial of the *Rothermere* action might well require prolonged examination of documents within the meaning of s 6(1) of the 1933 Act the judge, in the exercise of his discretion under that section, had failed to give sufficient weight to the national importance of the issues and trial by jury should be ordered.

i Those provisions were considered by Parliament when the Supreme Court Bill of 1981

was debated. After discussion, so we have been told by counsel for the plaintiffs, Parliament decided to deal with trials with juries in s 69 of the 1981 Act. Subsection (1) is in substantially the same terms as the 1933 provision as amended, but there is one important difference, which is this. Whereas, as I have already said, at the end of the provision in the 1933 Act came the words: 'but, save as aforesaid, any action to be tried in that Division may, in the discretion of the Court or a judge, be ordered to be tried either with or without a jury', that provision was replaced by sub-s (3) of s 69, which is as follows:

'An action to be tried in the Queen's Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried with a jury.'

My construction of s 69 is this, that it is still mandatory for actions of libel and slander to be tried with a jury unless the court is of opinion that the trial requires any prolonged examination of documents which cannot conveniently be made with a jury, but even if it does require a prolonged examination of documents there is still a discretion in the court to allow trial with a jury, but the emphasis now is against trial with juries, and the court should take this emphasis into account when exercising its discretion.

The defendants say that, having regard to the particulars of justification, this case will require a prolonged examination of documents which cannot conveniently be made with a jury. The plaintiffs, through counsel, have submitted that that is not so in the circumstances of this case; but even if it were so the court, in the exercise of its discretion, should order trial by jury because Sir James is a figure well known in the financial circles of this and other countries, that the article attacks his reputation and integrity, and in those circumstances it is a proper case for the exercise of the court's discretion in favour of trial with a jury.

It is now necessary to outline the kind of case this is and the sort of issues which will arise. As I have already said, Sir James accepts that he has complicated financial interests which are dealt with and controlled through a group of companies, some in this country, some in other countries. The defendants, by their particulars of justification, have given much detail about various share transactions which, they say, were carried out in contravention of s 27 of the Companies Act 1967. We have read those particulars and they are not easy to follow. Jupp J said that he had had difficulty in following them, and I have too. What the defendants have alleged is that there has been a pattern of hiding Sir James's financial affairs over a longish period of years. It seems that the period extends from 1976 to 1980. The subject matter of these particulars of justification, namely multiple transactions in the shares of interlocking companies, will, submitted the defendants, be very difficult for any jury to follow. That was accepted by counsel for the plaintiffs in the course of his submissions. The defendants say that trying to get the jury to understand these complicated transactions will require them to look at a large number of documents, and on the face of it that would be so. But counsel for the plaintiffs' answer to that was this, that the actual detail of the transactions, in the sense that they took place, and when they took place, are nearly all admitted. He produced in this court a most useful document in which all the particulars of justification which the plaintiffs are willing to admit were coloured in yellow ink. Looking at that document it is almost entirely coloured yellow. But there are sections which have not been admitted. One such section illustrates clearly, in my opinion, the complexity of this case. It appears under sub-para (xx)(b), and it is in these terms:

'The Defendants' contention is that the First Plaintiff is not entitled to withhold disclosure of dealings by General Oriental or Trocadero in Generale Occidentale, since both General Oriental and Trocadero are accustomed to act in accordance with the First Plaintiff's directions or instructions, and the First Plaintiff is entitled to control the exercise of one-third or more of the voting power at any general meeting

of General Oriental or Trocadero. In support of that contention the Defendants rely on the following matters [and a number are specified].'

All of them except one are admitted, but one is not admitted. It is in these terms:

'As an illustration of the First Plaintiff's control of the Brunneria Foundation, the Defendants rely on the acquisition by Ultrabridge Holdings Ltd. (a Hong Kong company wholly owned by the First Plaintiff personally) of shares in Ultrabridge Investments (1983) Ltd. which were issued on the flotation of Aspinall's Casino. As a result of such flotation, Lido S.A. and Enderbury Financial became entitled to a total of 23,400,500 shares worth £26.9 million. However (as was stated by the First Plaintiff in General Oriental's proposals for the flotation), arrangements were agreed in principle for him to acquire through Ultrabridge Holdings Ltd. the shares to which Lido S.A. and Enderbury Financial were entitled. By the said arrangement the trustees of the Brunneria Foundation divested themselves of an investment worth £26.9 million to a company wholly controlled by the Plaintiff. The consideration for the arrangement was not stated by the First Plaintiff.'

The jury could not begin to follow that kind of particular unless they had some documents before them. They could not keep these sort of details in their heads. In the ordinary way the documents relating to these details would have to be before the jury. Certainly if there were a criminal trial arising out of these allegations, as was pointed out in the course of the argument, the documents would have to be before the jury.

Counsel for the plaintiffs' answer was this. This being a libel action and not a criminal trial it is possible to have schedules setting out all the details of the case which are admitted, and as the plaintiffs are admitting nearly all the details alleged by way of justification the facts could be set out in a schedule. He accepted that the schedule would have to be long and it would inevitably be complicated. Counsel for the defendants submitted that it would not be practicable to have a complete schedule because there were so many matters which at present are unknown and which would only come to light in the course of Sir James's cross-examination. Inevitably more documents would be produced. Counsel also pointed out in the course of his submissions that although the plaintiffs are admitting the various share transactions which are set out in the share registers of the companies which are mentioned in the particulars of justification, the entries in those registers do not show who sold the shares or who bought them. He invited our attention to one share transaction where it appeared, from such information as could be gleaned from other documents which have been disclosed, that Sir James was buying shares from other companies which he controlled. That, said counsel, was a very important fact, and for this reason. It has been revealed in Sir James's affidavit, to which I have already referred, that his case is going to be this: either that he did not know about the details of these transactions and that is why they were not notified, as they should have been, within five days of them, or, alternatively, that when he did know he was advised by his lawyers that there was no need to register the transactions. So one of the issues, indeed the most important issue, in this case in the end will be: did Sir James know about the transactions? because if he did then he will have provided evidence that he has committed criminal offences contrary to s 27 of the 1967 Act. Counsel for the defendants' submission was that if he was buying shares, or acquiring shares, from other companies which he controlled it is inconceivable that he would not have known what was going on. Counsel said that there will have to be a great deal of detective work through the many documents which have been disclosed to trace the origin of some of these shares which Sir James admits he either did acquire or sell during the relevant period. Counsel for the defendants only drew our attention to one such transaction. But he submitted that many sale documents, flotation documents and the like, will have to be examined in detail to see what was the origin of the shares being sold or bought. In those circumstances, he submitted, not only would the jury have to keep looking at a

very complicated schedule but they would also have to look at other documents which may be put in evidence in order to show the origin of some of these shares. a

There is another complication in this case. As I have already recounted, the plaintiffs obtained an order against Mr Gillard for disclosure of his working papers relating to the many articles he has written in the last few years about Sir James's commercial activities. I found it difficult to understand why the plaintiffs applied for this further discovery, but as that order has been made (it has not been appealed against) it will be open to the plaintiffs to make use of the 2,500 pages of documents which Mr Gillard says he can disclose. If any use is going to be made of these documents at the trial they will have to be put before the jury. Counsel for the plaintiffs said that it was unlikely that he would put in evidence many of these documents; but there is here a potentiality for many documents being put in evidence. b

Another aspect of this case which I have kept in mind is this. Counsel on both sides in this case are very experienced in this class of litigation. It is accepted that discovery has already produced very large numbers of documents. Before us there are two very big bundles amounting to more than 500 documents in total. In addition there are smaller bundles, not particularly weighty; and then, over and above that, there is this reservoir of documents which may have to be looked at as a result of the plaintiffs' successful application for further discovery. Counsel for the defendants, as a responsible member of the Bar, has told us that the defendants' case will inevitably result in the production of many documents which will have to be put to Sir James and looked at by the jury. Counsel for the plaintiffs, on the other hand, has called our attention to the judgment of Lord Denning MR in *Rothermere's* case, in which there were even more documents than in this case. Lord Denning MR was of opinion that the probabilities were that not many documents would actually be used at the trial. I find difficulty in dealing with the matter in the robust way that Lord Denning MR did. It seems to me that if I said, as at one stage of this case I was tempted to say, that at the trial comparatively few documents are likely to be put in evidence, I would be guessing. I am of the opinion that I must accept the statement made by counsel for the defendants that many documents will have to be looked at in the course of Sir James's cross-examination. c

In those circumstances I am satisfied, as Jupp J was, that this case will require a prolonged examination of documents. d

Counsel for the plaintiffs submitted that the word 'examination' in s 69(1) has a limited meaning. It refers to documents which contain the actual evidence in the case. An example which was referred to in the course of submissions was a case in which a firm of auditors were alleged in a financial journal to have conducted an audit of a public company incompetently. In a case like that the court would have to look at the accounts of the company and the working papers of the auditors to see from them what the evidence was. Counsel for the plaintiffs submitted that that is not so in this case. The facts in the documents are going to be admitted and all that the documents will be used for, if they are used at all, will be to remind the jury of what the facts were. In other words, the documents would not contain the evidence which the jury would have to assess, they would merely be a record of the factual background of the case which the jury would have to keep in mind. e

For my part I do not construe the word 'examination' in the limited way in which counsel for the plaintiffs asked us to construe it. f

Another aspect of this case which came under discussion was the meaning of the word 'conveniently'. A trial with a jury inevitably takes longer than a trial by a judge alone. If the trial is made much longer because of the time taken up by the jury examining documents, then an element of inconvenience arises. In this case the trial would be likely to be lengthened considerably by the presence of a jury. g

I should add that one of the factors likely to lengthen the trial is going to be the need to look at some documents, perhaps not many, but some, relating to foreign companies. Documents will have to be translated from foreign languages and explained to the jury against a background of foreign law. h

a But, as I have already said, that is not the end of this matter, because under s 69(3) the court has a discretion. Counsel for the plaintiffs asked us to exercise that discretion in favour of the plaintiffs.

b It is necessary now for me to make some reference to one of the reasons which Jupp J gave for refusing trial by jury. He adjudged that the action would require a prolonged examination of documents, and he said that for that reason he was going to order trial by judge alone. Then, according to the note of his judgment which was taken by counsel, he went on as follows:

c 'I should add that the climate of opinion in the criminal jurisdiction as to whether cases of criminal liability under the Companies Act 1960 and similar crimes should be tried by jury has considerably changed since the decision in *Rothermere v Times Newspapers Ltd*. There is now a considerable body of opinion among the senior judiciary that such matters should be taken away from juries. That is relevant when considering a libel action involving allegations of Companies Act offences. Juries are not now looked at with the same favour as a decade ago.'

d With all respect to Jupp J, that was a wrong approach to the problem of discretion. It does not matter what the judiciary think about the advisability of trying this kind of case with a jury. What does matter is what Parliament thinks is advisable. It is clear from the terms of s 69 of the 1981 Act that Parliament still thinks that in the ordinary way libel actions should be tried with a jury. The only difference, as I have already stated, is that since 1981 the emphasis is against trial with jury.

e It is against that background that I now come to consider counsel for the plaintiffs' submission that this is a case in which, notwithstanding that there may have to be a prolonged examination of documents, discretion should be exercised by the court in favour of Sir James. Since in my judgment Jupp J looked at the matter in the wrong way on this aspect of the case I feel justified in looking at the problem afresh.

f It is true that the allegation against Sir James is an unpleasant one. It charges him with criminal offences. His reputation, honour and integrity are, to some extent, in issue; but, as was pointed out by the House of Lords in *Williams v Beesley* [1973] 3 All ER 144, [1973] 1 WLR 1295, the fact that honour and integrity are under attack in a case is not an overriding factor in favour of trial with a jury. But it is a factor which I take into account when deciding whether Sir James should have his case tried by a jury. This case, however, although it may be of importance to Sir James, cannot be said to be one affecting national interests or national personalities. It is a long way from such a case and, having regard to its undoubted complexity and the difficulties which a jury will have in following the detail of evidence, in my judgment the discretion of the court should not be exercised in favour of the plaintiffs.

g Accordingly I would dismiss the appeal.

KERR LJ. I agree that this appeal should be dismissed, and I mainly add some remarks in deference to counsel for the plaintiffs' forceful submissions that our decision to uphold the order for the trial of this libel action by a judge alone may have far-reaching implications for other cases by eroding the prima facie statutory right to jury trial in cases of defamation and the other categories of cases now referred to in s 69(1) of the Supreme Court Act 1981.

j In my view our decision in this case will not have this effect, and should not be taken to derogate in any way from the prima facie right to trial by jury in cases of defamation. Counsel for the plaintiffs rightly emphasised that for over half a century the intention of Parliament has been enshrined substantially in the wording of this provision by re-enacting in 1981 what was formerly s 6(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933. However, we have only been referred to one reported case in which the instant controversy has arisen during all those years: *Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013, [1973] 1 WLR 448. Over these fifty years there must have been countless libel actions which required the prolonged examination of documents in

order to decide the issues between the parties. Many, probably most, will have been tried with juries, but many will no doubt have been tried by judges alone as the result of agreement between the parties. The contest as to the mode of trial has therefore been an extremely rare event, and I do not regard the decision in favour of a jury in *Rothermere's* case, or our decision in this case in favour of trial by judge alone, as laying down anything in the nature of a precedent or as indicating a trend. In this context, in the same way as Lawton LJ, I would wholly dissociate myself from the concluding remarks made by the judge in this case about the exercise of his discretion which Lawton LJ has already read. a

However, when a court is faced with the present issue, as we are today, each case must clearly be considered individually in order to see whether or not the court is satisfied that the exceptions to the prima facie right to trial by jury laid down in s 69(1) have been established or not. The court must then form a view about the course which the trial is likely to take, or will be allowed to take, bearing in mind its proper conduct in the light of the issues properly raised on the pleadings. On this basis we therefore have to ask ourselves two primary questions in the present case. Firstly, is the trial likely to require a prolonged examination of documents? Secondly, if so, could this be carried out conveniently if the trial was to be conducted with a jury? Thirdly, and only if both those factual requirements are answered in the affirmative, one comes to the question of the court's residual discretion. In that regard s 69(3) of the 1981 Act does indicate a shift in legislative policy from the position which has been enacted since 1933 and which still applied in 1973 when *Rothermere's* case fell to be decided. Whereas the balance was then wholly even as between trial by jury and trial by judge alone, even after the requirements of what is now s 69(1) had been met, sub-s (3) now indicates a shift in favour of the latter mode of trial in such cases. b

On this appeal my mind has wavered to some extent on the application of s 69(1). This was due to counsel for the plaintiffs' persuasive presentation of the ultimate issue which will fall to be decided: does the court accept Sir James Goldsmith as truthful or not when he says that any contraventions of his obligations to disclose his many share transactions which figure in this case, and which may have occurred in breach of s 27 of the Companies Act 1967, took place without his personal complicity? But when I picture the course that this trial is likely to take, being conducted with perfect propriety on behalf of the defendants, the path to the answer to this ultimate question is far from simple. I bear in mind Sir James's statement on oath that neither he nor the plaintiff company has any documents concerning these transactions other than the entries in the various share registers which have been disclosed, although even these, as made originally and subsequently amended by the substitution of more detailed entries, are complex in themselves. But the history of the many share transactions, even when these will be admitted in themselves, is only the beginning of the inquiry raised by the issues in this action. c

The plaintiffs have pleaded that the article in *Private Eye* implied, whether in its ordinary meaning or by way of innuendo, what Lawton LJ has already read out from the amended statement of claim. I refer, in the present context, solely to the allegation that the article meant that the plaintiff 'operated a deliberate policy of making false claims for exemption . . . to suppress information about his business in various parts of the world', and one must add there 'over a considerable period of time'. The defendants have pleaded that if the article bears this meaning then this is true, and they have sought to sustain this plea in some eleven pages of complex particulars which, as their counsel has told us, may be sought to be amended further hereafter. d

Lawton LJ has already referred to the vast number of documents which have been disclosed, to many of which (although only by way of sample) we have been referred in the course of this hearing. e

The defendants are clearly entitled to seek to establish the truth of the meaning on which the plaintiffs have decided to rely. Counsel for the defendants has explained to us f

a how the defendants propose to set about seeking to do so. They will have to try to convince the court, whether judge alone or with a jury, that Sir James must have known at least about the general pattern of these many transactions over about four years and of their disclosability, as a matter of law, within the network of companies in which he had differing shareholdings and differing degrees of alleged or actual control so as to give rise to the statutory obligations of disclosure on his part.

b The issue raised by s 69(1) is, then: how will the defendants in fact properly attempt to discharge this onus at the trial? As to this I am ultimately left in no doubt. The 12 members of the jury, if there be a jury, would be asked to apply their minds to the unfamiliar and perhaps largely incomprehensible territory of a multitude of share transactions over a period of years in interlocking, or allegedly interlocking, companies against the background of the statutory circumstances which may require their public disclosure. They would have to do so in order to reach a conclusion about the extent of c Sir James's probable knowledge of these transactions and of their implications against the background of the legislation. How would they be asked to perform this task? No one suggests that this can be done without reference to documents which will have to be put before them. To what extent would they have to refer to these documents? As I see it, even given the admissions of fact which will be made, a prolonged examination of two categories of documents will be inevitable. Firstly, a chronological schedule of the d transactions themselves, showing who were the sellers and who were the purchasers in the context of Sir James's shareholdings at that time against the background of his statutory obligations as to disclosure. Any jury (and, indeed, any judge) would find it impossible to follow this part of the evidence alone without constant reference to this schedule. Secondly, such other of the many documents on which the defendants will seek to rely in order to attempt to show that some strategy or pattern in these transactions e points towards Sir James's personal knowledge of them and, if they can do so, of their disclosability as a matter of law. This may well involve a formidable task for the defendants in seeking to discharge the burden of proving justification which they have undertaken. But the plaintiffs' plea as to the meaning conveyed by the article entitles them to do so and to seek to justify in the way in which I have indicated. I cannot think f that any jury could be asked to grapple with these issues without constantly referring to these two categories of documents. They would have to do so merely in order to follow what is being debated between counsel and witnesses and in counsel's speeches.

I therefore have no doubt that this is a case which will require prolonged and, indeed, constant examination of documents by anyone seeking to arrive at a conclusion on the ultimate issue. Equally I have no doubt that this cannot be done conveniently with a jury. 'Conveniently' means, as I see it, without substantial difficulty in comparison with g carrying out the same process with a judge alone. On the issues raised in this case the investigatory process of arriving at the ultimate answer would be a difficult task for any judge despite constant reference to documents, and far more difficult, and therefore inconvenient as a forensic process, when it has to be done in a way which is capable of being followed and understood by 12 jurors.

h In these circumstances I am fully satisfied that this is a case which meets the two requirements of s 69(1) so as to entitle the defendants to say that it falls outside the ordinary category of cases in which trial by jury is prescribed.

On that basis the application of the discretion to be exercised by the court under sub-s (3) to my mind becomes almost self-evident. Given the fact that the case is not one which must be tried with a jury under sub-s (1), there are, in my judgment, clearly no sufficient j grounds for concluding that it should nevertheless be tried with a jury. The issues are not of the same public importance as those raised in *Rothermere's* case, and the guideline for the residual discretion has been shifted towards trial by judge alone in what is now sub-s (3).

Counsel for the defendants has also, to my mind, convincingly shown, by reference to

Williams v Beesley [1973] 3 All ER 144, [1973] 1 WLR 1295, that a plaintiff cannot be treated as having any predominant claim to trial by jury, but that the legitimate interests of all the parties to the action must be considered. a

Accordingly, I would dismiss this appeal.

SLADE LJ. I agree that this appeal should be dismissed and with what Lawton LJ has said relating to the amendment of the plaintiffs' pleading.

My own observations will relate principally to the construction and effect of s 69 of the Supreme Court Act 1981, even at the risk of some recapitulation. b

Although the brief note of the judge's reasons for his decision make no specific reference to the provisions of this section I think it clear that he had them well in mind and that they formed an essential part of the background to his decision.

Under s 69(1) of the 1981 Act, the plaintiffs, as I read the subsection, have an absolute statutory right to trial of this libel action with a jury unless the court is of opinion that two conditions are satisfied, namely (1) that the trial requires a 'prolonged examination of documents' and (2) that this examination cannot 'conveniently be made with a jury'. c

It is common ground that under the subsection the mere volume, difficulty or complexity of the issues involved in a libel action will not, by themselves, deprive litigants of their right to trial by jury. The legislature, in enacting the 1981 Act, might well have so provided, but has elected not to do so. Unless the judge is of opinion that the two conditions I have mentioned are satisfied, he has to order trial by jury, however wide-ranging and difficult the issues may be and, indeed, whatever may be his personal doubts as to the appropriateness of a jury for the trial of the particular case. d

Correspondingly, I infer that the legislature, in using the particular word 'conveniently' in the context of the subsection, was directing its attention to the efficient administration of justice, rather more than the probable difficulty or otherwise of the issues involved. This, for example, I infer was the reason why it included a reference to 'local investigation' alongside the other exceptional cases mentioned in s 69(1). Actions involving a local investigation are inherently no more likely to be complex than any other case. However, they do constitute a category of case which might well give rise to practical difficulties from the forensic and practical point of view if the investigation fell to be made with a jury. e

I would also add that the mere number of documents which will require to be looked at in the course of a trial, although, of course, a relevant factor, is not, in my view, a conclusive one either way. There may be many cases where numerous documents will be required to be looked at, but no substantial practical difficulties are likely to arise in their examination being made with a jury. On the other hand, cases may, I conceive, arise where relatively few documents will require examination, but nevertheless long and minute examination of them is likely to be required, and, because of their particular nature, a satisfactory examination of them by a jury will present formidable practical difficulties. f

As to the word 'examination', I merely construe it in its context as meaning 'careful reading'. g

Approaching the construction of s 69 in this manner I find it impossible to disagree with the conclusion of the judge and of Lawton and Kerr LJ that the trial of the present action will involve a 'prolonged examination of documents' and that this examination cannot 'conveniently be made with a jury'. h

Counsel for the defendants, in his tenacious and able argument, has convinced me of these two points. I agree with what Lawton and Kerr LJ have said in this context and only wish to add these observations. One of the most important allegations embodied in the defendants' plea of justification will be that Sir James Goldsmith has, on frequent occasions, failed to comply with the statutory obligations of notification imposed on him by s 27(1)(b) of the Companies Act 1967. The time limits within which these obligations i

a are to be complied with are laid down by s 27(3)(b). However, having regard to the definition of these time limits contained in that subsection, in order to ascertain whether the limits have been complied with it will be necessary to ascertain (i) the nature of the event which gave rise to the obligation under s 27(1)(b), (ii) the date of the event, (iii) the date, if any, on which Sir James became aware of the event, (iv) the date, if any, on which he became aware of the fact that this occurrence gave rise to the relevant legal obligation.

b Counsel for the plaintiffs submitted that the real issue for the jury will be whether or not they believe Sir James, when he gives evidence to the effect that he was at no time knowingly and deliberately in breach of the relevant provisions of the Companies Acts. I agree that, at the end of the day, this may well be the ultimate issue. Nevertheless, for the purpose of refuting, or attempting to refute, this evidence and establishing their plea of justification, the defendants, as their counsel explained, will be compelled to invite the judge, or judge and jury, as the case may be, to conduct a minute examination of the history of the complex dealings in shares in the various interlocking companies which took place between about 1976 and 1980. This exercise, as I see the position, will be quite impossible without constant reference to documents of one sort or another, even if the principal documents which will fall to be examined are merely the schedule to which Lawton LJ has referred and the entries in the relevant share registers. They are not the kind of matters which either the judge or jury would be able to keep in their heads without such constant reference. Furthermore, they will, in my view, be very difficult to follow even for the judge. Investigation of them would, in my opinion, inevitably be both greatly prolonged and practically intensely difficult if it had to be conducted with a jury, not only because of the complexity of the factual issues, but because of the frequent reference to the relevant statutory provisions which will be necessary if the relevant issues are to be properly understood: simply for example, the complicated rules for giving effect to s 27(1) which are to be found in s 28(1) of the 1967 Act.

e Counsel for the plaintiffs has emphasised the apparently large proportion of facts inserted in the particulars of justification which are now admitted by the plaintiffs. However, his beguiling argument obscured the fact that there are no clear cut admissions whatever by the plaintiffs that specific events occurred on a specific date which triggered off the statutory obligation to disclose, or as to Sir James's knowledge of such occurrence, or as to his knowledge of the existence of the obligation to disclose. All these matters will, so far as possible, have to be proved by the defendants.

f For these reasons, if no others, I would, for my part, think it unrealistic to suppose that the trial of this very unusual libel action will not require a prolonged examination of documents, or that this examination can conveniently be made with a jury; but Lawton and Kerr LJ have given a number of further reasons of no less importance for reaching the same conclusion, with which I respectfully agree.

g I also agree with the following passage from the judge's reasons, which I will quote:

h 'I am perfectly clear that on the present state of the pleadings this case will involve prolonged examination of documents not easily comprehensible to ordinary folk, or even to a judge. They are really only comprehensible to accountants. That part of the case cannot be tried by a jury. It concerns interlocking shareholdings here and abroad, and the constitution of companies here, as well as in Panama and Liechtenstein, will have to be looked at. The picture is not stabilised at any one date: it is a shifting scene over a number of years. There will have to be prolonged examination of company registers which have been changed from time to time. The jury will be concerned with legal advice and the instructions on which it was based.'

i It follows from what I have said that in my view the present action is an 'action to be tried in the Queen's Bench Division which does not by virtue of subsection (1) fall to be tried with a jury' within the meaning of s 69(3) of the 1981 Act.

Theoretically the judge, in my opinion, did still have a discretion under s 69(3) to order this libel action to be tried with a jury, even though sub-s (1) did not make such a trial mandatory. Nevertheless, in my opinion, Parliament, in enacting s 69(3), has indicated its clear intention that trial without a jury should be the normal mode of trial for any Queen's Bench action which does not, by virtue of sub-s (1), fall to be tried with a jury. In this respect the statutory position is, I think, now different from that which appertained when this court gave its decision in *Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013, [1973] 1 WLR 448. The relevant statutory provision in force at that time was s 6 of the Administration of Justice (Miscellaneous Provisions) Act 1933 as amended, which had the one important difference from s 69 of the 1981 Act which Lawton LJ has already mentioned. Particularly having regard to this difference in the relevant statutory provision, I do not, for my part, think that the *Rothermere* decision would oblige or, indeed, entitle this court to interfere with the refusal of the judge to order trial by jury in the present case, even though I appreciate that the alleged libel does involve serious imputations against Sir James Goldsmith's honour. The nature of the particular libel alleged and of the defendants' plea of justification, in my opinion, makes this a quite exceptional case.

As I read the brief note of the judge's reasons for his decision, the process of his reasoning was briefly this. Having implicitly concluded, in my view correctly, that the action was not one which fell to be tried with a jury by virtue of sub-s (1), he implicitly declined to depart from the normal mode of trial laid down by sub-s (3) by exercising the discretion given him by that subsection to order trial by jury. I can see no sufficient grounds for this court to say that he was wrong to decline to exercise the discretion given him by sub-s (3).

One passage at the end of the note of his reasons is open to criticism for the reasons referred to by Lawton and Kerr LJ, but this passage was, as it were, a postscript after he had already decided to order trial by judge alone, for what seem to me to have been the perfectly good and sufficient reasons already stated by him.

I cannot think that Parliament, in enacting s 69 of the 1981 Act, contemplated that, save in a very rare case, a judge would order trial by jury in a case where, for good and sufficient reasons, he considered that the trial would require prolonged examination of documents which could not conveniently be made with a jury.

For these and the other reasons given by Lawton and Kerr LJJ, with which I respectfully agree, I, too, would dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

14 November. A petition by the plaintiffs for leave to appeal to the House of Lords was withdrawn.

Solicitors: Allen & Overy (for the plaintiffs); Bindman & Partners (for the defendants).

Mary Rose Plummer Barrister.

a Viscount De L'Isle v Times Newspapers Ltd

COURT OF APPEAL, CIVIL DIVISION

MAY, MUSTILL AND BALCOMBE LJJ

23 MARCH, 15 APRIL 1987

b Practice – Trial – Trial by jury – Libel – Trial of action requiring prolonged examination of documents and accounts – Whether administration of justice would suffer if trial was with a jury – Whether judge having discretion to order trial by judge alone – Supreme Court Act 1981, s 69(1)(3).

The defendant newspaper published an article commenting on a press release which announced the appointment of the plaintiff as chairman of a large property investment trust. The article referred to the omission in the press release of the plaintiff's previous tenure of the chairmanship of a public company and stated that the plaintiff had left that company 'as its multi-million pound real estate ventures collapsed, forcing the government to throw it a lifeline to keep it afloat'. The plaintiff brought an action for libel against the defendants in respect of the article. The defendants pleaded justification, the particulars of which referred to the financial difficulties of the company over a period of years and set out the extent of its losses. On the summons for directions the master ordered trial by judge alone. On appeal by the defendants, the judge held that since the case would require prolonged examination of accounts it could not conveniently be tried by a jury, and accordingly under s 69(1)(a)⁴ of the Supreme Court Act 1981 the action should be heard by a judge alone. He further refused to exercise his discretion under s 69(3) of the 1981 Act to order trial by jury. The defendants appealed to the Court of Appeal.

Held – The questions which a judge was called on to decide under s 69(1) of the 1981 Act, namely whether the trial of the action would require prolonged examination of documents or accounts, and whether that could conveniently be done with a jury, were not questions which called for an exercise of 'discretion'. The issue was whether the trial was likely to involve such a lengthy examination of documents and accounts that it was likely that the administration of justice would suffer if the trial was with a jury rather than by a judge alone, and that required weighing up the conflicting considerations in the light of the pleadings and any other material put before the judge. Accordingly, since it was not reviewing the exercise of a discretion of the court below, the Court of Appeal was free to review the judge's findings of fact and to substitute its own conclusions in the light of more detailed argument and information. Since on the facts the trial was not likely to involve such a lengthy examination of accounts that the administration of justice would suffer the appeal would be allowed and an order made for trial by judge and jury (see p 504 *eg* to p 505 *a*, p 506 *f* to *j* and p 508 *efj* to p 509 *b d*, post).

Lucas-Box v News Group Newspapers Ltd [1986] 1 All ER 177 and *Goldsmith v Pressdram Ltd* [1987] 3 All ER 485 considered.

Notes

For the right to trial by jury, see 37 Halsbury's Laws (4th edn) para 474, and for cases on the subject, see 37(3) Digest (Reissue) 93–98, 3418–3434.

For the Supreme Court Act 1981, s 69, see 11 Halsbury's Statutes (4th edn) 824.

j Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

G v G [1985] 2 All ER 225, [1985] 1 WLR 647, HL.

^a Section 69, so far as material, is set out at p 502 *h j*, post

Goldsmith v Pressdram Ltd (1984) [1987] 3 All ER 485, CA.

Hadmor Productions Ltd v Hamilton [1982] 1 All ER 1042, [1983] 1 AC 191, [1982] 2 WLR 322, HL.

Lucas-Box v News Group Newspapers Ltd, Lucas-Box v Associated Newspapers Group plc [1986] 1 All ER 177, [1986] 1 WLR 147, CA.

Rothermere v Times Newspapers Ltd [1973] 1 All ER 1013, [1973] 1 WLR 448, CA.

Interlocutory appeal

The defendants, Times Newspapers Ltd, appealed with leave from a decision of Owen J given on 17 July 1986 whereby he dismissed the defendants' appeal from a decision of Master Lubbock made on 20 March 1986 ordering that a libel action brought by the plaintiff, Viscount De L'Isle, against the defendants be tried by a judge alone without a jury. The facts are set out in the judgment of May LJ.

Desmond Browne for the defendants.

Robert Alexander QC and *Richard Walker* for the plaintiff.

Cur adv vult

15 April. The following judgments were delivered.

MAY LJ. This is an appeal with leave of the judge from an order of Owen J of 17 July 1986. On 20 March 1986 Master Lubbock ordered that this action should be tried by a judge alone. From that order the defendants appealed unsuccessfully to the judge. They now appeal to this court asking that the orders of the judge and master should be reversed and that we should order that the action should be tried by a judge and jury.

A limited company known as First National Finance Corp Ltd (FNFC) was at all material times and still is a substantial company with extensive interests in, inter alia, the property field and consumer finance. It thus became involved in the secondary banking crisis which occurred in the early 1970s: indeed it was the largest victim of that crisis. At all material times until 16 July 1975 the plaintiff was the chairman of FNFC. He is a well-known former member of the Cabinet and a former Governor General of Australia. He is the holder of the Victoria Cross and a Knight of the Garter.

In 1974 and 1975 FNFC was in increasing difficulties because of the general market conditions in the financial fields in which it operated. Ultimately, what has been described as a support group arranged by the Bank of England and the clearing banks provided funds for FNFC to replace deposits which had been made with the company through normal market channels, as and when they fell due.

The plaintiff resigned as chairman of FNFC on 16 July 1975. There is a clear issue between the parties as to the circumstances in which this resignation took place and the reasons for it.

To complete the history of FNFC in so far as is relevant, on the evidence before us it seems that after overcoming substantial difficulties and at least two major reorganisations, FNFC ultimately repaid the balance due to the support group, after the provision of a loan of £160,000,000 from a syndicate of banks, in October 1983. So far as I am aware, the company is now trading profitably.

On 15 July 1985 a Mr Peter Palumbo put out a press release announcing the appointment of the plaintiff as the chairman of an organisation known as City Acre Property Investment Trust. This organisation has extensive property interests in the United Kingdom and was in the public eye in July 1985 in connection with its proposed development of the Mansion House Square site in the City of London.

On 17 July 1985 the following paragraph appeared in *The Times Diary*:

'Peter Palumbo is being unduly reticent about the background of the new

a chairman for his City Acre Property Investment Trust: Viscount De L'Isle. The extensive biography Palumbo has provided goes to great lengths to demonstrate that the Viscount is well suited to the task of persuading the City that the Mansion House needs a new neighbour. Yet curiously it leaves out one aspect of De L'Isle's experience of the property business: for several years he was chairman of the First National Finance Corporation. He left in 1975 as its multi-million pound real estate ventures collapsed, forcing the government to throw it a lifeline to keep it afloat.'

b The plaintiff complained about this paragraph in a letter to the editor of the Times dated 19 July 1985. In this he contended that the article contained substantial misstatements. Parts of the plaintiff's letter need setting out in full:

c '... The Government did not "throw a lifeline" to keep it afloat. When lenders withdrew their short term credit from FNFC and a number of other banking and financial institutions, under the leadership of the Bank of England a consortium of joint stocks banks was formed to replace these funds. I did not leave as FNFC's "multi-million pound real estate ventures collapsed". I left when the financial viability of the company was assured as a result of the action described above. I resigned my chairmanship on the advice of the Governor of the Bank of England. Any reader ignorant of the facts would, on reading the sentence to which I am referring, suppose that I had quit my responsibility as FNFC was forced into liquidation, with the inference that I had done so at the expense, not only of the shareholders, but depositors. In the context of my appointment of Chairman of the Board of City Acre Property Investment Trust the paragraph in question was clearly deliberately designed to be damaging.' (The plaintiff's emphasis.)

e The plaintiff's letter ended:

'I look forward to hearing from you that the false impression made by the paragraph in question will be corrected immediately.'

However in his reply of 25 July 1985 the editor disputed that the facts stated in the Diary were incorrect and his letter continued:

f 'The Diary paragraph was a bit sharp but I understand that this arose because of surprise that your chairmanship of FNFC was left out of the c.v. provided by the Palumbo organisation.'

After a further inconclusive exchange of letters, the plaintiff instructed solicitors who wrote to the editor on 6 August 1985 asking him to publish in the Times Diary the following statement, in order to avoid the necessity for legal proceedings:

g 'In my piece about the Palumbo Project, I mentioned that Lord De L'Isle, the new Chairman for the City Acre Property Investment Trust, was previously Chairman of the First National Finance Corporation from which he resigned in 1975. Unfortunately what I said gave the impression, which was not intended, that Lord De L'Isle's resignation had forced the Government to step in to keep the Corporation "afloat". This was not so. Lord De L'Isle remained with the company during its progress towards rehabilitation and only resigned as Chairman when this was agreed with the Bank of England. Prior to entering commerce Lord De L'Isle was Secretary of State for Air in Sir Winston Churchill's post-war Cabinet and later Governor General of Australia. I regret any misunderstanding to which my piece may have given rise.'

j The editor was not prepared to comply and accordingly these proceedings were started.

The writ was issued on 20 August 1985 and the statement of claim served on 2 September 1985. In para 3 of the latter the pleader quoted the first and last sentences from the paragraph in the Times Diary which I have already set out in full. The statement

of claim then contended, in para 4, that the words so published in their natural and ordinary or inferential meaning meant and were understood to mean: a

'(1) That the Plaintiff had deliberately and for selfish and/or cowardly motive, resigned his chairmanship of a public company because it was in financial difficulty; (2) That the Plaintiff had, thereby, put personal self-interest before the interest of shareholders and/or investors and/or the public purse; (3) That the Plaintiff had, thereby, behaved discredibly in so resigning his chairmanship.' b

The defendants' defence was served on 27 September 1985. Paragraph 4 of it contained the usual denial that the words complained of in their natural and ordinary meaning bore or were understood to bear or are capable of bearing any of the meanings that were alleged in para 4 of the statement of claim or any meaning defamatory of the plaintiff. In para 5 the defendants set up a plea of justification. The first four sub-paragraphs of the particulars of justification referred to the press release of 15 July 1985 and to the fact that although the plaintiff's curriculum vitae accompanying it mentioned that he had been a former director of various well-known British and American public companies, it did not say that for a number of years up until July 1975 he had been the chairman of FNFC. The particulars then briefly referred to the financial difficulties in which FNFC had been in 1974 and 1975, concluding with the plaintiff's resignation from the FNFC board on 16 July 1975. c

Sub-paragraph (5) of the particulars of justification was then in these terms: d

'The Defendants deny: (a) the Plaintiff's assertion in his letter to the editor of The Times dated 19th July 1985 that he "left when the financial viability of FNFC was assured", and (b) his solicitors' contention in their proposed apology of 6th August 1985 that the Plaintiff "remained with FNFC during its progress towards rehabilitation". The Defendants rely on the following matters as demonstrating that was not so.' e

Thereafter in 15 further sub-paragraphs (sub-paras (6) to (20)) the particulars purported to trace FNFC's financial history and position up to at least the end of 1982. The sub-paragraphs alleged, inter alia, that the provisions made by FNFC in respect of expected or possible losses had to be increased from time to time. They set out the extent of FNFC's losses over the years. They referred to statements by chairmen subsequent to the plaintiff about the future of FNFC from time to time including the possibility that the company might be forced into liquidation and contended, correctly, that it was only in October 1983 that FNFC did finally repay the support group's funds. f

The summons for directions was heard by Master Lubbock on 24 March 1986 and, as I have said, he ordered the trial of the action by judge alone. As I have also said, this order was appealed to the judge, but the appeal was dismissed. It is in these circumstances that the matter now comes before us. g

The relevant statutory provision is now contained in s 69(1) and (3) of the Supreme Court Act 1981, which is in these terms:

'(1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue—(a) a charge of fraud against that party; or (b) a claim in respect of libel, slander, malicious prosecution or false imprisonment; or (c) any question or issue of a kind prescribed for the purposes of this paragraph, the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury . . . h

(3) An action to be tried in the Queen's Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried with a jury . . . ' j

a The previous similar statutory provisions were contained in s 6(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933. It was these that were considered in *Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013, [1973] 1 WLR 448. The wording of the 1981 Act changed the emphasis for the exercise by the court of the residuary discretion given by s 69(3). In *Goldsmith v Pressdram Ltd* (1984) [1987] 3 All ER 485 at 490 Lawton LJ said:

b 'My construction of s 69 [of the 1981 Act] is this, that it is still mandatory for actions of libel and slander to be tried with a jury unless the court is of opinion that the trial requires any prolonged examination of documents which cannot conveniently be made with a jury, but even if it does require a prolonged examination of documents there is still a discretion in the court to allow trial with a jury, but the emphasis now is against trial with juries, and the court should take this emphasis into account when exercising its discretion.'

c In his turn Kerr LJ said (at 494):

'Whereas the balance was then [in 1973] wholly even as between trial by jury and trial by judge alone, even after the requirements of what is now s 69(1) had been met, sub-s (3) now indicates a shift in favour of the latter mode of trial in such cases.'

d Slade LJ expressed the same view in his judgment.

e In this case the judge below was referred to the decisions in both *Rothermere's* and *Goldsmith's* cases and in the fourth paragraph of his judgment set out his conclusions about the law to be applied in the instant case in three propositions, with which, with respect, I entirely agree. Having considered the history and circumstances of the matter, the judge concluded that the trial of this action would require a prolonged examination of accounts and that this could not conveniently be made with a jury. Consequently, he held that the case met the two requirements of s 69(1) and that, notwithstanding an argument on behalf of the defendants that the plaintiff was attacking their honour and integrity in this litigation, he should not exercise his discretion under s 69(3) to order a trial by jury. It was for these reasons that the judge dismissed the appeal from the order of Master Lubbock.

f On behalf of the defendants counsel argued, first, that this was not a case in which this court was being asked to review the exercise of a discretion of the court below: if it were, he accepted that the court's approach would be restricted on the lines indicated in the recent decisions of *Hadmor Productions Ltd v Hamilton* [1982] 1 All ER 1042, [1983] 1 AC 191 and *G v G* [1985] 2 All ER 225, [1985] 1 WLR 647. Counsel for the defendants submitted that in cases such as this the Court of Appeal had to review the 'opinion' of the judge below that the requirements of s 69(1) had been satisfied. This was a mixed question of law and fact and a question of making a judgment or decision on the material available. He contended that in the instant case the judge erred in three basic respects. Firstly, that in truth the trial of this action would not involve the prolonged examination of documents or accounts; indeed when one analyses the pleadings it was clear that the reference to documents at the trial would be relatively limited. Secondly, it was suggested that the judge had failed to appreciate that the issues which the jury would have to try were two simple ones, namely did the words complained of inferentially bear the meaning alleged in the statement of claim, and then was the plaintiff correct in asserting in his letter to the editor of 19 July 1985 that he only left FNFC when that company's financial viability was secured. Thirdly, it was said that the judge ought to have exercised the residual discretion under s 69(3) of the 1981 Act in favour of a trial by jury, having regard to the public importance of the issues which the case will raise.

j In reply, counsel for the plaintiff submitted that the task of the judge was in essential no different from a judge's task in a discretion case and that accordingly the principles to which I have referred should be applied by this court in this appeal. Against that

background, he submitted that the judge had directed himself perfectly correctly according to the law and had neither failed to take into account matters which he ought to have done, nor taken into account matters which he ought not to have done. In any event, whether it was a discretion case or not, the judge's conclusions on the preconditions set out in s 69(1) of the 1981 Act were clearly correct. The trial would not be limited in its extent as counsel for the defendants had suggested. The judge had been right to accept the contention of counsel then appearing for the plaintiff that the bare financial statements which were made in the accounts, documents and press from time to time would require analysis and explanation and that this would involve looking at the general financial condition of the company over a number of years, which will of necessity involve a prolonged examination and explanation of the relevant accounts. Counsel for the plaintiff drew our attention to a brief passage from the judgment of Lawton LJ in *Goldsmith v Pressdram Ltd* [1987] 3 All ER 485 at 492 (in which it so happened that counsel for the defendants here was appearing on behalf of the defendants there), to the effect that—

'I am of the opinion that I must accept the statement made by counsel for the defendants that many documents will have to be looked at in the course of Sir James's cross-examination.'

Counsel for the plaintiff contended that at the relatively early stage of the litigation when the question of the mode of trial was before the judge below, it was proper and indeed necessary for him to take into account the views expressed by experienced counsel, of course on both sides, about how the action was likely to develop at trial as, on the limited material then available to the court, they were in a better position than it to know.

In my opinion, however, the task of the judge below in this matter is not properly to be compared with an exercise of discretion as, for instance, in a case where the judge has to decide on facts found by him whether it is a proper case for an injunction; or whether again, on the facts found and the impressions gained of witnesses, the custody of a child should be given to this parent or the other. In my opinion a judge reaches a decision in the exercise of his 'discretion' within the scope of the decisions of the House of Lords to which I have referred where, on the facts found by or agreed before him and on the law correctly stated by him, he is required in the exercise of his judicial function to decide between two or more courses of action without any further rules governing the decision which he should make, other than that he should act judicially. It is just because this is the nature of such a task facing a judge that this court is restricted by the authorities to the extent to which it can interfere. Unless his decision is perverse in the *Wednesbury* sense (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223), it must be one to which a judge, acting judicially, could come. But I do not think that these considerations apply in the instant case, in so far as s 69(1) of the 1981 Act is concerned. I do not think that this court ought to consider itself restricted by the decision of the judge below that the projected trial will require a prolonged examination of documents or accounts, which cannot conveniently be made with a jury, save of course by the respect which this court always pays to an opinion expressed by a judge in the court below. In my view the questions raised by s 69(1) of the Act are not ones calling for the exercise of a 'discretion' by a judge: he has to weigh up the conflicting considerations in the light of the pleadings and any other material that there is before him; no doubt one side says that all will depend on the documents and accounts in the case and the proper inferences to be drawn from them, and that these will consequently have to be gone into in detail; the other side contends in effect that only a few documents will be material and they will in the main speak for themselves. On the question of convenience, given that there will have to be the prolonged examination to which the subsection refers, the judge has to decide whether that can or cannot conveniently be made with a jury. Each of the questions to which he must give an answer requires a value judgment, based on the material available to him, on what he is told by counsel, and his experience at the Bar and on the Bench. The judicial task and approach under

a sub-s (1) of s 69 is clearly to be contrasted with that under sub-s (3) which is expressly one for the exercise of discretion.

Next, it is clear that the answer to the questions posed by s 69(1), on which the ultimate decision as to the mode of trial will be made, must depend in the first place on the nature of the plaintiff's case and of the defendant's defence. In other fields of litigation the rules of practice and pleading have been designed to ensure, so far as possible, that each side does know the case which will be raised by his opponent and will not be taken by surprise. In the instant case it is I think difficult to know what the case is on either side. For myself, the plea in the statement of claim of the natural, ordinary or inferential meaning of the words complained of goes well beyond any meaning which at any rate immediately comes to my mind. In the course of the argument counsel for the plaintiff told us that really what the plaintiff is complaining of in these proceedings is the suggestion that he had abandoned a sinking ship, when in truth this was not so because he had taken all necessary steps to ensure that wholly adequate salvage was at hand.

c The position in so far as the defence is concerned seems to me to be even more difficult. True it is that a defendant is not yet permitted to set out in his defence what he contends the words complained of mean, although I respectfully agree with the editors of *Duncan and Neill on Defamation* (2nd edn, 1983) p 53, para 11.11, where they suggest that this rule needs re-examination. On the other hand the extent to which a defendant in defamation proceedings who relies on a plea of justification must make clear in the particulars of justification what precisely is the case which he is seeking to set up was recently considered by this court in *Lucas-Box v News Group Newspapers Ltd, Lucas-Box v Associated Newspapers Group plc* [1986] 1 All ER 177, [1986] 1 WLR 147. The facts of that case were special and those in the instant case can clearly be distinguished. Nevertheless in delivering the judgment of the court Ackner LJ said ([1986] 1 All ER 177 at 183, [1986] 1 WLR 147 at 153):

f 'However, we would go even further and say that, whatever may have been the practice to date, in future a defendant who is relying on a plea of justification must make it clear to the plaintiff what is the case which he is seeking to set up. The particulars themselves may make this quite clear, but if they are ambiguous then the situation must be made unequivocal.'

I have already referred to the particulars of justification as they are presently contained in the defence in this case and have quoted sub-para (5) of them. On the particulars of justification as they stand, I do not think that the requirement referred to in the passage from the judgment in the *Lucas-Box* case which I have quoted has been complied with. Without explanation, I think that it is uncertain from the pleading precisely what case the defendants are seeking to set up. Nevertheless, in the course of the argument counsel for the defendants made it clear that the intent, in particular of sub-para (5) of the particulars of justification, was to assert that if and in so far as the true meaning of the article complained of was that the plaintiff left FNFC before its financial viability was assured and that he did not remain with that company during its progress towards rehabilitation (contrary to his assertion in his letter of 19 July 1985 and his solicitors' contention in their proposed apology of 6 August 1985) then it was that meaning which they were prepared to justify at trial.

h There have been many criticisms in the past by the courts of obfuscation and undue technicality in the pleadings in these defamation actions. There are historical and constitutional reasons which it is said support this. Nevertheless, in the instant case it is quite clear, in the first place, that the plaintiff, following what I understand to be the normal practice in these cases, has pleaded the most serious possible meaning of the alleged defamatory article and certainly put his case far higher than it will be at trial. The defendants on the other hand only seek to justify a limited interpretation of the relevant article but in my opinion have even then failed to make clear precisely what their case is. I see no reason why today it is impossible to hope that a new wind of realism cannot blow

through the pleadings and practice in this particular field of jurisprudence. In the modern context it ought to be a field in which openness on both sides is the order of the day. a

Be that as it may, in his judgment the judge said that he thought that the particulars of justification in the defence opened up the whole financial history of FNFC from about 1970 to 1982; that it would be necessary to go into this history in some detail; and that a jury, if the action was to be tried by one, would have constantly to be referred to accounts and other documents. He did not wholly accept the contention of counsel for the defendants, which the latter repeated before us, that his case would be proved largely by the statements which were made from time to time by officials of the company, and also by reference to its published annual accounts, neither of which would involve what could properly be described as involving any prolonged examination of any account or document. b

In seeking to support the decision of the judge counsel for the plaintiff reminded us of the inherent difficulties of trying a case of this nature with a jury. He pointed out that the qualities of individual jurors will necessarily vary and it cannot be assumed that all, or at least the majority, of any jury empanelled to decide this action would be able adequately to understand figures and accounts. Any trial by jury would take longer than a trial of the same issues by a judge and for that reason alone would be bound to be more expensive. The cost of the litigation fell more heavily on a plaintiff in a defamation action, who was almost always an individual, than on corporate defendants such as the substantial defendant company in the instant case. All these were considerations which the court should have well in mind, he submitted, when deciding whether the criteria set out in s 69(1) of the 1981 Act were fulfilled. c

On the other hand, I think that one must also remember that Parliament has provided that in general, defamation actions should be tried by juries. In my opinion one should not read the relevant subsection almost as if the word 'prolonged' were not there. Further, adopting respectfully the approach of Slade LJ in *Goldsmith v Pressdram Ltd* [1987] 3 All ER 485 at 496 I agree that the second phrase in s 69(1) directs one's attention to the question of the efficient administration of justice rather than to the difficulty or complexity of the issues involved in the litigation. The question is whether the trial is likely to involve so lengthy an examination of documents and accounts that it is likely that the administration of justice will suffer if the trial is with a jury rather than by a judge alone. d

I think that it is clear that on the hearing of this appeal we had the benefit of more detailed argument and information about the respective cases on the two sides than did the judge. With that assistance I have reached the conclusion that the judge below came to the wrong decision in this case, a decision, be it noted, to which he came only after considerable hesitation. I do not think that the trial of this action will require the long and detailed investigation of the financial position of FNFC over more than ten years which counsel for the plaintiff suggested. On the issues raised by the pleadings I think that it will only be necessary to take a 'broad brush' or general over-view of the company's financial situation before and after the plaintiff resigned as chairman. The instant case is very different in its facts from *Goldsmith's* case. e

I should add that had I been able to reach the same conclusion as the judge on the questions raised by s 69(1), I too would not have gone on nevertheless to exercise my discretion under s 69(3) in favour of a jury trial. f

For the reasons I have given, however, I would allow this appeal and vary the order as to mode of trial made by the master so that it should be by a judge and jury, rather than by a judge alone. g

MUSTILL LJ. I agree and will add only a few observations on *Lucas-Box v News Group Newspapers Ltd*, *Lucas-Box v Associated Newspapers Group plc* [1986] 1 All ER 177, [1986] 1 WLR 147 and on the shape of the pleadings in the present action. h

a First, as to the *Lucas-Box* case. Two different interpretations have been put on the decision and judgment of this court. The first is that a defendant is now required to plead the meaning which he ascribes to the writing of which the plaintiff complains if that differs from the meaning pleaded by the plaintiff. Second, that the defendant is obliged to make clear what version of the facts it is that he asserts to be true.

b Whilst I understand why the authors of the headnotes should have adopted the first interpretation of what the court decided and said, I believe it to be mistaken. Whatever the state of the law and practice about the defendant's entitlement to plead a meaning if he thinks fit, it would have been a large step for the court to upset what appears to have been a settled rule of practice that he cannot be obliged to do so. I do not read the relevant passage of the judgment (see [1986] 1 All ER 177 at 183, [1986] 1 WLR 147 at 153) as requiring this to be done, and it is significant that in the *Lucas-Box* case itself the radical amendments insisted on by the court did not extend to any statement of the defendants' case about the true meaning of the articles in question.

c The effect of the *Lucas-Box* case was in my judgment significantly different. The situation with which it deals has the following elements: (i) the defendant denies the meaning relied on by the plaintiff, and all other defamatory meaning; (ii) he offers no plea himself as to the meaning borne by the article; (iii) he does not attempt to justify the matter complained of, if it is understood in the sense for which the plaintiff contends; d (iv) he wishes to establish by evidence, if the court accepts that the writing does have a defamatory meaning short of the meaning which the plaintiff attributes to it, that in that more limited sense what he has written was true. The essence of the decision in the *Lucas-Box* case (and here it may have broken new ground) is that the justification must be pleaded so as to inform the plaintiff and the court precisely what meaning the defendant e will seek to justify. This is, however, an altogether different matter from saying that the defendant is obliged to say, yea or nay, whether that meaning is the one which the writing really bears.

f Thus, on the law as it stands at present I do not consider that the defence can be criticised for omitting any statement of the defendants' chosen interpretation of the article. Nevertheless, it does seem to me that the course of the pleadings has been such as to make the issue now before the court unnecessarily difficult to decide.

g Thus, (1) it is not to my mind clear what the statement of claim alleges as to the untruth of the various interpretations which it is said should be placed on the article, (2) sub-para (5) of the plea of justification and the subsequent paragraphs in which it is elaborated were concerned with traversing the truth of two assertions of fact which were contained respectively in the plaintiff's letter dated 19 July 1985 and in his solicitor's draft apology, but were not repeated in the statement of claim, (3) the defence did not (as it seemed to me on first and subsequent reading) clearly identify which of the possible meanings of the article the defendants proposed to justify, (4) the plaintiff has not served a reply. He was not obliged to do so, but there is in the result no pleading in which he sets out the case which, according to the arguments presented on his behalf, will call for a prolonged and inconvenient scrutiny of documents.

h On this state of the pleadings it seemed hard to discern even the barest outlines of the issues which the judge or jury would have to decide at the trial. Yet the court has to take the pleadings as they stand. On this basis, counsel for the plaintiff addressed an argument on the following lines. Whatever exactly the defendants are going to contend at the trial, they have made it plain that in some way or another they are going to invite the court of trial to look at a course of events beginning in the early 1970s and continuing until 1982.

j In order that the court can soundly consider whether this course of events does contain material which could be said to justify whatever imputation the article may be said to have conveyed, it is essential to understand that history aright. For this purpose, so the argument runs, it is necessary to place the history in context, and to expand it beyond the bare facts relied on in the defence. This will mean looking carefully at a number of documents, including in particular the accounts to which the defence refers. Thus, the

court will have to understand the secondary banking crisis which began in 1973 and its effect on the company. It will also have to comprehend the support operation not only in the form which it ultimately took, but its various other proposed shapes; and also the effect which the support could be expected to have on the company's prospects of recovery, especially at the time when the plaintiff resigned. Again, since the subsequent increases in provisions are relied on as part of the justification, the reasons for them must be understood, before any appreciation can be formed as to the extent to which they shed light on the prospects of recovery as they existed at the time of the plaintiff's resignation. a

After the conclusion of the submissions of counsel for the plaintiff, counsel for the defendants gave an explanation of sub-para (5) which elucidated what I had previously failed to understand. What the plea means is essentially this: 'If the judge or jury decide that the article conveyed that the plaintiff had left FNFC at a time when its financial viability was not assured, and had not remained with the company during its progress towards rehabilitation (and we (the defendants) make no assertion about whether it did or did not mean this) then we aver for the following reasons that what we said was true.' Counsel for the defendants went on to say that the defendants did not intend to assert the truth of a meaning attributed to the article in the draft apology (but not in the statement of claim) that the resignation had forced the government to step in to keep the company afloat. He also repeated, what must in any event have been clear on a reading of the particulars, that no attempt will be made to justify a reading which might perhaps cross the mind of a judge or juror, to the effect that the plaintiff who had been at the helm of the company when it ran into trouble, was to be regarded as having been responsible for that trouble, and was therefore an unsuitable choice to head the new company. b

Now that the parties have explained to this court what the pleadings really mean, it can be seen that the issues are much more circumscribed than they had appeared to the judge. So regarded they will not in my judgment necessitate a prolonged examination of documents or accounts of a kind which cannot conveniently be made with a jury. As May LJ has observed, it is likely that there will be no need to do more than make a 'broad brush' assessment of how the company's financial position appeared at the material times. There is no reason to suppose that this task will be outside the compass of the jury. c

For these reasons I consider that, with the benefit of an exposition more detailed than the one furnished to the judge, his appreciation of the shape of the trial was incorrect, and the case is one in which we can properly intervene. d

BALCOMBE LJ. An appeal to the Court of Appeal is by way of rehearing (see RSC Ord 59, r 3(1)). Unlike those cases where statute limits the right of appeal to a question of law, this court in a case such as the present has the right, and indeed the duty, to review the decision of the judge at first instance both on law and on fact. In doing so, it will, of course, follow certain well-established principles. Thus it will not normally interfere with a finding of fact by the judge of first instance, where that finding depends on the credibility of a witness whom the judge has observed giving evidence. Again, an appellate court may interfere with the exercise of a discretion by a judge of first instance only if it is satisfied that the judge has erred in certain well-defined respects (see *Hadmor Productions Ltd v Hamilton* [1982] All ER 1042 at 1046, [1983] 1 AC 191 at 220 and *G v G* [1985] 2 All ER 225, [1985] 1 WLR 647). But, subject to the established limitations, this court can and should be prepared to review the decision of a judge of first instance, both as to law and as to fact. e

In the present case, the operative words of s 69(1) of the Supreme Court Act 1981 are 'unless the court is of opinion that the trial requires any prolonged examination of documents or accounts . . . which cannot conveniently be made with a jury.' In forming its opinion the court must first ascertain the relevant facts (and here the Court of Appeal is as well able to do this as was the judge below, since nothing turns on the credibility of witnesses) and then apply its experience in forming the opinion that the subsection requires. While I appreciate the similarity of this process to the exercise of a judicial f

a discretion, in that in either case there will be scope for a legitimate difference of judicial views, nevertheless I agree with May LJ that the process of forming an opinion under s 69(1) involves a different judicial process from that of exercising a discretion (as under s 69(3)) and this court is not precluded from reviewing the judge's decision on this question merely because it may not fall within the limited area where an appellate court is entitled to review the exercise of a judicial discretion.

b On the substantive issue as to whether the trial does require prolonged examination of documents which cannot conveniently be made with a jury, I agree with the judgment of May LJ and do not wish to add anything. However, as one who comes fresh to this arcane branch of the law, I wish to associate myself with what has fallen from May LJ about the pleadings in this case. The purpose of pleadings is to make plain what are the issues between the parties: the pleadings here singularly fail to do this. Where the fault lies I am not qualified to say: there may be good historical and constitutional reasons why c a plaintiff should not be required to state in what respects the statement of which he complains is untrue. Nevertheless, even allowing for the difficulty in which this places a defendant who wishes to plead justification, the particulars in the present case do not fulfil the test set out by this court in *Lucas-Box v News Group Newspapers Ltd*, *Lucas-Box v Associated Newspapers Group plc* [1986] 1 All ER 177 at 183, [1986] 1 WLR 147 at 153, a test which in any other branch of the law would be treated as axiomatic. I echo the hope d of May LJ that a new wind of realism, even, perhaps, a wind of change, may blow through the pleadings and practice in this field.

I, too, would allow this appeal and I agree with the order proposed by May LJ.

Appeal allowed.

e Solicitors: *Alastair J Brett* (for the defendants); *Peter Carter-Ruck & Partners* (for the plaintiff).

Carolyn Toulmin Barrister.

SNI Aérospatiale v Lee Kui Jak and another

PRIVY COUNCIL

LORD KEITH OF KINKEL, LORD GRIFFITHS, LORD MACKAY OF CLASHFERN, LORD GOFF OF CHIEVELEY
AND SIR JOHN MEGAW

6, 7, 8, 9 APRIL, 14 MAY 1987

Conflict of laws – Foreign proceedings – Restraint of foreign proceedings – Principles to be applied by court in deciding whether to restrain foreign proceedings – Deceased killed in helicopter crash in Brunei – Helicopter manufactured by French company which did business in Texas – Deceased's representatives commencing actions in Brunei and Texas – Plaintiffs' Texas attorneys carrying out extensive pre-trial discovery in Texas and France – Whether pre-trial discovery turning Texas into natural forum – Whether Texas proceedings vexatious or oppressive – Whether plaintiff would be unjustly deprived of advantages in Texas if Texas proceedings restrained – Whether injunction should be granted restraining plaintiff from continuing Texas proceedings – Whether same principles applying to restraint of foreign proceedings as applying to stay of English proceedings – Whether foreign judgment giving right to seek contribution from others liable in respect of same damage.

The plaintiffs were the widow and administrators of the estate of a passenger in a helicopter who was killed in 1980 when the helicopter crashed in Brunei. The helicopter was manufactured in France by the defendants, a French company which had a subsidiary in Texas to whom it sold helicopters. At the time of the crash the helicopter was owned by an English company and operated and serviced by its Malaysian subsidiary under contract to a Brunei subsidiary of an international oil company. The plaintiffs brought proceedings against, inter alia, the defendants in both Brunei and Texas alleging faulty design and manufacture. Jurisdiction in Texas was asserted on the basis that the defendants did business there. The plaintiffs' advisers considered that the action had more prospect of success in Texas because Texas law on product liability was more favourable and United States courts awarded a higher level of damages. The plaintiffs' Texas attorneys carried out substantial pre-trial discovery of documents and witnesses in Texas and France and trial of the Texas action was fixed for 1 July 1987. In December 1986 the defendants applied in Brunei for an injunction restraining the plaintiffs from continuing the Texas proceedings. The application was refused and the defendants appealed to the Court of Appeal of Brunei. In the course of the hearing of the appeal both sides gave various undertakings to support their respective cases. The plaintiffs agreed to accept that in any trial in Texas liability and quantum should be determined according to the law of Brunei, while the defendants agreed to allow evidence obtained by the plaintiffs' Texas attorneys to be available in any trial in Brunei, and to co-operate in enabling the Texas attorneys to appear at a trial in Brunei and in obtaining an early date of trial. Also in the course of the hearing of the appeal the defendants served a contribution notice on the Malaysian company which serviced and operated the helicopter. That company was prepared to accept Brunei jurisdiction but resisted Texas jurisdiction on the ground that it had never done business there. The Court of Appeal, applying the principles applicable to the grant of a stay of proceedings in favour of a foreign forum, held that Texas had become the natural forum by reason of the pre-trial discovery carried out there and that that was the forum in which the case could be more suitably tried because of the early trial scheduled there and the fact that the Texas attorneys were familiar with the case. The Court of Appeal accordingly dismissed the appeal. The defendants appealed to the Privy Council.

Held – (1) The principles applicable to the grant by an English court of an injunction to restrain the commencement or continuance of proceedings in a foreign jurisdiction were

a not the same as those applicable to the grant of a stay of English proceedings in favour of a more appropriate foreign forum, and where a remedy for a particular wrong was available both in an English court and a foreign court the English court would normally only restrain the plaintiff from pursuing the foreign proceedings if it would be vexatious or oppressive for him to do so. As a general rule, a decision to grant an injunction restraining foreign proceedings presupposed that the English court would provide the natural forum for the trial of the action and that, as a matter of justice, the injustice to the defendant if the plaintiff was allowed to pursue the foreign proceedings would outweigh the injustice to the plaintiff if he was not allowed to do so, since the court would not grant an injunction restraining foreign proceedings if to do so would unjustly deprive the plaintiff of advantages in the foreign forum (see p 522 d to j and p 524 g h, post); *McHenry v Lewis* (1882) 22 Ch D 397 and *Peruvian Guano Co v Bockwoldt* [1881-5] All ER Rep 715 applied; *Spiliada Maritime Corp v Cansulex Ltd*, *The Spiliada* [1986] 3 All ER 843 distinguished; *MacShannon v Rockware Glass Ltd* [1978] 1 All ER 625 and *Castanho v Brown & Root (UK) Ltd* [1981] 1 All ER 143 considered; dicta of Lord Scarman in *Castanho v Brown & Root (UK) Ltd* [1981] 1 All ER at 150-151 and of Lord Diplock in *British Airways Board v Laker Airways Ltd* [1984] 3 All ER at 45 doubted.

b (2) Since those principles applied equally in Brunei, Brunei was the natural forum at the time of the commencement of the proceedings because the fatal accident had occurred there, the deceased and the plaintiffs were resident there and the law governing the claim was the law of Brunei. At that time, therefore, there was nothing to connect the action with Texas, and the pre-trial discovery subsequently carried out by the plaintiffs' Texas attorneys had not changed that, because it had not made Texas the natural forum and it was not a juridical advantage of which it would be unjust to deprive the plaintiffs since it had been neutralised by the undertakings given by the defendants.

c Accordingly, Brunei remained the natural forum for the action and, furthermore, it would be oppressive for the plaintiffs to proceed in Texas because the defendants might well be unable to pursue in those proceedings their own contribution claim against the Malaysian company which serviced and operated the helicopter. The appeal would therefore be allowed and an injunction granted restraining the plaintiffs from continuing their Texas proceedings (see p 522 j to p 523 d, p 524 c to g j to p 525 d and p 526 j to p 527 b, post).

f Quaere. Whether a foreign judgment gives a right to seek contribution from others liable in respect of the same damage (see p 526 g, post); *Comex Houlder Diving Ltd v Colne Fishing Co Ltd* 1987 SLT 443 considered.

Notes

g For the general principle governing the stay of foreign proceedings, see 8 Halsbury's Laws (4th edn) paras 787-788, and for cases on the subject, see 11 Digest (Reissue) 637-641, 1720-1746.

Cases referred to in judgment

British Airways Board v Laker Airways Ltd [1984] 3 All ER 39, [1985] AC 58, [1984] 3 WLR 413, HL.

h *Bushby v Munday* (1821) 5 Madd 297, [1814-23] All ER Rep 304, 56 ER 908.
Carron Iron Co v MacLaren (1855) 5 HL Cas 416, 10 ER 961.
Castanho v Brown & Root (UK) Ltd [1981] 1 All ER 143, [1981] AC 557, [1980] 3 WLR 991, HL.
Cohen v Rothfield [1919] 1 KB 410, [1918-19] All ER Rep 260, CA.

j *Comex Houlder Diving Ltd v Colne Fishing Co Ltd* 1987 SLT 443, HL.
Harris v Express Motors Ltd [1983] 3 All ER 561, [1984] 1 WLR 212, CA.
Hyman v Helm (1883) 24 Ch D 531, CA.
MacShannon v Rockware Glass Ltd [1978] 1 All ER 625, [1978] AC 795, [1978] 2 WLR 362, HL.
McHenry v Lewis (1882) 22 Ch D 397, CA.

North Carolina Estate Co Ltd, Re (1889) 5 TLR 328.

Peruvian Guano Co v Bockwoldt (1882) 23 Ch D 225, [1881-5] All ER Rep 715, CA.

Pickett v British Rail Engineering Ltd [1979] 1 All ER 774, [1980] AC 136, [1978] 3 WLR 955, HL.

St Pierre v South American Stores (Gath & Chaves) Ltd [1936] 1 KB 382, [1935] All ER Rep 408, CA.

South Carolina Insurance Co v Assurantie Maatschappij 'de Zeven Provinciën' NV [1986] 3 All ER 487, [1987] AC 24, [1986] 3 WLR 398, HL.

Spiliada Maritime Corp v Cansulex Ltd, The Spiliada [1986] 3 All ER 843, [1987] AC 460, [1986] 3 WLR 972, HL.

Young v Barclay (1846) 8 Dunl (Ct of Sess) 774.

Appeal

The defendants, SNI Aérospatiale (SNIAS), appealed with leave of the Court of Appeal of Brunei Darussalam against the decision of that court (Briggs P, Kempster and O'Connor, Judicial Commissioners) on 20 March 1987 dismissing an appeal by SNIAS from the judgment given orally by Mr Commissioner Rhind in chambers in the High Court of Negara Brunei Darussalam on 22 December 1986 and in writing on 16 January 1987 dismissing the application of SNIAS for an order restraining the plaintiffs, Lee Kui Jak and Yong Joon Kim, the administrators of the estate of Yong Joon San deceased, the former suing also on behalf of herself as widow of the deceased, from continuing proceedings against SNIAS in the 61st Judicial District Court of Harris County, Texas in respect of the death of the deceased in a helicopter crash on 16 December 1980. The facts are set out in the judgment of the Board.

Ian Hunter QC and *David Joseph* for SNIAS.

Nicholas Chambers QC and *Raymond Sze-tu* (of the Brunei and Malaysian Bars) for the plaintiffs.

14 May. The following judgment of the Board was delivered.

LORD GOFF OF CHIEVELEY. There is before their Lordships an appeal by the appellants, SNI Aérospatiale (whom their Lordships will refer to as 'SNIAS'), from a judgment of the Court of Appeal of Brunei Darussalam delivered on 20 March 1987, in which the Court of Appeal dismissed an appeal from a decision of Mr Commissioner Rhind (delivered orally on 22 December 1986 and in writing on 16 January 1987) declining to grant an injunction restraining the respondents from continuing proceedings commenced by them in the 61st Judicial District Court of Harris County, Texas.

The matter has arisen as follows. On 16 December 1980 a Puma 330J helicopter crashed near Kuala Belait in Brunei. There were 12 people on board; all were killed. Among those killed was Yong Joon San.

Yong Joon San was a very successful businessman. His home was in Brunei, where he lived with his wife and children. His main business (carried on by him under the name of Yong Joon San General Contractor) was a business in his sole proprietorship concerned with providing catering services to oil rigs and other structures operating off Brunei. He also had a much smaller business in Malaysia called Yong & Co, which was likewise in his sole proprietorship. It appears from the evidence presently available that Yong Joon San was making a very substantial income from his business activities, and especially from his catering business in Brunei, and that in addition he was making substantial sums on the New York Stock Exchange. One estimate given of his income in the year before his death was over \$US1.8m. It has also been stated that, by the time of his death, he had accumulated a fortune in the region of \$US20m.

The Puma helicopter which crashed was manufactured by SNIAS in France in 1978.

a SNIAS are a French company in the ownership of the French state. The helicopter in question was owned by an English company, British and Commonwealth Shipping Co (Aviation) Ltd (British and Commonwealth); but it was at all material times operated and serviced by Bristow Helicopters Malaysia Sdn Bhd (Bristow Malaysia), an associated company of Bristow Helicopters Ltd (Bristow UK), and was under contract to Sarawak Shell Bhd and so was based at Miri Airport in Sarawak. The Bristow companies are ultimately owned by British and Commonwealth.

b The Brunei government ordered an inquiry into the accident. The inquiry was conducted by the Brunei chief inspector of accidents, Mr J M Holden. His report was submitted to the Director of Civil Aviation of Brunei on 20 July 1982. The main conclusion of the report was as follows:

c '... the most likely cause of the accident was a planetary gear failure in the second stage of the two stage epicyclic main gear box reduction gear; the associated metal debris caused jamming within the rotating assemblies, generating forces which fractured the common epicyclic ring gear and the main gearbox casing. This resulted in a gross instability in the rotor system which caused blades to strike the fuselage.'

d It was further concluded that 'the initial cause of the accident was due to the mistaken health monitoring of the gearbox leading to a deterioration of the mechanical condition of the gearbox components'. (Another possible cause was briefly mentioned, but their Lordships were informed that this is no longer regarded as a serious possibility and it can therefore be disregarded.)

e The point about 'mistaken health monitoring of the gearbox' is explained in the body of the report. The maintenance practices to be followed in the event of gearbox contamination are set out in the SNIAS maintenance manual, which refers to nickel or carbon steel particles taken from the filter and magnetic plug, and lays down a procedure to be followed in the event of over 50 mm² of such particles being collected. As is pointed out in the report, this implies that debris from the filter and magnetic plug should be laid out and measured on a cumulative basis until the maximum allowable measured area (50 mm²) is reached; at that stage, the relevant component (either main gearbox or main rotor head) should be returned to the factory and a new component fitted. The report continues:

g 'On 30 January 1980 instructions had been received at Miri from Bristow Helicopters Ltd. in the United Kingdom, following advice from [SNIAS], that "metal particles which are less than 50 mm sq., i.e. 6 × 8 mm are acceptable". This was attempting to confirm the information contained in the Standard Practices Manual. Despite the above clarification, all the engineers concerned with the maintenance of Puma 9 M-SSC at Miri misinterpreted the maximum allowable area of particles of 50 mm² (50 square millimetres) and in all cases it was understood to mean the area of a square with 50 mm sides (2500 square millimetres). According to Bristow's Deputy Chief Engineer at Miri, the practices recommended in the Maintenance and Standard Practices Manuals were carried out but there is no written record of the daily measured or cumulative total area of particle debris obtained from the filter and the magnetic plug. However, the actual debris was retained and subsequently handed over to the investigators who assessed the total area as 1580 mm² (1580 square millimetres) or over thirty times the maximum allowable area.'

j It was however later stated in the report:

'... although the Standard Practices Manual is categoric in stating that a gearbox which has produced more than 50 mm² of metal should be removed and returned to the factory, the Miri engineers had some justification for thinking that this instruction was not to be taken too literally.'

In para 3 of the report headed 'Conclusions', finding 2 is as follows:

'Gross contamination of the main gearbox magnetic plug and filter had occurred during the six weeks preceding the accident. The particles had undoubtedly originated from the second stage planet pinion bearing surfaces. Maintenance personnel had wrongly interpreted the amount of allowable debris as defined in the [SNIAS] Standard Practices Manual, due to the mistaken interpretation of an unfamiliar metric term.'

And in para 4, headed 'Recommendations', the first recommendation is as follows:

'Any possibility of misinterpretation of the terms used in the Puma Standard Practices Manual, on the allowable areas of debris from the main gearbox, should be corrected.'

Proceedings were started by Yong Joon San's widow, Lee Kui Jak, on her own behalf as widow and (with her husband's brother) as administrator of her husband's estate; they are the respondents to the present appeal. For convenience their Lordships will refer to them as 'the plaintiffs'. Three sets of proceedings were started, in December 1981, in Brunei, France and Texas respectively. The Brunei proceedings were issued on 9 December 1981 against Bristow Malaysia as first defendants and SNIAS as second defendants; they were served on SNIAS in December 1982. It was alleged that Bristow Malaysia were solely responsible for the accident; as against SNIAS, allegations were made of negligent design and manufacture, but no particulars were given. The French proceedings were against SNIAS alone. No further steps were taken in those proceedings, and they have been discontinued long ago. The Texas proceedings were also issued on 9 December 1981. Among the plaintiffs was a Richard J Kittrell; it appears that he is a New York attorney who was appointed administrator for the purpose of the proceedings; and was as such simply a nominal plaintiff. There were eight defendants in the Texas proceedings, who fall into three groups: (1) SNIAS, together with two United States associates of SNIAS: Aerospatiale Helicopter Corp (AHC), a Texas corporation, and European Aerospace Corp (EAC), a Delaware corporation; (2) Bristow Malaysia, together with two United States associated companies: Bristow Helicopters Inc, a Connecticut corporation, and Bristow Offshore Helicopters Inc, a Texas corporation; and (3) Sarawak Shell Bhd, together with Shell Oil Co, a Delaware corporation. The plaintiffs' claim against SNIAS was advanced under the Texas Wrongful Death Statute (§ 71.031 of the Texas Civil Practice and Remedies Code), which can apparently be invoked notwithstanding that the deceased had no connection with Texas and that the accident causing death occurred elsewhere, jurisdiction being asserted on the basis that SNIAS were doing business in Texas by selling their products to purchasers in Texas, ie to their subsidiary AHC. The lawyers responsible for launching the Texas proceedings were Messrs Speiser Krause & Madole of New York, a specialist firm of aviation lawyers, acting on the instructions of the plaintiffs' Brunei lawyer, Mr Szetu. The reasons for launching them were subsequently stated by Mr Szetu (in an affidavit dated 30 January 1984) to be (1) the more favourable Texas law on product liability and (2) the higher level of damages awarded in courts in the United States. Shortly after the Texas proceedings were commenced, the Texas lawyers acting for SNIAS attempted to have the case removed to the federal court; but in mid-1982 the federal court remitted the case back to the state court.

In the course of 1983 an agreement was reached whereby all proceedings as between the plaintiffs on the one hand and the Bristow companies and the Shell companies on the other hand were settled. A general release was granted to these companies by the plaintiffs and by Richard Kittrell. The amount payable, and no doubt paid, to the plaintiffs under the settlement was \$US430,000; of this sum, \$107,500 was to go to Speiser Krause & Madole and Mr Kittrell. The settlement, together with an apportionment between the widow and her three children, was approved by the chief registrar in Brunei on 24 June

1984. SNIAS were not parties to the settlement, and their Lordships were told that they were never invited to be parties to it.

- a Meanwhile, it appears that little progress was being made in the Texas proceedings against SNIAS and their associated companies. However, in March 1985 the plaintiffs decided to instruct fresh attorneys in the United States, changing from Speiser Krause & Madole of New York to a Mr Mithoff and a Mr Jacks, members of two comparatively small firms which practise in Houston, Texas, and which specialise in personal injury claims.
- b Thereafter, it seems that they proceeded to obtain discovery with a view to establishing jurisdiction over the three Aérospatiale defendants. However, in February 1986 a vigilant computer drew the attention of the Texas court to the lack of progress in these proceedings, and the court of its own motion took the formal step of listing the case for dismissal for want of prosecution. On 14 March 1986 the plaintiffs filed a motion to retain; and on 28 May 1986 the defendants filed a motion to dismiss on the ground of forum non conveniens. The court decided not to dismiss the action for want of prosecution, but fixed a trial date for 10 November 1986. Briefs were filed on the motion to dismiss on the ground of forum non conveniens. This motion was opposed by the plaintiffs on two grounds: (1) that, where a claim is made under the Texas Wrongful Death Statute, as a matter of construction the doctrine of forum non conveniens has no application; and (2) that, in the alternative, the court should in any event exercise its discretion to refuse the defendants' motion on the ground of forum non conveniens.
- c On 14 August 1986 the Texas court refused the defendants' motion. In accordance with the practice of that court, no reasons were given for the decision; it is impossible therefore to know whether the decision was made on the first or the second ground advanced by the plaintiffs, nor, if the decision was made on the second ground, for what reasons it was held that the Texas court should not give effect to the doctrine of forum non conveniens.
- d Furthermore, under the procedure of the Texas court, no appeal lay from this decision. An attempt was made to have the decision reviewed by petitioning the Court of Appeals for a writ of mandamus; but this failed, the petition being dismissed on 2 October 1986. A further petition to the Texas Supreme Court was dismissed on 5 November 1986; and a petition for a rehearing was dismissed on 3 December 1986. By then, the defendants had exhausted their remedies in Texas. Meanwhile, the plaintiffs' new Texas attorneys had turned their attention to the substantive issues in the case, taking depositions from a number of employees of AHC in Texas. The trial date of 10 November 1986 was vacated as impracticable; and a new date was fixed for February 1987. That date, too, has since been vacated; the trial in Texas is at present fixed for 1 June 1987. Between December 1986 and March 1987 a number of depositions were taken by the plaintiffs' Texas attorneys in France from employees of SNIAS.
- e In December 1986, having failed in their attempts to obtain dismissal of the proceedings against them and their associated companies in Texas, SNIAS turned their attention to the possibility of obtaining an injunction from the Brunei court restraining the plaintiffs from continuing the Texas proceedings. Having taken advice from English and Brunei solicitors, it was decided to make an immediate application because it transpired that a judge would be available until 23 December 1986 but that thereafter no judge would be available until late January 1987. Accordingly, the application was made to Mr Commissioner Rhind on 20 December 1986; on 22 December, he refused to grant an injunction, giving his reasons in writing later, on 16 January 1987. It is now accepted on both sides that, due to the limited time available, the evidence laid before the commissioner was inadequate and, to some extent, misleading. Their Lordships trust that, in these circumstances, they will not be thought to be lacking in courtesy if they do not refer to his judgment.
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SNIAS then lodged a notice of appeal and, having regard to the urgency of the matter, a court of appeal was specially assembled to hear the appeal in March 1987. The hearing began on 19 March. Substantial further evidence was put in by both sides in the course of the hearing of the appeal; indeed, it was common ground between the parties that the

Court of Appeal should consider the matter de novo. An additional reason for taking this course was that a full report of the decision of the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd*, *The Spiliada* [1986] 3 All ER 843, [1987] AC 460, was available to the Court of Appeal; no such report had been available to Mr Commissioner Rhind. Furthermore, during the hearing undertakings were given by both sides, no doubt with a view to fortifying their respective positions. The plaintiffs first stated that, if SNIAS wished for trial by judge alone in Texas, the plaintiffs would agree to such a trial. Second, they accepted that, the law of Brunei being applicable both as to liability and quantum in respect of the trial of the matter in Texas, no claim lay against SNIAS either (a) in consequence of strict liability or (b) for punitive damages. In their turn, SNIAS gave a number of undertakings. These run to nearly three pages; the full text is appended to this opinion. The most important are the following:

'1. To provide the Plaintiffs within 28 days with two irrevocable Letters of Credit drawn in their favour and confirmed by a first class bank within Brunei in the terms annexed hereto . . . 5. That the Texas proceedings shall be permitted to continue until completion of pre-trial discovery. (SNIAS' position is that they are willing to undertake that they will procure AHC to make any further documentary discovery of documents in the possession custody or power of AHC which Plaintiffs may require. SNIAS are unwilling to accept further deposition-taking in Texas unless the Court takes the view that no injunction will be granted in the absence of such undertaking). 6. To agree to a trial date in September/October 1987 or as soon thereafter as may be convenient to the Court and to cooperate in every way practicable to keep such date effective. 7. To cooperate in every practicable way in the admission to the Bar of Brunei Darussalam as ad hoc members for the purposes of this action of: William Thomas Jacks and Richard Warner Mithoff. 8. To take all such steps as may be necessary to obtain all relevant consents for the use in this action of any documents obtained by discovery in the Texas Action . . .'

The undertakings of SNIAS included in addition two alternative clauses regarding the payment of the costs of the plaintiffs' Texas attorneys.

In addition, there were certain developments regarding the position of Bristow Malaysia. In the course of the hearing before the Court of Appeal, a contribution notice was served on Bristow Malaysia by SNIAS. It has been suggested that this was in fact too late, because Bristow Malaysia were no longer parties to the action. But this was disputed, and in any event Bristow Malaysia have indicated their readiness to accept service within the jurisdiction of the Brunei court of any third party notice issued by SNIAS. It appears that, whereas Bristow Malaysia are vigorously resisting Texas jurisdiction on the ground that they have never done business in Texas, they have indicated their readiness to submit to the jurisdiction of the courts in Brunei to enable the whole case to be determined there. On the same day, 18 March 1987, SNIAS accepted service of a writ issued against them on 16 December 1986 (one day before the expiry of the limitation period) by the owners of the crashed helicopter together with the insurers of the hull.

Their Lordships now turn to the judgments of the Court of Appeal. The leading judgment was delivered by Mr Commissioner Kempster. He referred first to the speech of Lord Scarman in *Castanho v Brown & Root (UK) Ltd* [1981] 1 All ER 143, [1981] AC 557. In his speech Lord Scarman recognised that, in a case where a party seeks to enjoin another party from proceeding against him in another jurisdiction, such an injunction can be granted 'where it is appropriate to avoid injustice' (see [1981] 1 All ER 143 at 149, [1981] AC 557 at 573). He then said ([1981] 1 All ER 143 at 150, [1981] AC 557 at 574):

'I turn to consider what criteria should govern the exercise of the court's discretion to impose a stay or grant an injunction. It is unnecessary now to examine the earlier case law. The principle is the same whether the remedy sought is a stay of English proceedings or a restraint on foreign proceedings.'

a Next, he referred to a much-quoted passage from Lord Diplock's speech in *MacShannon v Rockware Glass Ltd* [1978] 1 All ER 625 at 630, [1978] AC 795 at 812, concerning the circumstances in which a stay of proceedings may be granted, viz:

b 'In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.'

Lord Scarman continued ([1981] 1 All ER 143 at 151, [1981] AC 557 at 575):

c 'Transposed into the context of the present case, this formulation means that to justify the grant of an injunction the defendants must show (a) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience and expense, and (b) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction.'

d Mr Commissioner Kempster then proceeded to apply the principle thus stated by Lord Scarman. He first considered a submission advanced by counsel for SNIAS that justice could be done in Brunei at substantially less expense to them because, if held liable to the plaintiffs, they intended to seek contribution or indemnity from Bristow Malaysia, who were not amenable to the jurisdiction of the court in Texas, and one set of proceedings in Brunei involving the plaintiffs, SNIAS and Bristow Malaysia, would be less expensive
e than two sets of proceedings, one between the plaintiffs and SNIAS in Texas and another between SNIAS and Bristow Malaysia in Brunei. Mr Commissioner Kempster declined to accept this submission. He considered that a 'desperate flurry of procedural steps' had been 'procured' by SNIAS to support this argument. He said:

f 'The contribution point does not appear to have been argued before Mr Commissioner Rhind, though the convenience of Brunei for Bristows was urged, and had only belatedly been mentioned in the course of the attempts to challenge the jurisdiction of the Texan courts. A party seeking a discretionary remedy must get his tackle in order and proceed with due expedition and [SNIAS] had no good reason to defer the service of a contribution notice on Bristows in Brunei particularly
g after receipt of a letter in April 1983 telling them of the settlement between the plaintiffs and Bristows. A fortiori after their objections to the Texan jurisdiction had to all intents and purposes failed in August 1986. Securing the promise of Bristows to submit to the jurisdiction after inquiry by this court as to the real state of play comes, in my view, too late to allow a real rather than a hypothetical possibility of proceedings both in Texas and Brunei (*lis alibi pendens*) to weigh in the balance.'

h He then turned to consider 'personal or juridical advantages' redounding to the advantage of the plaintiffs by continuing the suit in Texas. He recognised that the plaintiffs no longer maintained that they had the advantage of strict liability or the prospect of higher damages in Texas, though he considered that there was a prospect of an early hearing in Texas. He further referred to 'substantial pre-trial discovery of documents and witnesses' which had taken place and continued to take place due to the industry of the Texan attorneys acting for the plaintiffs, and to the fact that these attorneys were familiar with
i the case. He concluded:

'In my opinion the prospects of an early trial and the availability of a skilled professional team, both in Texas, constitute personal and juridical advantages of which the plaintiffs should not lightly be deprived.'

On a submission by SNIAS that the Brunei courts were better able to apply Brunei law on liability and quantum, he declined to query the competence of the Texas judiciary on these matters. Costs he regarded as a neutral factor; so also, in the light of SNIAS' undertaking to open letters of credit to cover a possible award of damages and costs, did he regard the availability of assets to satisfy any judgment against SNIAS. He took into account the other undertakings of SNIAS. On this aspect of the case, he concluded as follows:

'It transpires that no witnesses relevant to liability are presently to be found in Brunei and only a few relevant to damages. That the helicopter crashed here rather [than] in Malaysia was fortuitous, the only real links with this country being the residence of the deceased and his family, the applicability of its law and the fact that a report on the accident was prepared here. Applying the principles enunciated by Lord Scarman in *Castanho v Brown & Root (UK) Ltd* [1981] 1 All ER 143, [1981] AC 557 in the light of the foregoing conclusions and undertakings I am satisfied that [SNIAS] has failed to demonstrate that justice can be done in Brunei at substantially less inconvenience and expense than in Texas and, in so far as it is necessary so to determine, that the injunction sought would deprive the plaintiffs of legitimate personal and juridical advantages.'

Mr Commissioner Kempster then turned to consider whether, and if so how, the principles outlined in *Castanho's* case had been affected by the subsequent decision of the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd*, *The Spiliada* [1986] 3 All ER 843, [1987] AC 460. He said:

'It remains to consider whether and if so how the principles outlined in *Castanho's* case have been affected by the subsequent decision of the House of Lords in *The Spiliada*, when, as in the instant case, "parties to a dispute have chosen to litigate in order to determine where they shall litigate" (see [1986] 3 All ER 843 at 846, [1987] AC 460 at 464 per Lord Templeman). Lord Goff's speech does not purport to deal with the grant or refusal of an injunction restraining the continuance of proceedings overseas but it does, I think, none the less require us to consider the application to the material facts of the "forum non conveniens" doctrine. After all it would be inelegant and anomalous to say the least if similar principles did not fall for consideration in the three related types of application giving rise to the authoritative decisions already cited. Which then is the "appropriate" or "natural" forum in the sense that litigation there is the more likely to secure the ends of justice? If it is Brunei, the jurisdiction with which, in 1981, the dispute might have been thought more closely connected, it will be proper to consider the exercise of our discretion, but if, for the reasons already given when seeking to apply the *Castanho* principles, it is or has since become, as I believe, Texas it will be wrong in principle to consider such exercise. Likewise if we were not satisfied that any forum was "appropriate" or "natural". However the problem is approached, I am satisfied that Mr Commissioner Rhind was right in finding that Texas is presently the "appropriate" and "natural" forum and that [SNIAS] fail in their application. The relief sought is not necessary in the interests of justice. I would dismiss the appeal accordingly.'

Mr Commissioner O'Connor delivered a concurring judgment to the same effect. The president of the court, Sir Geoffrey Briggs, agreed.

It is plain from the judgments that the Court of Appeal was concerned, and understandably concerned, about the relationship between the decisions of the House of Lords in *Castanho's* case and *The Spiliada*. Since a proper identification of the applicable legal principles lies at the heart of the present case, their Lordships consider that their first duty is to identify those principles, giving due consideration to those two decisions. That they should undertake this task is, they consider, all the more necessary because certain observations of Lord Scarman in *Castanho's* case are substantially founded on the

much-quoted dictum of Lord Diplock in *MacShannon's* case which has to a considerable extent been overtaken by the subsequent development of the law in *The Spiliada* [1986] 3 All ER 843 at 854–856, 859–861, [1987] AC 460 at 475–478, 482–484. For this purpose, no material distinction is to be drawn between the law of Brunei and the law of England.

The law relating to injunctions restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction has a long history, stretching back at least as far as the early nineteenth century. From an early stage, certain basic principles emerged which are now beyond dispute. First, the jurisdiction is to be exercised when the 'ends of justice' require it (see *Bushby v Munday* (1821) 5 Madd 297 at 307, [1814–23] All ER Rep 304 at 306 per Leach V-C) and *Carron Iron Co v MacLaren* (1855) 5 HL Cas 416 at 453, 10 ER 961 at 976 per Lord St Leonards (in a dissenting speech, the force of which was, however, recognised by Lord Brougham (see 5 HL Cas 416 at 459, 10 ER 961 at 979)).

This fundamental principle has been reasserted in recent years, notably by Lord Scarman in *Castanho's* case and by Lord Diplock in *British Airways Board v Laker Airways Ltd* [1984] 3 All ER 39 at 46, [1985] AC 58 at 81. Second, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed. As Leach V-C said in *Bushby v Munday* 5 Madd 297 at 307, [1814–23] All ER Rep 304 at 306:

'If a Defendant who is ordered by this Court to discontinue a proceeding which he has commenced against the Plaintiff, in some other Court of Justice, either in this country or abroad, thinks fit to disobey that order, and to prosecute such proceedings, this Court does not pretend to any interference with the other Courts; it acts upon the Defendant by punishment for his contempt in his disobedience to the order of the Court . . .'

There are, of course, many other statements in the cases to the same effect. Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court against whom an injunction will be an effective remedy: see e.g. *Re North Carolina Estate Co* (1889) 5 TLR 328 per Chitty J. Fourth, it has been emphasised on many occasions that, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution: see e.g. *Cohen v Rothfield* [1919] 1 KB 410 at 413, [1918–19] All ER Rep 260 at 261 per Scrutton LJ and, in more recent times, *Castanho's* case [1981] 1 All ER 143 at 149, [1981] AC 557 at 573 per Lord Scarman. All of this is, their Lordships think, uncontroversial; but it has to be recognised that it does not provide very much guidance to judges at first instance who have to decide whether or not to exercise the jurisdiction in any particular case.

The decided cases, stretching back over a hundred years and more, provide however a useful source of experience from which guidance may be drawn. They show, moreover, judges seeking to apply the fundamental principles in certain categories of case, while at the same time never asserting that the jurisdiction is to be confined to those categories. Their Lordships were helpfully taken through many of the authorities by counsel in the present case. One such category of case arises where an estate is being administered in this country, or a petition in bankruptcy has been presented in this country, or winding-up proceedings have been commenced here, and an injunction is granted to restrain a person from seeking, by foreign proceedings, to obtain the sole benefit of certain foreign assets. In such cases it may be said that the purpose of the injunction is to protect the jurisdiction of the English court. Indeed, one of their Lordships has been inclined to think that such an idea generally underlies the jurisdiction to grant injunctions restraining the pursuit of foreign proceedings: see *South Carolina Insurance Co v Assurantie Maatschappij 'de Zeven Provinciën' NV* [1986] 3 All ER 487 at 499, [1987] AC 24 at 45 per Lord Goff; but their Lordships are persuaded that this is too narrow a view. Another important category of case in which injunctions may be granted is where the plaintiff has commenced proceedings against the defendant in respect of the same subject matter

both in this country and overseas, and the defendant has asked the English court to compel the plaintiff to elect in which country he shall alone proceed. In such cases there is authority that the court will only restrain the plaintiff from pursuing the foreign proceedings if the pursuit of such proceedings is regarded as vexatious or oppressive: see *McHenry v Lewis* (1882) 22 Ch D 397 and *Peruvian Guano Co v Bockwoldt* (1882) 23 Ch D 225, [1881-5] All ER Rep 715. Since in these cases the court has been presented with a choice whether to restrain the foreign proceedings or to stay the English proceedings, we find in them the germ of the idea that the same test (ie whether the relevant proceedings are vexatious or oppressive) is applicable in both classes of case, an idea which was to bear fruit in the statement of principle by Scott LJ in *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382 at 398, [1935] All ER Rep 408 at 414 in relation to staying proceedings in this country, a statement of principle now overlaid by the adoption in such cases of the Scottish principle of *forum non conveniens*, which has been gratefully incorporated into English law.

The old principle that an injunction may be granted to restrain the pursuit of foreign proceedings on the grounds of vexation or oppression, though it should not be regarded as the only ground on which the jurisdiction may be exercised, is of such importance, and of such apparent relevance in the present case, that it is desirable to examine it in a little detail. As with the basic principle of justice underlying the whole of this jurisdiction, it has been emphasised that the notions of vexation and oppression should not be restricted by definition. As Bowen LJ said in *McHenry v Lewis* (1882) 22 Ch D 397 at 407-408:

'I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case.'

In *Peruvian Guano Co v Bockwoldt* (1882) 23 Ch D 225 at 230, [1881-5] All ER Rep 715 at 716 Jessel MR gave two examples of vexatious proceedings. One, which he called pure vexation, occurs when the proceedings are so utterly absurd that they cannot possibly succeed. Another occurs when the plaintiff, not intending to annoy or harass the defendant, but thinking he could get some fanciful advantage, sues him in two courts at the same time under the same jurisdiction. He went on to say that similar, although not perhaps the same, considerations apply in a case where the actions are brought one in a foreign country and one in this country. Referring to *McHenry v Lewis*, he summed up the position as follows: that it is not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff. Now, it is easy to see why in many cases this is so, as, indeed, the nineteenth century cases show. For example, there may be assets available for execution in a foreign country, or another party may only be amenable to the jurisdiction of the courts of the foreign country. Indeed, it has been stressed that there is no presumption that a multiplicity of proceedings is vexatious (see eg *McHenry v Lewis* 22 Ch D 397 at 400 per Jessel MR) and that proceedings are not to be regarded as vexatious merely because they are brought in an inconvenient place (see *Hyman v Helm* (1883) 24 Ch D 531 at 537 per Brett MR). But their Lordships, bearing in mind the words of caution expressed by Bowen LJ in *McHenry v Lewis* 22 Ch D 397 at 407-408 quoted above, think it wise to remember the breadth of the jurisdiction. In particular, the possibility must be borne in mind that foreign proceedings may be restrained not only where they are vexatious, in the sense of being frivolous or useless, but also where they are oppressive; and also that, as Bowen LJ observed, everything depends on the circumstances of the particular case, and new circumstances have emerged which were not, perhaps, foreseen by our Victorian predecessors. Their Lordships refer, in particular,

to the fact that litigants may now be encouraged to proceed in foreign jurisdictions, having no connection with the subject matter of the dispute, which exercise an exceptionally broad jurisdiction and which offer such great inducements, in particular greatly enhanced, even punitive, damages, that they may tempt litigants to pursue their remedies there. In normal circumstances, application of the now very widely recognised principle of *forum non conveniens* should ensure that the foreign court will itself, where appropriate, decline to exercise its own jurisdiction, especially as the existence of any particular advantage to the plaintiff in that jurisdiction (eg availability of assets for execution within the jurisdiction) can usually be protected, if thought appropriate, by granting a stay on terms. But a stay may not be granted; and, if the English court concludes that it is the natural forum for the adjudication of the relevant dispute, and that by proceeding in the foreign court the plaintiff is acting oppressively, the English court may, in the interests of justice, grant an injunction restraining the plaintiff from pursuing the proceedings in the foreign court. As Bowen LJ said in *Peruvian Guano Co v Bockwoldt* 23 Ch D 225 at 233, [1881-5] All ER Rep 715 at 718, the court will interfere when a party is acting under colour of asking for justice 'in a way which necessarily involves injustice' to others.

Now, as already recorded, in *Castanho's* case [1981] 1 All ER 143 at 150, [1981] AC 557 at 574 Lord Scarman expressed the opinion that it was no longer necessary to examine the earlier case law. He said:

'I turn to consider what criteria should govern the exercise of the court's discretion to impose a stay or grant an injunction. It is unnecessary now to examine the earlier case law. The principle is the same whether the remedy sought is a stay of English proceedings or a restraint on foreign proceedings.'

He then proceeded to refer to the much-quoted dictum from the speech of Lord Diplock in *MacShannon's* case [1978] 1 All ER 625 at 630, [1978] AC 795 at 812, and said ([1981] 1 All ER 143 at 151, [1981] AC 557 at 575):

'Transposed into the context of the present case, this formulation means that to justify the grant of an injunction the defendants must show (a) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience or expense, and (b) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction.' (Lord Scarman's emphasis.)

Now it is to be observed, in the first place, that that approach has been overtaken by events in the form of the decision of the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd, The Spiliada* [1986] 3 All ER 843, [1987] AC 460. If Lord Scarman's approach were to be adapted to take account of the statement of principle expressed in *The Spiliada* as applicable in cases of stay of proceedings, it would presumably read as follows. To justify the grant of an injunction the defendant must show (a) that the English court is the natural forum for the trial of the action to whose jurisdiction the parties are amenable and (b) that justice does not require that the action should nevertheless be allowed to proceed in the foreign court.

In practice, however, the principle so stated would have the effect that, where the parties are in dispute on the point whether the action should proceed in an English or a foreign court, the English court would be prepared, not merely to decline to adjudicate by granting a stay of proceedings on the ground that the English court was *forum non conveniens*, but, if it concluded that England was the natural forum, to restrain a party from proceeding in the foreign court *on that ground alone*. Their Lordships cannot think that this is right. Not only does it conflict with the observation of Brett MR in *Hyman v Helm* referred to above, but it leads to the conclusion that, in a case where there is simply a difference of view between the English court and the foreign court as to which is the natural forum, the English court can arrogate to itself, by the grant of an injunction, the power to resolve that dispute. Indeed, in a passage in his speech in *British Airways Board v Laker Airways Ltd* [1984] 3 All ER 39 at 45, [1985] AC 58 at 80 Lord Diplock appears to

have been ready to give credence to this approach. But, with all respect, such a conclusion appears to their Lordships to be inconsistent with comity, and, indeed, to disregard the fundamental requirement that an injunction will only be granted where the ends of justice so require. Furthermore, if it were right, it would lead to the remarkable conclusion that, in a case such as *MacShannon's* case, the Scottish court, having concluded that Scotland was the natural forum for the trial of the action, might for that reason alone grant an interdict restraining the plaintiffs from proceeding in England. Their Lordships are fortified in their opinion by the fact that, on examining a number of authorities from the United States (for the citation of which they are much indebted to counsel), a country where the principle of *forum non conveniens* is recognised as applicable in cases of stay of proceedings, and also authorities from the law of Scotland in which that principle has long been so applicable, they can find no trace of any suggestion that the principles applicable in cases of stay of proceedings and in cases of injunctions are the same. On the contrary, the principles applicable in those countries in cases of injunctions to restrain foreign proceedings bear a marked resemblance to those which have been applicable for many years in this country. Certainly, this has long been the law in Scotland: see eg *Young v Barclay* (1846) 8 Durl (Ct of Sess) 774, where an interdict was granted restraining the pursuit of proceedings overseas on the ground that they were oppressive. There are numerous cases in the United States to the like effect. It is enough for present purposes to refer to *Moore Federal Practice* (2nd edn, 1986) vol 7, pt 2, para 65.19.

For all these reasons, their Lordships are of the opinion that the long line of English cases concerned with injunctions restraining foreign proceedings still provides useful guidance on the circumstances in which such injunctions may be granted, though of course the law on the subject is in a continuous state of development. They are further of the opinion that the fact that the Scottish principle of *forum non conveniens* has now been adopted in England and is applicable in cases of stay of proceedings provides no good reason for departing from those principles. They wish to observe that, in *The Spiliada* [1986] 3 All ER 843 esp at 857-858, [1987] AC 460 esp at 480 per Lord Goff, care was taken to state the principle of *forum non conveniens* without reference to cases on injunctions. They cannot help but think that the suggestion in *Castanho's* case that the principle is the same in cases of stay of proceedings and in cases of injunctions finds its origin in the fact that the argument of counsel before the House of Lords appears to have proceeded very substantially on that assumption. In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. Fortunately, however, as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction on appropriate terms, just as, in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is, *prima facie*, inappropriate can likewise often be solved by granting a stay on terms.

It follows that, through no fault of theirs, the Court of Appeal did not proceed on the correct principles in considering whether or not to grant an injunction in the present case. It is necessary therefore for their Lordships to consider *de novo*, on the applicable principles as stated by them, whether the decision to refuse an injunction should stand.

Now, if a question (which their Lordships accept could only be hypothetical) had arisen shortly after the commencement of proceedings by the plaintiffs in Brunei whether those proceedings should be stayed on the ground that there existed another forum, ie

- Texas, which was clearly more appropriate for the trial of the action, there can be no doubt that such a question would have been answered unhesitatingly in the negative. Obviously, there were strong connecting factors with Brunei as a forum. The fatal accident had happened there. In a sense that was fortuitous; but it carried with it the consequence that the applicable law governing the claim was the law of Brunei. Moreover, that was by no means insignificant in the circumstances because, as compared with the law of Texas, no question arises under the law of Brunei of strict product liability, no question arises under the law of Brunei of punitive damages and, perhaps most important of all, the problem does arise under the law of Brunei of an award of damages for the so called 'lost years', a matter which, in the experience of some of their Lordships, has proved to be difficult enough even for those judges who have experience of it (see, in particular, *Pickett v British Rail Engineering Ltd* [1979] 1 All ER 774, [1980] AC 136 and *Harris v Empress Motors Ltd* [1983] 3 All ER 561, [1984] 1 WLR 212). In addition, the deceased was resident in Brunei and carried on his principal business there; and the plaintiffs, his widow and her co-administrator, are likewise resident in Brunei. Again, having regard to the very substantial income of the deceased, and the volatile nature of the oil industry on which his business depended, it is plain that witnesses of fact, experienced in the conditions of that industry in Brunei, are likely to be called on the issue of quantum. As against these factors, there was absolutely nothing to connect the action with Texas at all.

Yet the Court of Appeal, like Mr Commissioner Rhind, concluded that, by the time the matter came before it, Texas had become the natural forum for the trial of the action. In order to test that proposition it is necessary to examine what had happened to bring about, in their opinion, that change.

- It is primarily on the basis of the steps taken by the plaintiffs' Texas attorneys, in late 1986 and early 1987, that the Court of Appeal considered that the natural forum for the trial of the action had become Texas. In reaching that conclusion, it decided to disregard the question of proceedings by SNIAS against Bristow Malaysia; as to that it was, in the opinion of their Lordships, in error, for reasons which will appear later. But it placed particular reliance on the work done in Texas by the plaintiffs' new Texas attorneys. In placing reliance on this factor, there is no doubt that it was influenced by the importance attached by the trial judge in *The Spiliada* to the so-called 'Cambridgeshire factor', a matter which was also recognised as relevant by the House of Lords (see [1986] 3 All ER 843 at 861-862, [1987] AC 460 at 485-486 per Lord Goff). But, with all respect, the two cases are poles apart. In *The Spiliada* the question at issue was the effect of wet sulphur on the holds of ships. This question was of profound importance, not only to the shipping industry, but to the whole sulphur exporting industry in British Columbia. The first case in which the question was investigated in depth was concerned with a ship called the *Cambridgeshire*, and was plainly recognised as in the nature of a test case. Armies of lawyers and experts were engaged. An enormous amount of preparatory work was undertaken; the documentation was voluminous in the extreme. The scientific investigation was of a most fundamental kind, and, indeed, approached the limits of scientific knowledge. The trial of the *Cambridgeshire* action was begun and had proceeded for about a month when the application was made for a stay of proceedings in *The Spiliada*, a parallel case raising the same profound scientific questions as those which had arisen in the *Cambridgeshire* action. The application came on for hearing before Staughton J, the trial judge in the *Cambridgeshire* action. In these somewhat unusual circumstances, it is scarcely surprising that he regarded the building up of expertise and understanding among the teams of lawyers and experts in England as being a relevant factor to be taken into account when deciding whether or not to order a stay of the English proceedings in *The Spiliada*; this view was shared by the House of Lords, where it was pointed out that, in addition, the parties in both actions were substantially the same, Cansulex Ltd being defendants in both actions, and the plaintiff shipowners in both actions being insured by the same P & I club who were financing and controlling both sets of proceedings and instructing the same lawyers in both.

Now compare that case with the present. Here there are no previous proceedings in Texas involving substantially the same parties. Here the issues do not begin to approach in complexity those involved in *The Cambridgeshire* and *The Spiliada*. Their Lordships do not wish for one moment to belittle the expertise or competence of Mr Mithoff or Mr Jacks; but the engineering issues which arise in the present case do not appear to be, in degree, of greater complexity than those which many lawyers, in England and in the United States, are very competent to deal with and can very readily assimilate. What has happened is simply that, during and after the period when SNIAS were seeking to obtain dismissal of the Texas proceedings on the ground of forum non conveniens, the plaintiffs' Texas lawyers were, in accordance with the procedure in the United States (as to which their Lordships make no criticism), seeking, by means of the generous United States procedure of pre-trial oral discovery, evidence on which they could found a case of negligence against SNIAS. The extent of their success in this activity will no doubt be judged at the trial of the action. The nature of the case which they wish to advance against SNIAS has now been made known and, although of course contested by them, is recognised by SNIAS to be arguable. But their Lordships do not consider that the fact that the Texas lawyers have been so engaged during the period in question can possibly have the effect of now rendering Texas the natural forum for the trial of the action instead of Brunei. In truth, the matters relied on by the plaintiffs (viz superior means of gathering evidence to mount a case against SNIAS; availability of expert counsel; the contingency fee system; prospects of an early trial) are not so much connecting factors with Texas which now render Texas the natural forum as advantages available to the plaintiffs in Texas of which, they submit, it would be unjust to deprive them. In any event, these points have effectively been neutralised by undertakings given on behalf of SNIAS that such evidence as has been obtained by Mr Mithoff and Mr Jacks will be available in the Brunei proceedings, that every effort will be made by SNIAS to enable Mr Mithoff and Mr Jacks to have rights of audience in Brunei and that they will co-operate in obtaining an early trial date there. No doubt both American attorneys would feel more at home in the courts in Texas; but that cannot be a matter of any relevance, especially as, in a case involving a claim assessed by the plaintiffs at many millions of dollars, they may well wish to instruct leading counsel from England, a course which they have, indeed, already taken in the injunction proceedings in Brunei and, of course, before their Lordships.

It follows that, in their Lordships' opinion, the Court of Appeal, in concluding that Texas had replaced Brunei as the natural forum, took into account matters which it ought not to have taken into account. In the opinion of their Lordships, for reasons which are already apparent, the natural forum for the trial of the action remains, as it always has been, the courts of Brunei.

It is against that background that their Lordships have to consider the crucial question, which is whether in the circumstances of this case an injunction should be granted to restrain the plaintiffs from further proceeding in Texas. The mere fact that the courts of Brunei provide the natural forum for the action is, for reasons already given, not enough of itself to justify the grant of an injunction. An injunction will only be granted to prevent injustice, and, in the context of a case such as the present, that means that the Texas proceedings must be shown in the circumstances to be vexatious or oppressive.

Now it can no longer be suggested that the Texas proceedings are vexatious or oppressive on the ground that the plaintiffs are seeking, in an inappropriate forum, to impose a strict liability or liability for punitive damages which would not be available in the natural forum. These points have been effectively neutralised by the plaintiffs' undertaking that neither of them will be pursued, and by their further undertaking that they will not invoke jury trial, which, coupled with the effect of the contingency fee system, might lead to a substantial enhancement of an award of damages. These points have therefore ceased to have such relevance as they might otherwise have had. There remains however a matter to which their Lordships attach great importance, and that is the question of a claim by SNIAS over against Bristow Malaysia.

As to that, the position is as follows. First, it is plain that the American lawyers first instructed by the plaintiffs regarded Bristow Malaysia as the plaintiffs' prime target. This is scarcely surprising in the light of the conclusions contained in the report submitted to the Brunei Department of Civil Aviation by Mr Holden, and it is evidenced by the fact that, in the settlement of 1984, the plaintiffs did not invite SNIAS to contribute to that settlement, or, indeed, to be party to it. It was not until Mr Mithoff and Mr Jacks were instructed, some time after that settlement, that any serious effort was made to pursue the proceedings against SNIAS. In these circumstances, it seems to their Lordships inevitable that, if the proceedings are brought to trial, SNIAS will wish to seek contribution from Bristow Malaysia, rather than expose themselves to the possibility of being held wholly to blame for an accident for which, if they are responsible at all, their responsibility may prove to be relatively small as compared with that of Bristow Malaysia; and the necessity for their so proceeding is underlined by the fact that the claim now made by the plaintiffs amounts to well over \$US20m, and the amount of the settlement between the plaintiffs and the Bristow and Shell companies, which would no doubt have to be taken into account in reduction of the plaintiffs' damages, amounts to no more than \$US430,000. In addition, SNIAS, having been served with proceedings in Brunei by the owners and insurers of the hull of the helicopter, wish to claim contribution or indemnity from Bristow Malaysia in respect of that claim.

The Court of Appeal did not regard the expressed desire of SNIAS to seek contribution from Bristow Malaysia as sincere. It was impressed by the number of procedural steps taken shortly before the hearing before it; these, it considered, had been 'procured' by SNIAS, and were 'hardly suggestive of a long-held or sincere concern'. Their Lordships do not, however, consider that the Court of Appeal was justified in so regarding them. There was no evidence before the court that the steps taken by Bristow Malaysia were 'procured' by SNIAS. True it is that the steps so taken were taken very late in the day; but, having regard to the obvious desirability, in the interests of SNIAS, that it should be open to them to claim over against Bristow Malaysia in the Brunei proceedings, their Lordships do not consider that the mere lateness of those steps is productive of the inference drawn by the Court of Appeal, especially when it is borne in mind that, until December 1986, the attention of SNIAS and their advisers was concentrated on the Texas proceedings. Their Lordships do not doubt that the intention of SNIAS in claiming over against Bristow Malaysia is sincere and, indeed, of great importance to them.

So their Lordships are faced with the following situation. Bristow Malaysia are contesting the jurisdiction of the Texas court; and there is nothing before their Lordships to suggest that the grounds on which they are contesting that jurisdiction are other than substantial. On the other hand, Bristow Malaysia are prepared to accept service of third party proceedings in Brunei served on them by SNIAS. It follows that, if the plaintiffs are permitted to proceed with the Texas proceedings, on the evidence before their Lordships it is at least possible that Bristow Malaysia will not be party to those proceedings, with the effect that SNIAS, if held liable in Texas, will have to commence separate proceedings, presumably in Brunei, in order to seek an indemnity or contribution from Bristow Malaysia. This itself would involve multiplicity of proceedings. There are however two additional factors. First, Bristow Malaysia have already entered into a settlement with the plaintiffs, to which settlement SNIAS are not party. If SNIAS seek contribution or indemnity from Bristow Malaysia, Bristow Malaysia may wish to invoke that settlement as against the plaintiffs. Their Lordships do not wish to pre-empt any arguments which may be founded on the settlement by Bristow Malaysia, but it is obviously desirable that, if Bristow Malaysia do take any such point, they should be able to do so in proceedings in which all three parties, the plaintiffs, SNIAS and Bristow Malaysia, are involved.

The second complicating factor is of even greater importance. In seeking contribution from Bristow Malaysia, SNIAS will have to invoke the relevant Brunei legislation, which, their Lordships were informed, is in the same terms as s 6 of the English Law Reform (Married Women and Tortfeasors) Act 1935. Section 6(1)(c) provided as follows:

'Where damage is suffered by any person as a result of a tort (whether a crime or not) . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise . . .'

Now, let it be supposed that the proceedings in Texas against SNIAS are allowed to continue to proceed, and that in those proceedings SNIAS are held liable to the plaintiffs. Then let it be further supposed that SNIAS claim contribution or indemnity from Bristow Malaysia in Brunei, relying on a judgment of the Texas court as showing that they, SNIAS, were liable in respect of the relevant damage. Would that judgment provide conclusive evidence that SNIAS were so liable? Or would SNIAS have to satisfy the Brunei court, independently of that evidence, that they were in law liable for such damage? If the latter were the case, SNIAS would be exposed to two sets of proceedings in which the same issue of liability would have to be tried, and so would be exposed to the danger of inconsistent conclusions on that issue, with the conceivable result that they might be held liable to the plaintiffs in Texas without any right over against Bristow Malaysia in that court, and might be held not liable to the plaintiffs in Brunei, in which event they would have no claim over against Bristow Malaysia, even though negligence on the part of Bristow Malaysia may in fact have been a substantial cause of the accident.

The point has arisen in Scots law in the recent House of Lords case of *Comex Houlder Diving Ltd v Colne Fishing Co Ltd* 1987 SLT 443. In Scotland the applicable statutory provision is s 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, which is not in identical terms to s 6 of the English 1935 Act. The right of contribution there arises, under s 3(2), 'Where any person has paid any damages or expenses in which he has been found liable in any such action as aforesaid . . .'; the words 'any such action as aforesaid' refer back to the words in s 3(1) 'any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions [in which] two or more persons are, in pursuance of the verdict of a jury or the judgment of a court found jointly and severally liable in damages or expenses'. The House of Lords held that the words 'any such action as aforesaid' in s 3(2), read in context, and in particular with reference to the words quoted from s 3(1), applied only to an action in the Scottish courts. It does not, of course, follow that a similar construction would be placed on different words in s 6 of the English 1935 Act, as applied in Brunei. But there is a danger that such a construction might be placed on them, as is evidenced by the fact that in *Clerk and Lindsell on the Law of Torts* (15th edn, 1982) pp 144-145 the view is expressed, with regard to s 1(1) of the Civil Liability (Contribution) Act 1978, which likewise refers to 'any person liable in respect of any damage suffered by another person', that 'a foreign judgment, it seems, gives no right to seek contribution from others liable in respect of the same damage'. This is a point which it is impossible for their Lordships to resolve on an interlocutory application such as the present; but in all the circumstances their Lordships do not consider that it can be dismissed as being without substance.

So SNIAS are now, it appears, in the unenviable position that, if the plaintiffs are not restrained from continuing their proceedings in Texas, SNIAS may well be unable to claim over against Bristow Malaysia in those proceedings, and that, if held liable to the plaintiffs in the Texas court, they may have to bring a separate action in Brunei against Bristow Malaysia in which they may have to establish their own liability to the plaintiffs before they can be entitled to claim contribution from Bristow Malaysia, with all the attendant difficulties which this would involve, including the possibility of inconsistent conclusions on the issue of liability.

Their Lordships are of the opinion that for the plaintiffs to be permitted to proceed in a forum, Texas, other than the natural forum, Brunei, with that consequence could, indeed, lead to serious injustice to SNIAS, and that the plaintiffs' conduct in continuing with their proceedings in Texas in these circumstances should properly be described as oppressive. Furthermore, no objection to the grant of an injunction to restrain the plaintiffs from continuing with these proceedings can be made by them on the basis of

injustice to them, having regard to the undertakings given by SNIAS. It follows that, in their Lordships' opinion, an injunction should be granted.

For these reasons their Lordships are of the opinion that the appeal should be allowed, and that an injunction ought to be granted restraining the plaintiffs from further proceeding with their action against SNIAS in the Texas court, either by themselves or by any other person on their behalf, such an injunction to be granted on terms. As at present advised, their Lordships consider that such terms should be those contained in the following undertakings of SNIAS set out in the appendix to this opinion, viz paras 1, 2 (omitting the final parenthesis), 3, 4, 5 (omitting the final parenthesis), 6, 7, 8, 9(B) (substituting '20 March 1987' for 'today's date' in both places where these words appear, and omitting the final parenthesis) and 12. Their Lordships wish to comment that, although the first of the letters of credit referred to in para 1 of the undertakings is in a sum considerably less than that stated to be the amount of the plaintiffs' claim, nevertheless they were informed that the sum specified in the letter of credit was regarded by the plaintiffs' advisers as realistic, and further that they are prepared to allow the plaintiffs to continue the Texas proceedings until completion of pre-trial discovery simply because such discovery has already gone so far, and the trial in Brunei is likely to take place so soon, that it appears in any event to be unrealistic not to allow such discovery to be completed. If either party has any objection to the terms proposed by their Lordships, any such objection must be notified to their Lordships within 14 days, in which event their Lordships will give consideration to it; failing any such objection within such period, the terms proposed by their Lordships will become final. So far as costs are concerned, the plaintiffs must pay the costs of SNIAS before their Lordships and before the Court of Appeal. As regards the hearing before Mr Commissioner Rhind, however, since it is apparent that neither party was fully prepared for that hearing, and that some misleading evidence was placed before the commissioner on behalf of the plaintiffs, their Lordships consider that each party should bear their own costs. Their Lordships will humbly advise Her Majesty accordingly.

Appeal allowed.

Solicitors: *Brymer Marland & Co* (for SNIAS); *Norton Rose Botterell & Roche* (for the plaintiffs).

Mary Rose Plummer Barrister.

APPENDIX

UNDERTAKINGS BY SNIAS

1. To provide the Plaintiffs within 28 days with two irrevocable Letters of Credit drawn in their favour and confirmed by a first class bank within Brunei in the terms annexed hereto (Annexure A).

2. Within 28 days to provide the Plaintiffs' Attorneys (Law Offices of Richard Warner Mithoff referred to herein as the Attorneys) with the documents set out in the schedule hereto (Annexure B) in accordance with the agreement between Winstol D. Carter and Tommy Jacks referred to in paragraph of the Affidavit of Tommy Jacks. (SNIAS say this is subject to confirmation from Carter of Fulbrights that such agreement exists with Jacks. No difficulty anticipated in this respect).

3. In addition to the documents set out in Annexure B, to produce as discovery by list within 21 days all documents relevant to the matters in question between the parties in accordance with the Brunei Rules of Court save where already disclosed. Inspection to be within 14 days thereafter. All copies requested by the Plaintiffs to be supplied within 14 days of such request. Plaintiffs to pay all reasonable copying charges.

4. If and in so far as any representations are necessary to the French Ministry of Justice or any other authority to obtain permission for any act referred to herein, to make all

such representations vigorously and with minimum delay and to inform the Plaintiffs' Attorneys upon their requests of the steps so taken.

5. That the Texas proceedings shall be permitted to continue until completion of pre-trial discovery. (SNIAS' position is that they are willing to undertake that they will procure AHC to make any further documentary discovery of documents in the possession custody or power of AHC which Plaintiffs may require. SNIAS are unwilling to accept further deposition-taking in Texas unless the Court takes the view that no injunction will be granted in the absence of such undertaking).

6. To agree to a trial date in September/October 1987 or as soon thereafter as may be convenient to the Court and to cooperate in every way practicable to keep such date effective.

7. To cooperate in every practicable way in the admission to the Bar of Brunei Darussalam as ad hoc members for the purposes of this action of: William Thomas Jacks and Richard Warner Mithoff.

8. To take all such steps as may be necessary to obtain all relevant consents for the use in this action of any documents obtained by discovery in the Texas Action.

9.A. *Plaintiffs' proposed clause*

To pay all reasonable costs of the firms Law Offices of Richard Warner Mithoff and Doggets, Jacks, Marston & Perlmutter, P.C (the two firms) relating to the Texas Action and the Brunei Action (in the latter case up to the date of judgment in this Appeal). Thereafter to accept as costs in the cause all costs reasonably incurred by the two firms in connection with Brunei Action, it being understood that the two firms will have the main responsibility for the preparation and carriage of that Action.

B. *SNIAS' proposed clause*

To treat all reasonable costs of the firms Law Offices of Richard Warner Mithoff and Doggets, Jacks, Marston & Perlmutter, P.C (the two firms) relating to the substantive issues (but not the jurisdiction issues) incurred in the Texas Action up to today's date as costs in cause in the Brunei Action. In relation to costs incurred by the two firms after today's date, to treat all costs reasonably so incurred in connection with the Brunei Action (other than any appeal by the Plaintiffs from the decision of the Brunei Court of Appeal) as costs in cause in the Brunei Action, it being understood that the two firms will have the main responsibility for the preparation and carriage of the Brunei Action. (Plaintiffs seek clause A. SNIAS are prepared to agree to clause B, but if the Court were to take the view that acceptance of clause A by SNIAS were a condition precedent to the grant of the injunction they seek, they would agree to give an undertaking in the form contained in clause A.)

10. There shall be liberty to apply to the High Court.

11. SNIAS to seek leave forthwith to issue a Third Party Notice and assuming such leave to be given, to serve a Third Party Statement of Claim on Bristow Malaysia within 7 days hereof. Application for third party directions to be made immediately following service of Third Party Statement of Claim.

12. All prior agreements made by SNIAS' Texas lawyers regarding authentication of documents or supplying information to be filled in blank spaces left in the oral depositions to remain in effect.

13. SNIAS will join in any application to the Brunei Courts for the initiation of any procedures available in Brunei for obtaining the foregoing oral evidence before trial in France. (SNIAS does not agree to this but will do so if the Court directs that such undertaking ought to be given by SNIAS if an injunction is granted).

ANNEXURE A

Letter of Credit No. 1

We

Bank hereby irrevocably undertake to pay you on demand any sum together with interest thereon not exceeding US\$5,000,000 which may either be agreed to be due to you in respect of the liability of Societe Nationale Industrielle Aerospatiale in Suite No. 187 of 1981 as a result of the crash

a of a Puma 330 helicopter at Kuala Belait on 16 December 1980 or which may be adjudged due to you in respect thereof from Societe Nationale Industrielle Aerospatiale.

Letter of Credit No. 2

We

b Bank hereby irrevocably undertake to pay you on demand any sum not exceeding US\$500,000 which may either be agreed to be due to you in respect of costs incurred in relation to Brunei Suit No. 187 of 1981 or which may be adjudged due to you in respect of such costs from Societe Nationale Industrielle Aerospatiale.

ANNEXURE B

The documents in question are as follows:

- c 1. The design calculations and drawings referred to in that certain letter of January 1987 from Tommy Jacks to Winstol D. Carter;
- d 2. The documents described in the Letter of Request for International Judicial Assistance of 30 January 1987 (except that, as to certain documents pertaining to sensitive current engineering projects, SNIAS may provide a description of each of said documents so that the Plaintiffs' Attorneys may better determine how essential they are to the case, and the parties will attempt to work in good faith toward the resolution of any disagreement about these documents).
- e 3. The documents ordered to be produced by AHC by the order of the Harris County, Texas, District Court dated 1987.

e R v Commisioner for the Special Purposes of the Income Tax Acts, ex parte Napier

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

STUART-SMITH J

f 14 JULY 1987

Judicial review – Availability of remedy – Case stated – Challenge to case stated – Applicant appealing against decision of Special Commissioner – Commissioner determining taxpayer's liability and stating case for opinion of High Court – Taxpayer complaining that case stated not setting out certain matters in dispute – Taxpayer alleging that commissioner in course of hearing refusing him opportunity to make a case or to reply – Whether taxpayer entitled to judicial review of commissioner's determination.

h During the relevant years of assessment the taxpayer was self-employed. In due course, as he had not submitted any accounts, the Revenue raised estimated assessments. A hearing before the Special Commissioner was adjourned to give the taxpayer an opportunity to provide accounts to the Revenue. When the hearing resumed the taxpayer had still not provided any accounts and the commissioner, having inquired into the taxpayer's earnings and expenses and having heard his evidence, determined his liability to tax. The taxpayer was dissatisfied with both the conduct of the hearing and the result, and he required the commissioner to state a case for the opinion of the High Court. A copy of the case stated was sent to both the taxpayer and the Revenue. Subsequently the taxpayer applied for judicial review by way of an order of certiorari to quash the commissioner's decision on the ground that, inter alia, matters which he wished to dispute, such as travel allowances, were not raised in the case stated. The taxpayer also complained that the commissioner had conducted the hearing and arrived at her decision in breach of the rules of natural justice.

Held – Where a case stated did not include all the points which the aggrieved party

wished to raise, the normal course was for that person to bring his proposals for its amendment to the commissioner's attention at an early stage so that matters could be rectified. If that informal procedure failed then an appeal could be made by notice of motion in the Chancery Division. It followed, therefore, that the taxpayer's application for judicial review on that ground was misconceived. Furthermore, on the facts, there was no substance in any of the allegations that there had been a breach of natural justice in the proceedings before the commissioner. The application would therefore be dismissed (see p 532 e to g j to p 533 g, post).

Notes

For the contents of cases stated in tax appeals and the amendment and remission thereof, see 23 Halsbury's Laws (4th edn) paras 1620, 1628.

For judicial review generally, see 37 *ibid* paras 567–583.

Cases referred to in judgment

Andrew v Taylor (Inspector of Taxes) (1965) 42 TC 557, CA.

R v Brentford General Comrs, ex p Chan [1986] STC 65.

Application for judicial review

Alec William Napier (the taxpayer) applied, with the leave of Nolan J given on 10 June 1986, for judicial review by way of an order of certiorari quashing the decision of the Commissioner for the Special Purposes of the Income Tax Acts on 5 December 1985 on the grounds that the commissioner had arrived at her decision by abandoning every principle of law and justice. The facts are set out in the judgment.

The taxpayer appeared in person.

Alan Moses for the Crown.

STUART-SMITH J. This is an application for judicial review and for an order of certiorari and an order which the taxpayer seeks 'to set aside and nullify' (those are his words taken from the notice of motion) the decision of the Special Commissioner (Miss Wix) which was given on 5 December 1985. He brings the proceedings with the leave of Nolan J.

It is necessary to set out briefly the background of the matter. The taxpayer is an electronic consultant and he has practised as such for a number of years. For many years he was taxed as a self-employed person under Sch D of the Income Tax Acts, but in 1975, by the Finance (No 2) Act 1975, s 38, it was provided as follows:

'(1) Subject to the provisions of this section, where—(a) an individual (in this section called "the worker") renders or is under an obligation to render personal services to another person (in this section called "the client") and is subject to, or to the right of, supervision, direction or control as to the manner in which he renders those services; and (b) the worker is supplied to the client by or through a third person (in this section called "the agency"), and renders or is under an obligation to render those services under the terms of a contract between the worker and the agency (in this section called "the relevant contract") . . . then, for all the purposes of the Income Tax Acts, the services which the worker renders or is under an obligation to render to the client under that contract shall be treated as if they were the duties of an office or employment held by the worker, and all remuneration receivable under or in consequence of that contract shall be treated as emoluments of that office or employment and shall be assessable to income tax under Schedule E accordingly . . .'

It happened that in fact much if not all of the taxpayer's remuneration fell within the provisions of that section. Unfortunately that fact was not known to the Revenue and so

a far as I can see it matters not why it was unknown to them (they say it was because the taxpayer never told them; the taxpayer says he did tell them and they never woke up to the fact). To my mind it makes no difference. The fact is they did not know and they continued, throughout the relevant years when the taxpayer was so employed, to treat him as if he was assessable under Sch D, and he was assessed under Sch D in the years 1976-77 through to 1980-81.

b In due course the Revenue became alerted to the fact that he was assessable under Sch E and in fact had had tax deducted at source under the PAYE scheme. The taxpayer had, in the mean time, appealed against the various assessments under Sch D. Those matters came before the General Commissioners, and in due course, because in most instances the taxpayer neither turned up nor rendered any accounts, the assessments were confirmed. But, when the position became clear that in fact the taxpayer was assessable under Sch E and had had his tax deducted at source, he applied to be assessed under Sch E and that was in due course done.

c He ceased to carry on his practice in such a way as to be assessable under Sch E in 1980 (it may have been 1979, but it does not matter), and he began fresh employment on 10 May 1981 which made him taxable under Sch D. In due course, he not having submitted any accounts in relation to his business, the Revenue raised assessments for the years 1981-82, 1982-83 and 1983-84. So there were eight years in all with which the Revenue d and the taxpayer were concerned.

e The taxpayer appealed in relation to all those assessments, and the appeal came on before the Special Commissioner, a Miss Wix, on 3 June 1985. The position in relation to the double assessment was explained, and the position in relation to the year when he ceased to be employed on an agency basis was also explained. The net result of the hearing on 3 June 1985 was that the assessment for the year 1980-1981 was discharged under Sch D; the assessments under Sch E were confirmed, but the net result was that f the taxpayer having paid the tax in accordance with the provisions of Sch E, having had it deducted at source, was able to recover, did recover and was repaid any excess tax that he had paid. No sums were sought to be recovered under Sch D.

The slate, therefore, was cleaned, or at any rate sorted out, down to the year 1980-81 at the hearing on 3 June 1985. That left the three years from 1981-82 to 1983-84. The commissioner could not deal with that appeal on 3 June because the taxpayer had not submitted any accounts to her or to the Revenue on which the matter could be assessed, so the hearing on 3 June was adjourned. It was adjourned, as it seems to me quite clearly, so that the taxpayer could provide accounts to the Revenue.

g There was another matter which was troubling the taxpayer at this time. He was in dispute with the Department of Health and Social Security about his national insurance contributions. He wanted to establish that at the material time he was assessable under either Sch E or Sch D as the case may be. It was thought, and no doubt rightly thought, that the DHSS would be assisted or impressed by evidence from the Revenue as to what the position was. The taxpayer said he had been trying to get that information from the Revenue and they were not co-operative; but, be that as it may, in the course of the h hearing on 3 June the commissioner expressed the hope that the Revenue might be able to provide that material to the taxpayer so he could forward it to the DHSS. In fact the inspector, Mr Griffiths, did send two draft letters setting out the information, but it did not satisfy the taxpayer, and by the time the adjourned hearing came on on 5 December the taxpayer had not got that information. It seems to have caused some trouble to him that he had not got it.

j Be that as it may, as I have said, the adjournment hearing came on again before Miss Wix on 5 December 1985. It is in relation to that matter that the taxpayer seeks judicial review. As I have already pointed out, she was concerned, and concerned solely on that occasion, with the assessments for the three last years to which I have referred. The position was that the taxpayer, not having provided any accounts, was in some difficulty. The commissioner took the view that she would be entitled to determine the matter

there and then on the basis of the assessments. In fact she did not do that. What happened was that she inquired into the taxpayer's earnings for the material years. She inquired into his expenses, or at any rate asked him about that, and having heard his evidence she made calculations. a

At the end of that hearing the taxpayer expressed his dissatisfaction with it, and in the result the commissioner stated a case for the opinion of the High Court under s 56 of the Taxes Management Act 1970. She sent a draft copy of the case stated to both the parties, as is the practice, and some amendments of a relatively minor nature were made to the case stated. That matter is now pending in the Chancery Division to be determined. b

The questions which were asked for the opinion of the High Court are these:

'1. Whether I was correct in holding that for the years under appeal [the taxpayer] was assessable under Schedule D.'

So far as I can make out there was never any dispute but that he was. The taxpayer seems to complain that he was not able to argue the point. The questions continue: c

'2. Whether I was correct in holding that for the purpose of computing his liability to tax under Schedule D [the taxpayer] was to be treated as if he had started a new business in May 1981. 3. Whether I was entitled to determine the assessments on the basis of the estimated figures proffered by [the taxpayer] and not dissented from by the Inspector. 4. Whether I was correct in holding that no expenditure was deductible in respect of the flat at Welling.' d

The taxpayer has complained that those points do not cover all the points that he wished to raise in the Chancery Division. He says that one of the matters which he raised was the question of his travelling expenses in going to see clients from his place of work. He seeks to have the whole proceedings before the commissioner quashed on the basis that that is something which she ought to have dealt with and did not do so. To my mind that is a total misconception of what judicial review proceedings are about, and it ignores completely the provisions by which, if a case stated as drafted by the person who states it is not and does not raise the issues which the parties require to be raised, that matter can be rectified. In the ordinary way it is done informally when the draft cases are sent to the parties, and they make amendments which are usually accepted, if they are relevant, by the person stating the case. If that procedure fails then a motion can be brought in relation to cases stated under s 56 of the Taxes Management Act 1970; motions can be brought in the Chancery Division; the judge, if satisfied that the case does not raise the point which should properly be raised, can send it back to the person stating the case for that matter to be dealt with. To my mind, therefore, any criticism that points of law were not raised and not dealt with in the case stated is not a matter for judicial review at all. It is matter to be raised, if correct, on the case stated by the procedures to which I have referred. e

The taxpayer makes other criticisms, and serious criticisms, of the hearing before the commissioner. In his notice of motion it is alleged that she arrived at those decisions— f

'by abandoning every principle of law and justice in that she refused to allow either party to make any case or reply, or to raise any authority (including those notified in advance) or to refer to any grounds of appeal or the crucial decisions of the Farnham General Commissioners of Taxes or to any of the seventy-odd documents put in as evidence.' g

That is amplified in para 19 of the taxpayer's affidavit. He amplified it again in his submissions to me. It is said that she refused to hear any case; that is apparently the grounds of the appeal. She refused to listen to any reply that the taxpayer had to make or to any argument or any authority or any grounds of appeal or reference to the inspector's refusal to provide the information and evidence that he had undertaken to provide. It seems to me to be a travesty of what evidently occurred and what appears manifestly h

j

a from the notes of that hearing, and also what appears from the affidavit of Miss Wix herself, to say that she refused to listen to any case. She quite clearly went into the matter with very considerable care and I am bound to say that I get the impression that she bent over backwards to be as fair as she could to the taxpayer. I am totally dissatisfied in this case that there was any substance in the suggestion that she refused to listen to any case, reply or argument.

b Then it is said that she refused to listen to an authority or to pay attention to the authority of *Andrew v Taylor (Inspector of Taxes)* (1965) 42 TC 557. To my mind that case has no bearing on the issues which she had to decide in any event, and I am not surprised that she did not listen to it.

It is said that she did not listen to the grounds of appeal either. To my mind it was perfectly clear that the taxpayer was appealing the assessments which had been made, and she did listen, and listened to his evidence in relation to those matters.

c The final matter which is referred to in that paragraph is the inspector's refusal to provide the information and evidence he had undertaken to provide. That is a reference to the information for the benefit of the DHSS. That had got nothing to do with the matters which the commissioner had to deal with on 5 December; it had no relevance whatever; it was not within her jurisdiction and was not a matter which she was called on to adjudicate.

d If there is any substance, and so far as I can see there is none, in the contention which the taxpayer makes about the date or time from which the accounting period should run, that seems to me to be a matter which could and should properly be raised in the Chancery Division. In fact, as I understand it, it was clear that the commissioner approached the matter on the basis that the taxpayer had started his present job on 10 May, and that his accounting periods were, as they have always been in the past, taken from 1 June to 31 May. That is the way in which she approached the matter. If that is wrong, then that is a matter, in my judgment, for the Chancery Division.

e I am entirely dissatisfied here that there was any breach of natural justice or any injustice in the conduct of this hearing so far as the taxpayer was concerned. Indeed, as I have already said, I have the impression, and the firm impression, from the evidence that the commissioner in fact leant over backwards to assist the taxpayer. I can find no basis f whatever for the application for judicial review.

I should perhaps add that even if there were substance in the allegations made, I am satisfied, having been referred to the authority of *R v Brentford General Comrs, ex p Chan* [1986] STC 65, that those are matters in this case which could be properly reviewed on appeal by case stated under s 56(6) of the Taxes Management Act 1970, and are not a suitable matter to be dealt with by way of judicial review in this court. Even if I were g satisfied that there was any substance in them, and I am not, then in my view judicial review in this court would not be an appropriate procedure, but those are matters which should be dealt with in the Chancery Division by judges familiar with taxes and by counsel experienced in tax matters, and not in this court. For those reasons this application is refused.

Application dismissed.

Solicitors: Solicitor of Inland Revenue.

Diana Brahams Barrister.

Ricci v Chow

COURT OF APPEAL, CIVIL DIVISION

KERR AND PARKER LJJ

18, 19 MAY, 18 JUNE 1987

Discovery – Discovery against parties to proceedings – Discovery for purpose of identifying other parties – Identification of wrongdoers – Defendant a mere witness – Interrogatory – Libel action – Plaintiff seeking to compel defendant to answer interrogatories concerning identity of publishers and printers of newspaper – Defendant having knowledge of identities but not involved in publication – Whether defendant compellable to disclose information.

Libel and slander – Interrogatory – Newspaper – Action against person not involved in publication – Plaintiff seeking to compel defendant to answer interrogatories concerning identity of publishers and printers of newspaper – Defendant having knowledge of identities but not involved in publication – Newspaper not established to have been published in United Kingdom – Whether defendant compellable to disclose information – Newspapers, Printers and Reading Rooms Repeal Act 1869, Sch 2.

Following the assassination in London of a prominent member of a Seychellois national movement (the SNM), a publication which styled itself as the official journal of the SNM published an article which alleged that the plaintiff, in collaboration with others, had caused or procured the assassination. The plaintiff brought an action for libel and/or discovery against the defendant, who was known as the secretary general of the SNM, although such a position was not recognised by the organisation's constitution and did not carry a place on the executive committee responsible for the publication of the journal. The plaintiff alleged that the defendant had published the article or caused it to be published and sought damages or alternatively an order that the defendant divulge the identity of the persons responsible for printing and publishing it. The plaintiff then obtained leave to administer five interrogatories to the defendant. On appeal by the defendant, the judge found that there was no evidence that the defendant had been in any way responsible for the publication of the article. The judge accordingly struck out the claim for damages for libel, but allowed two interrogatories, requiring the defendant to divulge the names of the publishers and printers of the publication, to stand. The purpose of the interrogatories was to enable the plaintiff to bring an action for libel against the publishers and printers of the article. The defendant appealed, seeking to have the two remaining interrogatories struck out. The plaintiff contended that, notwithstanding the dismissal of the libel action, the interrogatories should be allowed to remain under either the common law rule that a person who was innocently involved in the tort of other persons was under a duty to assist the person wronged by giving full information about, and disclosing the identity of, the tortfeasors, or under Sch 2^a to the Newspapers, Printers and Reading Rooms Repeal Act 1869 (which re-enacted s 19 of the Act 6 & 7 Will 4 c 76 (1836), which provided that if a person sought discovery of the printer, publisher or proprietor of a newspaper in order to bring a libel action in respect of matter published in the newspaper the person from whom discovery was sought 'shall be compellable to make the discovery required'). It was not denied that the defendant could provide the names sought by the plaintiffs.

Held – The appeal would be allowed and the action dismissed for the following reasons—

(1) Since it was accepted that the defendant had had nothing to do with the printing and publication of the article and had in no way facilitated its preparation, unwittingly or otherwise, the mere fact that he was aware of the identities of the alleged tortfeasors could not justify an order for discovery at common law even if his evidence constituted

^a Sch 2, so far as material, is set out at p 537 j, post

- the only way in which they could be identified, which was in any event doubtful. The defendant was in the position of a mere witness or observer in relation to the publication of the article, he had no involvement in the supposed tort and nor did he stand in any relation to the supposed tortfeasors. Accordingly, as a mere witness, he could not be sued and was not in the category of admissible defendants to an action for discovery at common law (see p 537 g, p 539 j to p 540 d, p 541 e f and p 542 d e, post); *Norwich Pharmacal Co v Customs and Excise Comrs* [1973] 2 All ER 943 distinguished.
- (2) Section 19 of the 1836 Act (as re-enacted in Sch 2 to the 1869 Act) did not abrogate the common law rule that a mere witness could not be sued in an action for discovery, since on its true construction it merely removed the privilege against self-incrimination from a person alleged to be the printer, publisher or proprietor of a newspaper who was sued as such. In any event, it had not been established that the publication in which the plaintiff was libelled was in fact a 'newspaper', since it had not been established that the publication had been printed in the United Kingdom (see p 538 b to g j to p 539 b, p 542 h j, p 543 f g j and p 544 d e, post); dictum of Lord Wilberforce in *British Steel Corp v Granada Television Ltd* [1981] 1 All ER at 458 applied.

Notes

- For actions for discovery, see 13 Halsbury's Laws (4th edn) para 18, and for cases on the subject, see 18 Digest (Reissue) 8, 16–23.
- For the Newspapers, Printers and Reading Rooms Repeal Act 1869, Sch 2, see 24 Halsbury's Statutes (4th edn) 100.

Cases referred to in judgments

- British Steel Corp v Granada Television Ltd* [1981] 1 All ER 417, [1981] AC 1096, [1980] 3 WLR 774, Ch D, CA and HL.
- Dixon v Enoch* (1872) LR 13 Eq 394.
- Fenton v Hughes* (1802) 7 Ves 287, 32 ER 117.
- Hillman's Airways Ltd v SA d'Editions Aéronautiques Internationales* [1934] 2 KB 356.
- Lefroy v Burnside* (1879) 41 LT 199.
- Moodalay v Morton* (1785) 1 Bro CC 469, 28 ER 1245.
- Norwich Pharmacal Co v Customs and Excise Comrs* [1973] 2 All ER 943, [1974] AC 133, [1973] 3 WLR 164, HL.
- Orr v Diaper* (1876) 4 Ch D 92.
- Post & Co v Toledo Cincinatti and St Louis Railroad Co* (1887) 144 Mass 341.
- Upmann v Elkan* (1871) LR 7 Ch App 130.

Cases also cited

- A-G v Beauchamp* [1920] 1 KB 650, DC.
- Wilson v Church* (1878) 9 Ch D 552.
- Wych v Meal* (1734) 3 P Wms 310, 24 ER 1078, LC.

Interlocutory appeal

- The defendant, Paul Chow, appealed against the order of Sir Neil Lawson sitting as a judge of the High Court in chambers, dated 16 October 1986 whereby he ordered that the defendant, by answering two out of five interrogatories administered by the plaintiff, Giovanni Mario Ricci, give discovery of the names of the publishers and printers of the December 1985 issue of the Seychelles Freedom Herald. The facts are set out in the judgment of Parker LJ.

James Price for the defendant.

Desmond Browne for the plaintiff.

18 June. The following judgments were delivered.

PARKER LJ (giving the first judgment at the invitation of Kerr LJ). On 29 November 1985 Mr Gerald Hoarau, the President of the exiled Seychellois organisation known as 'The Seychellois National Movement' (SNM), was assassinated in North London.

In December 1985 a special issue of the Seychelles Freedom Herald, a journal which describes itself as 'The Official Journal of SNM', carried an article which plainly alleged that the plaintiff, Mr Ricci, in conjunction with the ruler of the Seychelles, one René, had caused or procured the assassination and had taken part in an earlier plot to assassinate Mr Hoarau in France.

The defendant, Mr Chow, was appointed by Mr Hoarau to assist in the administration of SNM and was given by him the title of Secretary General, but the constitution of SNM provides for no such officer.

On the strength of Mr Chow's position as Secretary General the plaintiff issued a writ against the defendant on 11 February 1986, claiming damages for libel on the basis that the defendant had published or caused to be published the article to which I have referred. Two days later an application was issued on behalf of the plaintiff seeking leave to administer five interrogatories to the defendant. On 7 March Master Warren gave leave to administer all five interrogatories. The defendant appealed and on 16 October 1986 Sir Neil Lawson, sitting as a judge of the High Court in chambers, allowed the appeal in part.

He ordered that the indorsement on the writ claiming damages for libel be struck out on the basis that there was no evidence that the defendant was the publisher of the journal or in any way responsible for its publication but he gave leave to substitute a claim for discovery. On that basis he allowed interrogatories 4 and 5 but disallowed 1, 2 and 3. The defendant now appeals to this court seeking disallowance of 4 and 5 also. There is no cross-appeal and it is accepted (i) that this court must therefore proceed on the basis that the defendant is not himself a tortfeasor, and (ii) that this court is not concerned with interrogatories 1, 2 and 3.

Interrogatories 4 and 5 are in the following terms:

'4. Which individuals were the publishers of the said issue of the Seychelles Freedom Herald?

5. Who were the printers of the said issue of the Seychelles Freedom Herald?'

The plaintiff's claim to be entitled to administer these two interrogatories is based on alternative grounds: (i) under s 19 of the Act 6 & 7 Will 4 c 76 (stamp duties on newspapers (1836)) as re-enacted in the Newspapers, Printers and Reading Rooms Repeal Act 1869; (ii) on the principle established in *Norwich Pharmacal Co v Customs and Excise Comrs* [1973] 2 All ER 943, [1974] AC 133 and *British Steel Corp v Granada Television* [1981] 1 All ER 417, [1981] AC 1096.

The judge rejected the claim based on the two House of Lords cases but held that the interrogatories were allowable under the statute.

This is an over-simplification of a judgment which in some respects is not easy to follow, but it will suffice for present purposes. The defendant contends that the judge erred in law in so holding.

There was no respondent's notice but in the course of argument leave was given to serve a respondent's notice seeking to uphold the judge's judgment on the additional ground that, contrary to his view, the interrogatories were allowable under a combination of the *Norwich Pharmacal* principle, and the alleged principle that discovery can, as an exception to the well-established 'mere witness' rule, be ordered against representatives of a company.

Before considering the validity of the judgment or the alternative contentions raised by the plaintiff in the respondent's notice, it is convenient to set out briefly the basic purpose behind the application for leave to interrogate. It is simply this. The SNM is an

a unincorporated association or body of persons. An action for libel will not lie against it in its collective name, nor can an order be made under RSC Ord 15, r 12 that any individual members of the association be appointed to represent all the members. In such a case as the present the plaintiff's only course is therefore, if he knows who they are, to sue those members of the association who actually published or authorised publication (see *Gatley on Libel and Slander* (8th edn, 1981) paras 971-975). He can of course, if he knows their identity, also sue the printers. In the ordinary way there will be b no difficulty about this, for s 2 of the Act 2 & 3 Vict c 12 (printers and publishers (1839)), as re-enacted by the Newspapers, Printers and Reading Rooms Repeal Act 1869, Sch 2, provides:

c 'Every person who shall print any paper . . . which shall be meant to be published or dispersed, and who shall not print . . . upon the first or last leaf . . . in legible characters, his . . . name and usual place of abode or business . . . shall for every copy of such paper so printed by him . . . forfeit a sum not more than [level 1 on the standard scale].'

Unfortunately for the plaintiff neither the issue of the Seychelles Freedom Herald complained of nor any of its previous or subsequent issues bears the name and address of the printer. His only means of finding out is therefore, he says, to interrogate.

d As to the individuals in SNM who authorised publication he again says he can only find out by interrogation.

I confess that I do not follow his difficulty. The constitution of SNM is set out in its first issue. It provides for the appointment of an executive committee and by para 8(f):

e 'Subject to this Constitution and the direction of any Party Convention the affairs of the Party shall be conducted by the President duly assisted by the Executive Committee.'

f The names of the executive committee are set out in p 8 of the same issue. The issue complained of records that the executive committee elected Mr Gabriel Hoarau as interim or acting president on 30 November 1985 and that he lives in Brussels but commutes to London for party affairs. It also gives the address to which those wishing to join SNM should write as: 'SNM, PO Box 11, Isleworth, Middlesex, TW7 4BU, England.'

g There is, as it seems to me, an almost inescapable inference that the printing and publication of the issue complained of were authorised by Mr Gabriel Hoarau and some or all members of the executive committee. I see no reason therefore why the plaintiff should not sue them. Any difficulty with regard to addresses for service could no doubt be got over by an order for substituted service. They could then be interrogated as to the name and address of the printers.

As this matter was not ventilated in argument I make no firm finding on it. The facts, however, lead me to view with some considerable doubt the assertion that unless the defendant can be interrogated the plaintiff will not be able to sue at all.

h I turn now to consider the validity of the judge's conclusion that the interrogatories in question are allowable under s 19 of the 1836 Act, as re-enacted by the 1869 Act, Sch 2. Section 19 provides:

i 'If any person shall file any bill in any court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required; provided always, that such discovery shall not be made use of as evidence or otherwise in any proceedings against the defendant, save only in that proceeding for which the discovery is made.'

The rival contentions of the parties may be shortly stated. Counsel for the defendant submits, firstly, that the section confers no right: it merely deprives the defendant of a bill of discovery of a previously existing privilege against self-incrimination. He submits, secondly, that the Seychelles Freedom Herald is not a newspaper within the section. Counsel for the plaintiff contends simply that it is a newspaper and that the section confers a right to interrogate anyone at all, even a mere witness. a

I deal first with the question whether s 19 of the 1836 Act confers a right to have discovery. On its wording it does not in my view do so. It is conditional in form, for it starts with the words 'If any person shall' and then prevents the defendant from demurring or pleading to the bill. The only words which begin to suggest, at least at first sight, that a right was being conferred are 'but such defendant shall be compellable to make the discovery required'. In *British Steel Corp v Granada Television Ltd* [1981] 1 All ER 417 at 458, [1981] AC 1096 at 1172 Lord Wilberforce observed with regard to the above matters: b

'This, to my mind, supports rather than negatives the possibility of filing a bill of discovery against a newspaper, and suggests that the purpose was to remove the privilege against self-incrimination. I think that this is confirmed by the judgment of Du Parcq J in *Hillman's Airways Ltd v SA d'Editions Aéronautiques Internationales* [1934] 2 KB 356 at 359.' c

In the passage referred to by Lord Wilberforce, Du Parcq J said, referring to *Lefroy v Burnside* (1879) 41 LT 199: d

'Had it not been for the Act of 1836 the defendant, who was alleged to be the proprietor of a newspaper, could have declined to answer, on the ground that the answer might incriminate him, an interrogatory inquiring whether he was the proprietor.' e

Further, and as I think virtually conclusive, support for this view of the section is to be found in its concluding proviso.

Furthermore it is to be noted that if the section is construed as conferring a right it would appear to be so wide as to have swept away the mere witness rule in the case of defamatory matters contained in newspapers and to enable a bill of discovery to be brought against anyone thought to know the name of any person concerned as printer, publisher or proprietor albeit he had no connection with any of them or with the allegedly offending defamatory matter other than such knowledge. f

Counsel for the plaintiff seeks to draw comfort from observations in the *Hillman's Airways* case and in *Dixon v Enoch* (1872) LR 13 Eq 394, in which the section was treated as conferring a right; but in those cases the ambit of the section was not in issue and in my view they afford him no assistance. g

I conclude therefore that the judge erred in holding that the interrogatories could be ordered by virtue of the section. If they are allowable it can only be because they are prima facie allowable under the general law. If they are the section would, if the issue complained of is a newspaper, avail the plaintiff to defeat objections but it will do no more. h

This makes it strictly unnecessary to determine whether the issue was a newspaper but in my view the 1836 Act cannot in any event be invoked because it was not established that the issue complained of was a newspaper. Section 4 of the 1836 Act provided that every paper declared by Sch A to the Act to be chargeable with duties should be deemed and taken to be a newspaper within the meaning of the Act. That part of Sch A which alone could apply declares to be a newspaper— j

'Any Paper containing public News . . . printed in any Part of the United Kingdom to be dispersed and made public.'

a There was no direct evidence that the issue complained of, or indeed any issue of the Seychelles Freedom Herald, was printed in any part of the United Kingdom. It was submitted that it could be inferred from internal evidence that this was so. I am unable to accept this. Much material published in the United Kingdom is not printed here and it appears to me quite possible that it was printed abroad. The interim president immediately before the issue complained of was, as I have already said, resident in Brussels. One cannot in my view infer in the case of an organisation which is not
b confined to United Kingdom membership, and when printing is in many instances done overseas, that the issue in question or any issue was printed here.

If therefore the definition applies, the issue was not shown to be a newspaper. It does not directly apply, for the 1836 Act was repealed by the 1869 Act; but s 1 of the 1869 Act provides:

c '... the provisions of the ... Acts which are set out in the second schedule to this Act shall continue in force in the same manner as if they were enacted in the body of this Act ...'

and s 19 of the 1836 Act is set out in that schedule. In my view the result is that the definition continues to apply. Unless this is so the section will not have continued in force or have been re-enacted. It will have been amended if the requirement of printing
d in the United Kingdom no longer applies.

Apart from this one matter however I would agree with the judge that the issue was a newspaper. It contains public news and it was printed in order to be dispersed and made public. It also incidentally describes itself as a newspaper.

I turn now to the matters raised on behalf of the plaintiff in the respondent's notice.

e The judge found, and his finding is not challenged, that the defendant 'ha[d] nothing to do with the editing, publishing or printing of the Seychelles Freedom Herald'. He then said:

'Relief on the lines set out in the *Norwich Pharmacal* case is only available against a person who has innocently become involved in the wrongdoing. ... the claim clearly does not stand up on the *Norwich Pharmacal* case.'

f I respectfully agree. Indeed counsel for the plaintiff accepts that if he fails on the statute, as I have concluded that he does, he cannot bring the case within the *Norwich Pharmacal* decision, and that if he is to succeed this court will have to extend the law as pronounced in that case.

In support of this submission he relies on the well-established exception to the 'mere witness' rule which enables the representatives of a company to be interrogated, and on
g *Moodalay v Morton* (1785) 1 Bro CC 469, 28 ER 1245, *Fenton v Hughes* (1802) 7 Ves 287, 32 ER 117, *Orr v Diaper* (1876) 4 Ch D 92, *Post & Co v Toledo Cincinatti and St Louis Railroad Co* (1887) 144 Mass 341 and *Upmann v Elkan* (1871) LR 7 Ch App 130.

h He submits that the courts should always strive to give relief where the giving of such relief is necessary to enable justice to be done. Here the plaintiff has a clear cause of action against someone. It is not denied that the defendant could provide the names of those responsible for printing and publishing. Unless the courts allow this discovery justice will be denied. I fully accept that the courts should, where possible, give relief when it is necessary for justice to be done, but what he is seeking is relief against someone to make him disclose the names of individuals and of a printer with whom he stands in no relationship and in circumstances in which it is in my view doubtful, to say the least,
j whether the relief is necessary in the interests of justice. He does so in reliance on old cases much of the law in which has now been embodied in RSC Ord 26, r 2 and all of which were considered by the House of Lords in the *Norwich Pharmacal* case. In that case it was made abundantly plain that mere knowledge of the identity of a wrongdoer was not enough.

That at most is what the defendant has here. It cannot be said that 'without certain action on his part' the libel could never have been committed or that he 'unwittingly facilitated its perpetration' (see ([1973] 2 All ER 943 at 948, [1974] AC 133 at 174-175 per Lord Reid)) or that he was involved innocently or otherwise in its printing or publication. a

I can see no way in which this court can, consistently with their Lordships' speeches in the *Norwich Pharmacal* case, allow the interrogatories sought in the face of the judge's unchallenged finding that the defendant had nothing to do with the printing and publication. The result of this finding is that, if he knows the identity of those who published or authorised publication or the identity of the printer, he does so as an observer only. He is in my view in the like position to that of a bystander who has observed the number of the car of a hit and run driver. As to such a person Lord Reid had no doubt that discovery could not be ordered even if it was the only way in which the injured party could trace and therefore sue the wrongdoer. The fact that the defendant is a member of the same organisation as those who published or authorised the printing of the libel can make no difference, for the tort is not committed by the organisation. It is committed by individuals. b

I would accordingly allow this appeal and disallow the interrogatories. c

KERR LJ. The plaintiff's action against the defendant was originally a combined action for libel and further or alternatively for discovery. As an action for libel the relevant paragraph of the writ claimed damages and an injunction in relation to certain passages printed in the December 1985 issue of the *Seychelles Freedom Herald* and alleged that these were a libel on Mr Ricci 'published or caused to be published by the Defendant'. As an action for discovery the relevant paragraph of the writ claimed an order 'that the Defendant do depose on affidavit to the identity of the individuals responsible for the publishing and for the printing of [this issue]'. d

A summons for five interrogatories followed shortly thereafter, dealing with the defendant's position in the Seychellois National Movement (SNM), the status of the *Seychelles Freedom Herald* in it, and respectively the identity of the editor, the publishers and the printers of the issue in question. e

The defendant thereupon swore an affidavit in which he said, inter alia, that he had nothing whatever to do with the publication of this or any other issue of the *Seychelles Freedom Herald* and that there was accordingly no question of his having published the alleged libel or to have caused it to be published. This was evidently accepted by the plaintiff. There appears to have been no resistance to an order striking out the paragraphs of the writ based on an allegation of libel. The first three interrogatories were also struck out, and there has been no appeal against either of these orders. We are therefore left only with an action for discovery against the defendant in which the sole relief claimed is an order to answer the interrogatories 4 and 5, dealing with the identity of the publishers and printers, which have been set out in the judgment of Parker LJ. f

In order to maintain an action in which the sole claim is one for discovery, the plaintiff must show that he can overcome what is commonly referred to as the 'mere witness' rule, and the sole issue in this action is now whether or not the plaintiff can do so. g

The first ground on which the plaintiff contended before Sir Neil Lawson that he could overcome this rule was by relying on the qualifications to it which were recognised in the speeches of the House of Lords in *Norwich Pharmacal Co v Customs and Excise Comrs* [1973] 2 All ER 943, [1974] AC 133. While the continued existence of this ancient rule was of course unanimously affirmed (see in particular the discussion of the rule by Lord Reid ([1973] 2 All ER 943 at 947-948, [1974] AC 133 at 174)) it was accepted that actions for discovery, ie for the disclosure of information concerning a tort or alleged tort committed against the plaintiff, are maintainable against persons who are not necessarily themselves wrongdoers, but who are also not merely witnesses in the sense of persons who know or are reasonably believed to know the information sought by the plaintiff. h

a Such defendants therefore occupy an intermediate position between wrongdoers who can be sued as such and then interrogated on the one hand, and mere witnesses on the other hand who cannot be sued at all. To qualify as admissible defendants it is necessary that they should stand in some relation to, or have some involvement with, the tort alleged by the plaintiff. That relationship or involvement was described in various ways in the speeches in the *Norwich Pharmacal* case. Lord Reid said, in relation to the defendants in that case, that 'without certain actions on their part the infringements could never have been committed', and he then summarised the effect of the authorities as follows ([1973] 2 All ER 943 at 948, [1974] AC 133 at 174-175):

c 'They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became mixed up by voluntary action on his part or because it was his duty to do what he did.'

d Viscount Dilhorne postulated the test as 'involvement in the transaction', and this is equally the gist of the reasoning of Lord Cross and of Lord Kilbrandon (see [1973] 2 All ER 943 at 960, 968, 973-974, [1974] AC 133 at 188, 197, 203-204).

e Sir Neil Lawson held that on the defendant's evidence in this case, which was unchallenged by the plaintiff on any point that is relevant for present purposes, the position was as I have summarised it above, that he had 'nothing whatever to do with the preparation or publication of this or any issue of the *Seychelles Freedom Herald*'. Sir Neil Lawson therefore concluded that the defendant was not within the category of admissible defendants to an action for discovery as defined or described in the *Norwich Pharmacal* case.

f In my view he was clearly right in that conclusion, and indeed there was no direct appeal against it. My reason for having dealt with this aspect in some detail is that it is indirectly relevant to the other two means whereby the plaintiff seeks to overcome the 'mere witness' rule.

g I take firstly the belated respondent's notice whereby counsel for the plaintiff asks the court to apply the category of admissible defendants to the defendant on either or both of two grounds, even though he now concedes that he cannot rely directly on the *Norwich Pharmacal* case. The first is simply to extend the ambit of that decision so that it covers the defendant because he—

'is not a "mere witness", since he is Secretary General of the Seychellois National Movement, an unincorporated association which cannot be sued itself, but has gravely defamed the Plaintiff and consistently broken the criminal law by publishing its party newspaper without naming the printer.'

h The second, which may indeed be no more than another way of putting the first, is on the ground that the position of Mr Chow is analogous to that of a secretary or other officer of a corporate body and to that extent outside the 'mere witness' rule by virtue of the line of cases beginning with *Moodalay v Morton* (1785) 1 Bro CC 469, 28 ER 1245, which Parker LJ has cited.

i To take the second ground first, as counsel for the defendant pointed out in his reply, the analogy and line of cases on which counsel for the plaintiff relies is now embodied in RSC Ord 26, r 2, which provides as follows:

'Where a party to a cause or matter is a body of persons, whether corporate or unincorporate, being a body which is empowered by law to sue or be sued . . . the Court may, on the application of any other party, make an order allowing him to

serve interrogatories on such officer or member of the body as may be specified in the order.' a

Quite apart from the fact that the Seychellois National Movement cannot sue or be sued, the analogy of that provision would take the plaintiff no further than the *Norwich Pharmacal* case itself, and indeed the authorities from which that provision derives were considered and formed part of the reasoning in that case. In effect, the plaintiff's argument begs the question, since he can only rely as an analogy on what is now RSC b
Ord 26, r 2 if he can either bring himself within the *Norwich Pharmacal* case or if he can persuade the court to extend the categories of defendants covered by that case.

That leaves the first ground of the respondent's notice which I have quoted above, an extension of the ambit of the *Norwich Pharmacal* case. But how can that ground provide any basis for extending the principles there laid down to this defendant? The formulation of counsel for the plaintiff contains nothing in the nature of a principle. Nor does it point to any categorisation or definition of defendants against whom actions for discovery should be admissible beyond those covered by the tests referred to in the *Norwich Pharmacal* case. In effect, it is no more than a somewhat emotive statement of what the plaintiff feels the law should be on the particular facts of this case. c

If the submission of counsel for the plaintiff involved some basis of principle which is consistent, or at least not inconsistent, with the *Norwich Pharmacal* case, then its soundness would obviously have to be considered. But, as I have said, I can see no suggestion of any principle. To accept his submission would be analogous to legislating for this particular case. The consequence would be that the scope and limits of the qualifications to the 'mere witness' rule which were recognised in the *Norwich Pharmacal* case would become wholly uncertain, if not virtually at large. d

Whether the plaintiff would have any remedy against other members of the SNM within the principles of the *Norwich Pharmacal* case is a matter on which I express no view whatever, since it must depend wholly on evidence not before us. e

I therefore turn to the alternative way whereby counsel for the plaintiff seeks to overcome the 'mere witness' rule. This is by means of the bold and simple submission that s 19 of the Act 6 & 7 Will 4 c 76 (stamp duties on newspapers (1836)) has the effect of abrogating this rule in all actions for discovery against anyone in which the information f
sought by the plaintiff is 'the name of any person concerned as printer, publisher, or proprietor of any newspaper . . .' Parker LJ has set out the section in full, and I therefore do not repeat it.

There are several reasons why I cannot accept this submission in principle, bearing in mind the following matters.

(1) It was common ground that an objection to answer interrogatories because the answer might incriminate the defendant was recognised before 1836, just as it is now. Counsel for the defendant referred us to the 1845 and 1871 editions of *Daniell's Practice of the High Court of Chancery* and the 1896 edition of *Odgers on Libel and Slander*, but, since the point is indisputable and undisputed, there is no need to refer to the relevant passages. g

(2) It was equally undisputed (and shown by *Daniel* (2nd edn, 1845)) that this objection to interrogatories could be taken by demurrer or plea, both of which are expressly barred by s 19 in the cases to which it applies, ie discovery relating to newspapers. h

(3) Against this background, and having regard to the concluding proviso to s 19, there can be no doubt that s 19 had the effect of barring the self-incrimination objection to interrogatories when their object was to ascertain the name of the printer, publisher or proprietor of any newspaper.

(4) The inference that this was not only the effect but also the 'purpose' of s 19 is supported by the passage from the speech of Lord Wilberforce in *British Steel Corp v Granada Television Ltd* [1981] 1 All ER 417 at 458, [1981] AC 1096 at 1172 which Parker LJ has cited in his judgment. i

(5) But counsel for the plaintiff nevertheless submits, and Sir Neil Lawson appears to have accepted (though no doubt without the benefit of the searching arguments put

before us), that s 19 also has an entirely different and much more far-reaching effect, viz to abrogate the 'mere witness' rule in all cases to which it applies.

However, quite apart from the considerations mentioned in (1) to (4) above, there are other positive grounds for rejecting this submission.

(6) Discovery (then by a bill in Chancery) was already available before 1836 in order to join parties who had an interest in the action, in the sense that some order could properly be made against them in relation to it, for the purpose of finding out the names of other wrongdoers whom the plaintiff wished to sue. We were helpfully referred to *Bray Principles and Practice of Discovery* (1885) esp pp 19, 20, 40ff, but this aspect is in any event clear from the review of the history in the *Norwich Pharmacal* case [1973] 2 All ER 943 at 947, 952, 963–964, [1974] AC 133 at 173, 179, 192–193 per Lord Reid, Lord Morris and Lord Cross itself. Equally, the 'mere witness' rule had existed since long before 1836 as a barrier to the right to such discovery (see *Bray* and the *Norwich Pharmacal* case [1973] 2 All ER 943 at 947, 952–953, 957, 963, [1974] AC 133 at 174, 179–180, 185, 192 per Lord Reid, Lord Morris, Viscount Dilhorne and Lord Cross). The opening words of s 19 of the 1836 Act, which govern all that follows, are:

'If any person shall file any bill in any court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper . . .'

These words were clearly based on what was then the current law, ie the possibility of issuing bills for discovery in appropriate cases on the one hand, but only subject to the bar of the 'mere witness' rule on the other hand. Where the middle ground lay in 1836 for this purpose, as between a wrongdoer on the one hand and a mere witness on the other, which became the issue in the *Norwich Pharmacal* case about 140 years later, is uncertain and irrelevant, since the authorities relied on in the *Norwich Pharmacal* case for this purpose were all much later than 1836, notably *Orr v Diaper* (1876) 4 Ch D 92. On no view, however, could the pre-1836 law have impinged on the 'mere witness' rule to a greater extent than the *Norwich Pharmacal* case itself. In all these circumstances there can be no basis for any construction of s 19 which has the positive effect of modifying, let alone abrogating, the 'mere witness' rule. The opening words are merely intended to reflect the law as it then stood. The section then went on to alter the existing law in only one respect: by removing the defendant's right to object to the discovery in question on the ground of self-incrimination. All other permissible grounds of objection, including the 'mere witness' rule, were unaffected.

(7) It is also to be noted, that on the plaintiff's submission that s 19 does more than to remove the objection of self-incrimination, its effect would go much further than merely to preclude objection to the discovery in question on the ground of the 'mere witness' rule. The section excludes any plea or demurrer to a bill for discovery of the kind in question. Counsel for the defendant produced an impressively lengthy and esoteric list of pleas and demurrers which were available to defendants in Georgian and Victorian times, which can be found in the appendix to *Bray*. On counsel for the plaintiff's interpretation of s 19, however, all these grounds of objection would equally have been swept away in applications for discovery relating to newspapers. This was clearly not the intention; the section was aimed at the objection on the ground of self-incrimination.

I therefore conclude that s 19 of the 1836 Act does not enable the plaintiff to overcome the 'mere witness' rule in this action for discovery against the defendant. However, even if all that were wrong, there remains the point raised by Parker LJ during the argument, that there is no evidence that the *Seychelles Freedom Herald*, let alone the particular issue to which the claim for discovery related, was printed in the United Kingdom. There are two aspects to this point. First, in the absence of any evidence about it whatever, I cannot accept counsel for the plaintiff's invitation to make this assumption merely on the balance of probability. One simply does not know one way or the other. But it is obviously perfectly possible, and would nowadays not even be surprising, for the printing to have been done abroad. Second, there is the question whether the meaning of the

word 'newspaper' in s 19 of the 1836 Act includes the requirement that it should have been printed in the United Kingdom. In the original statute this was plainly so, by virtue of s 4 and Sch A to which Parker LJ has referred, even if (as in the case of the Seychelles Freedom Herald) the paper in question was not for sale. The problem is that the 1836 Act was repealed by the Newspapers, Printers and Reading Rooms Repeal Act 1869, but subject to certain provisions of it continuing in force as if re-enacted by that Act. These include s 19, but neither s 4 nor Sch A. a

Since this point only arose in the course of the hearing it was not investigated in the same depth as the other matters to which I have referred. One has to bear in mind, I think, that the process of drafting statutes may not have been as meticulous and sophisticated in Victorian times as it is now. But I see no need to assume that the permissible limits in applying common sense to the construction of statutes were then more restricted than today. So I ask myself whether, by expressly re-enacting s 19 of the 1836 Act in 1869, Parliament could nevertheless have intended that the words 'any newspaper' in it should have some different, and wholly undefined, meaning after 1869 from their statutory meaning in the 1836 Act. Since I can see no basis for any such assumption I would conclude that the meaning was intended to remain the same as before. Otherwise, as Parker LJ pointed out, s 19 would not have been 're-enacted'. b

I therefore conclude, on all these grounds, that s 19 of the 1836 Act is equally of no assistance to the plaintiff in seeking to overcome the 'mere witness' rule in his claim for discovery in the form of interrogatories against the defendant. It follows that I agree that this appeal must be allowed. Interrogatories 4 and 5 must be struck out. Since they are all that remains of the action, this must be dismissed. I would only repeat, as we said at the end of the hearing, our great indebtedness for the researches and arguments, both skeletal and oral, of counsel on both sides. c

Appeal allowed ; action dismissed. d

Solicitors: *Theodore Goddard* (for the defendant); *Baker & McKenzie* (for the plaintiff). e

Vivian Horvath Barrister.

R v Lambeth London Borough Council, ex parte Clayhope Properties Ltd

COURT OF APPEAL, CIVIL DIVISION

KERR, GLIDEWELL LJJ AND SIR GEORGE WALLER

8, 9, 10, 11 JUNE 1987

Housing – House in disrepair – Notice to execute works – Service on person having control of house – Person having control of house – House – Block of flats – Service of notice on long leaseholders of individual flats – Notice requiring leaseholder to execute works to interior and to common parts and exterior of block – Whether flat in a block is a ‘house’ – Whether flat ‘part of a building used as a dwelling’ – Whether repairs notice can be served on leaseholder – Whether notice can require leaseholder of flat to execute repairs to common parts and exterior – Whether notices valid – Housing Act 1985, ss 190, 207, 266, 494.

A purpose-built mansion block of flats, which comprised 14 flats held on long leaseholds and six flats let on short tenancies, required extensive repairs to both the interiors of the individual flats and also the common parts and exterior of the block. The latter works were by far the most extensive and included the complete re-roofing of the block. The local authority served notices under s 9(1A)^a of the Housing Act 1957 on the freeholder (in respect of the six flats let on short tenancies) and on the 14 long leaseholders requiring each of them, as ‘the person having control of the house’ to execute works set out in a schedule to the notice. Part A of the schedule specified works relating to the interiors of the individual flats and part B specified works relating to the common parts and exterior. Following service of the notices the freeholder and the leaseholders applied to the local authority for the repairs grant which was payable under s 71A^b of the Housing Act 1974 if the authority was satisfied that the works were necessary for compliance with a s 9(1A) notice. The authority refused to pay the grant because it had doubts about the validity of the s 9(1A) notices it had served in so far as the notices required the leaseholders to execute repairs to the common parts and exterior. The freeholder applied for an order of mandamus requiring the local authority to pay the grant but the judge dismissed the application on the ground that the individual flats were not ‘houses’ for the purposes of s 9(1A). The freeholder appealed.

Held – (1) Although a flat in a block of flats was not a ‘house’ for the purposes of s 9(1A) of the 1957 Act because a ‘house’ denoted a separate building, nevertheless such a flat was ‘part of a building . . . used as a dwelling’ and therefore under s 18(1)(a)^c of the 1957 Act a local authority could take like proceedings under s 9(1A) in relation to such a flat as it was empowered to take in relation to a house. It followed that a repairs notice under s 9(1A) could validly be served on a long leaseholder of a flat in a block of flats, because the leaseholder was ‘the person having control’ of it for the purposes of ss 9(1A) and 39(2)^d of the 1957 Act and the proceedings could be taken under s 18(1)(a) (see p 548 d e, p 550 g h, p 552 b c, p 554 f h j and p 555 a b, post); *Pollway Nominees Ltd v Croydon London BC* [1986] 2 All ER 849 applied.

(2) However, a repairs notice under s 9(1A) of the 1957 Act could not require the leaseholder of a flat in a block of flats to carry out repairs to the common parts or exterior of the block because a leaseholder was not the ‘person having control’ of the common parts and exterior even if his lease gave him rights against the freeholder in respect of a failure to repair the common parts and exterior. Accordingly, the s 9(1A) notices served

^a Section 9(1A), so far as material, is set out at p 547 c d, post

^b Section 71A, so far as material, is set out at p 547 a, post

^c Section 18(1), so far as material, is set out at p 548 c, post

^d Section 39(2) is set out at p 547 f g, post

on the 14 leaseholders were invalid as they stood and, furthermore, there was no material before the court on which it could sever part B of the schedule from the remainder of the notices. The appeal would therefore be dismissed (see p 552 g, p 553 b, p 554 d to f h j and p 555 e f, post).

Notes

For the power of a local authority to require the repair of a house in disrepair, see 22 Halsbury's Laws (4th edn) paras 577-579.

For the meaning of 'house', see *ibid* para 576.

As from 1 April 1986, ss 9(1A), 18(1) and 39(2) of the Housing Act 1957 and s 71A of the Housing Act 1974, have been replaced by ss 190, 266, 207 and 494 of the Housing Act 1985. For ss 190, 207, 266 and 494 of the 1985 Act, see 21 Halsbury's Statutes (4th edn) 191, 204, 250, 408.

Cases referred to in judgments

Critchell v Lambeth BC [1957] 2 All ER 417, [1957] 2 QB 535, [1957] 3 WLR 108, CA.

Cohen v West Ham Council [1933] Ch 814, [1933] All ER Rep 24, CA.

Pollway Nominees Ltd v Croydon London BC [1986] 2 All ER 849, [1987] AC 79, [1986] 3

WLR 277, HL; *affg* [1985] 3 All ER 24, [1986] Ch 198, [1985] 3 WLR 564, CA.

Quiltotex Co Ltd v Minister of Housing and Local Government [1965] 2 All ER 913, [1966] 1 QB 704, [1965] 3 WLR 801.

Appeal

Clayhope Properties Ltd appealed against the decision of Hodgson J on 8 October 1986 dismissing Clayhope's application for judicial review by way of mandamus requiring Lambeth London Borough Council to make repairs grants pursuant to ss 71 and 71A of the Housing Act 1974 in respect of the flats contained in a mansion block known as Dover Mansions situated at Canterbury Crescent, London SW9 or, alternatively, in respect of six flats in the block which were let by Clayhope as the freeholder on protected tenancies. The facts are set out in the judgment of Glidewell LJ.

J S Colyer QC and Roger Cooke for Clayhope.

Andrew Arden and Caroline Hunter for Lambeth.

GLIDEWELL LJ (giving the first judgment at the invitation of Kerr LJ). This is an appeal against a decision of Hodgson J given on 8 October 1986 refusing an application for judicial review; that is to say, refusing an order of mandamus requiring the Lambeth London Borough Council (Lambeth) to make to the applicants, Clayhope Properties Ltd, mandatory repairs grants under s 71A of the Housing Act 1974, as amended by the Housing Act 1980.

Clayhope are the freehold owners of a mansion block of flats called Dover Mansions, Canterbury Crescent, SW9. The block comprises 20 flats, served by two entrances. Fourteen are on 99-year leases at low ground rents; six are on protected tenancies. The roof and some common parts, including the passages and staircases, are not included in either the leases or the tenancies.

With that brief introduction I turn to consider the legislation which forms the battleground of this appeal.

Part VII of the 1974 Act empowers, and in some cases requires, local authorities to make grants for the improvement or repair of dwellings. Repair grants are mandatory if the provisions of s 71A of the 1974 Act are fulfilled, but otherwise they are discretionary. Lambeth's finances do not enable them to make discretionary grants.

Section 71A, so far as is material, provides:

a 'In so far as an application for a repairs grant relates to the execution of works required by a notice under section 9 of the Housing Act 1957 . . . (b) the authority shall not refuse it if it is duly made and the authority are satisfied that the works are necessary for compliance with the notice.'

b One comes, therefore, to s 9 of the Housing Act 1957, which was in force at all times material to this appeal, although its provisions have now been replaced by similar, though not totally identical, provisions in the Housing Act 1985, s 190. Section 9 of the 1957 Act is concerned, under the general rubric 'Unfit premises capable of repair at reasonable cost' with the power of local authorities to require the repair of houses. Section 9(1) gives the local authority power to require the repair of a house which in their opinion is unfit for human habitation, provided it is not incapable of being made habitable at reasonable expense. This case is concerned with sub-s (1A), which was added by the Housing Act 1969. Section 9, so far as material, provides:

c '(1A) Where a local authority . . . are satisfied that a house is in such a state of disrepair that, although it is not unfit for human habitation, substantial repairs are required to bring it up to a reasonable standard, having regard to its age, character and locality, they may serve upon the person having control of the house a notice requiring him, within such reasonable time, not being less than twenty-one days, as may be specified in the notice, to execute the works specified in the notice, not being works of internal decorative repair.'

d (2) In addition to serving a notice under this section on the person having control of the house, the local authority may serve a copy of the notice on any other person having an interest in the house, whether as freeholder, mortgagee, lessee or otherwise.

e (3) In this and the three next following sections references to a house include a reference to a hut, tent, caravan or other temporary or moveable form of shelter which is used for human habitation . . .'

f I leave out the end of sub-s (3), the provisions of which are not relevant in this case.

The phrase 'person having the control of a house' is defined in s 39(2) of the 1957 Act as follows:

g 'For the purposes of this Part of this Act [that is to say, Pt II], the person who receives the rack-rent of a house, whether on his own account or as agent or trustee for any other person, or who would so receive it if the house were let at a rack-rent, shall be deemed to be the person having control of the house. In this sub-section the expression "rack-rent" means rent which is not less than two-thirds of the full net annual value of the house.'

In the present case it is common ground that the 14 flats the subject of long leases, were not, and are not, let at rack-rents but if they were to be let at rents exceeding two-thirds of the full net annual value of the house, the person who would be entitled to receive that rent would in each case be the leaseholder.

h The person having control of the house is thus, as far as the leasehold flats are concerned, the leaseholder. In respect of the six other flats, the subject of the controlled tenancies, it is Clayhope, because they do, or they did at the material time, receive rack-rents from their tenants.

j What is a 'house' for the purposes of the 1957 Act, or at any rate for the purposes of Pt II of the Act? There are two references in the 1957 Act to what the word 'house' can include. I have already read s 9(3), which does not apply. The other reference is in the interpretation section, s 189(1). That states:

"house" includes—(a) any yard, garden, outhouses, and appurtenances belonging thereto or usually enjoyed therewith . . .'

Paragraph (b) of the definition of 'house' does not apply to Pt II of the 1957 Act, but it should perhaps be read because it throws some light on the meaning of the word 'house': **a**

'(b) for the purposes of any provisions of this Act relating to the provision of housing accommodation, any part of a building which is occupied or intended to be occupied as a separate dwelling.'

So for the purposes of another Part of the 1957 Act, a part of a building intended to be occupied as a separate dwelling is a house, but specifically not for the purposes of Pt II of the Act. **b**

If the premises are not a 'house', nevertheless the provisions of Pt II of the 1957 Act may apply, because there is another provision which so far I have not reached, namely s 18 of the 1957 Act, which provides:

'(1) A local authority may under the foregoing provisions of this Part of this Act take the like proceedings in relation to—(a) any part of a building which is used, or is suitable for use, as a dwelling . . . as they are empowered to take in relation to a house . . .'

The qualification which follows again does not arise in the present case.

So if the premises are not a house, but are part of a building which is used, or which is suitable for use, as a dwelling, then that part is a part in respect of which the local authority may take the same sort of proceedings as they may take in respect of a house under the earlier parts of Pt II of the 1957 Act, and thus may serve a s 9(1A) repairs notice. For this purpose the building itself may be a building wholly or partly, in residential occupation. Indeed, as I shall say later, although the question whether each of these flats is a house is a, if not the, major issue in this appeal, if the answer is 'No, each flat is not a house', it is common ground that each flat is certainly a part of a building used as a dwelling, and s 9(1A) repairs notices can properly be served in respect of each flat. **d**

There are two other provisions of the 1957 Act to which I should refer before I come briefly to the facts. If a repairs notice is served, under s 11 of the 1957 Act there is a right of appeal against it. Section 11(1) provides: **e**

'Any person aggrieved by (a) a notice under the foregoing provisions of this Part of this Act requiring the execution of works . . . may, within twenty-one days of the service of the notice, demand or order, appeal to the county court . . .'

By s 11(3), which I can summarise, on an appeal to the county court the judge may either confirm or quash or vary the notice as he thinks fit. So he has, as it seems to me, total discretion to arrive at whatever conclusion he thinks right in all the circumstances; he might quash the notice or he might say that the notice should be varied by deleting some of the works required to be done. **f**

Finally, under s 37(1): **g**

'Any notice, demand or order against which an appeal might be brought to a county court under this Part of this Act shall, if no such appeal is brought, become operative on the expiration of twenty-one days from the date of the service of the notice, demand or order, and shall be final and conclusive as to any matters which could have been raised on such an appeal . . .'

I turn now to the history. In May 1981 Lambeth served a notice on Clayhope under s 9(1A) of the 1957 Act in respect of repairs to the whole block. Lambeth did so on the basis that Dover Mansions as an entity was a 'house' within Pt II of the 1957 Act. Clayhope appealed to the county court. That appeal stands adjourned and has not yet been heard. If the notice had been upheld on the appeal, Lambeth accept that they would be liable to pay a mandatory repairs grant to Clayhope under s 71A of the 1974 Act, and indeed Clayhope applied for such a grant. But before anything had happened in respect of that application, there had been two material changes. By 1984, firstly the condition of the **j**

a block had deteriorated further, so that the schedule of repairs appended to the 1981 notice needed amendments and additions; secondly, doubt had arisen whether the whole block could properly be considered to be a 'house'. Lambeth therefore decided to change course; they decided to serve fresh notices, this time the notices with which this appeal is concerned, 20 in all, one in respect of each flat, 14 on the leaseholders and six on Clayhope as the person having the control of the flats the subject of the short tenancies. Those notices were served on or about 23 March 1984 and I should refer briefly to their contents.

b As I have said, 14 were addressed to the individual leaseholders and, apart from the formal parts of the notices, there is attached a sheet which states:

c 'The attached schedule is divided into two parts as follows: Part A—Internal works of repair in connection with the specified flat. Part B—External works of repair to the whole block and internal works to the shared common parts. Each recipient of this notice is responsible for all the works specified in Part A and one twentieth of the cost of the works in Part B of the schedule.'

d There then follow some five pages of schedule in part A, and 18 pages in part B. The works to the interior of the flats include such things as replastering, replacing defective window frames and doors. The works to the exterior and to the common parts are not merely in length and description, but, in fact, much more extensive; in particular, they include a complete re-roofing of the entire property, together with extensive repairs to the brickwork and stonework of the exterior walls.

e Following the service of those notices, applications were made for grants under s 71A of the 1974 Act in respect of each flat by the leaseholders and the tenants, each accompanied by a request that the money should be paid to the receiver appointed to receive the money on behalf of Clayhope; nothing turns on that.

Clayhope (but not the leaseholders) appealed to the county court in respect of the six tenancy flats against the 1984 repairs notices. Those appeals are still outstanding.

f It is clear, and I believe it to be common ground, that the part B repairs are substantially the major part of the repairs required to be carried out in these repairs notices. All are agreed that the block, and the flats within the block, are in bad condition and that major repairs are necessary.

In confirmation of what I have just said, a letter of 22 March 1984 from Messrs Zelin & Zelin, solicitors acting, I believe at that stage, on behalf of the leaseholders, stated:

g 'Clearly, therefore, the lessees have "control" only over the *insides* of their flats. As you are aware, the majority of the damage is on the *exterior* and *common parts*, in respect of which the lessees simply cannot have any control.' (The solicitors' emphasis.)

h However, on 17 October 1984 Lambeth wrote to the solicitors for the applicants, Clayhope, saying in effect that they had changed their minds again, and that current legal opinion is 'that we are not able to grant-aid works to common parts and areas of shared responsibility'. By this time they had doubts as to the validity or effect of the 20 notices which they had served earlier in that year, and indeed doubts as to whether they could achieve a situation in which they could be required to make mandatory grants in respect of the roof, the exterior walls and the common parts, and therefore they have made no grants at all. Accordingly, Clayhope made the present application for an order for mandamus in May 1985.

j In July 1985 Lambeth were advised by counsel that notices could not validly be served on the leaseholders, or indeed in respect of individual flats which required repairs to the roof, the exterior walls or common parts, in so far as they were not included in the leases or tenancies of the flats.

So one has a Gilbertian situation. Lambeth, though anxious to have the repairs done, and though happy to pay any grants which they can properly be required to make under s 71A of the 1974 Act (the major proportion of which, I should say, will come from the

Department of the Environment) argue that the repair notices of March 1984 in respect of the individual flats, are misconceived and invalid. Clayhope argue that the repairs notices are perfectly sound and valid and that therefore Lambeth should be ordered to make the grants. The form of order sought is—

‘an order of mandamus directed to the Lambeth Borough Council requiring them to make according to law mandatory repair grants pursuant to sections 71 and 71A of the Housing Act 1974 (as amended) in respect of each and every flat contained in the mansion block known as Dover Mansions . . . or alternatively flats nos. 2, 5, 8, 12, 14 and 17 contained in Dover Mansions,’

those being the subject of the short tenancies.

Counsel for Clayhope accepts that grants under s 71A of the 1974 Act are only payable if the repairs notices are valid and effective. He says that he can reach the conclusion that the repairs notices are valid by one of two alternative routes. I describe route one shortly as follows: (i) each flat is a ‘house’ within Pt II of the 1957 Act; (ii) under s 189 of the 1957 Act a house includes its appurtenances; (iii) the leaseholders have rights of support, shelter and way relating to the walls, roof and passages. If Clayhope decline to honour their obligations under the leases to keep the roof, main walls and passages under repair, the leaseholders may carry out these repairs themselves. Thus, the easements are ‘appurtenances’ to, and thus part of, each flat within the definition of ‘house’ in s 189, which I have already read. Thus, a notice requiring repair of the common parts and the roof and walls relates to the ‘house’; and, as an alternative to (iii), (iv) if the easements are not appurtenances, the leaseholder nevertheless has the right to do the repairs, as I have already said, and under s 9(1A) the repairs the subject of the notice need not be repairs to the ‘house’ itself, but may be repairs outside the limit of the ‘house’.

Route two is the route to be followed if the flat is not a ‘house’ for the purposes of Pt II of the 1957 Act. In that case (i) each flat is part of a building used as a dwelling. Counsel for Lambeth accepts and asserts that this is the case, and accepts that if an application for repairs notices were required only in respect of the interior of the flats, such notices could be served on each leaseholder in respect of the individual flats and in respect of works to the flats, and that mandatory grants would be payable, (ii) the ‘appurtenances’ way is closed if this route is followed, because the s 189 definition applies only to a house, but (iii) the last point which I sought to describe as counsel for Clayhope’s alternative termination to route one provides a termination to route two also; in other words, he argues that if each flat is part of a building used as a dwelling, then an order can still be made requiring repairs to be done outside that dwelling.

That raises the following issues; first, the major issue, is a flat a ‘house’ within Pt II of the 1957 Act? Hodgson J said this in his judgment:

‘Lambeth contend that these submissions fail in limine because a flat in a block is not a “house”; it is only a part of a building. I agree. I can find nothing in s 18 of the 1957 Act which would justify me in holding that a flat in a block is a house for the purposes of Pt II of the Act. If that had been intended it could have been specifically provided. And, in this connection, it is, in my judgment, importantly indicative of statutory intention that specific provision is made under (b) relating to “house” in s 189 that the word includes “part of a building” for the purposes of provisions in the Act relating to the provision of housing accommodation; these provisions one finds in Pt V of the Act. See also *Critchell v Lambeth BC* [1957] 2 All ER 417 at 420, [1957] 2 QB 535 at 540 per Lord Evershed MR: “In any case, in my judgment, s. 9, s. 10 and s. 11 of the Act of 1936 [ss 9, 10 and 16 of the 1957 Act] use the word “house”, in their context, as meaning what is commonly called a house—that is, a separate structure”.’

That passage in that judgment, being a decision of this court, is of course authoritative.

We were referred to two other authorities which are of assistance. The first is *Quiltotex*

a *Co Ltd v Minister of Housing and Local Government* [1965] 2 All ER 913, [1966] 1 QB 704, a decision of Salmon LJ sitting as an additional judge of the Queen's Bench Division. It was a question which arose under Pt III of the 1957 Act; that is the clearance and compulsory purchase part of the Act, the slum clearance part of the Act in ordinary parlance. The decision is to the effect that a house divided into tenements is nevertheless, or can nevertheless be, a 'house' for the purposes of at least that Part of the Act, and for this purpose I apprehend that the same is true of Pt II of the 1957 Act, because the definition, b in so far as there is a definition in Pt III, is the same as that in Pt II.

Salmon LJ said ([1965] 2 All ER 913 at 917, [1966] 1 QB 704 at 713):

c 'In this connexion, it is perhaps worth noting that in another part of the Act of 1957, Part 2, there is a section, s. 5, which lends some support to the conclusion at which I have arrived. Section 5(1) reads: "Notwithstanding anything in any local Act or byelaw in force in any borough or district, it shall not be lawful to erect any d back-to-back houses intended to be used as dwellings for the working classes, and any such house shall for the purposes of this Act be deemed to be unfit for human habitation: Provided that nothing in this section shall prevent the erection or use of a house containing several tenements in which the tenements are placed back to back, if the medical officer of health for the borough or district certifies that the several tenements are so constructed and arranged as to secure effective ventilation of all habitable rooms in every tenement." This postulates a house containing several e tenements. Each of these eight houses of the owners is, in my view, a house containing several tenements, and s. 5 at any rate does lend support to the view that "house" covers the genus "tenement house". No assistance can be gathered at all from the so called definition of "house" in s. 189, because it merely extends the ordinary meaning of the word but does not attempt to define it.'

And he so decided.

f Much more recently the House of Lords, in *Pollway Nominees Ltd v Croydon London BC* [1986] 2 All ER 849, [1987] AC 79, had for consideration a question relating to a block containing 42 flats which were let on long leaseholds. One repairs notice was served under s 9(1A) of the 1957 Act, in respect of the whole block, on the freeholder. It was held at all stages, by which I mean at first instance, by the Court of Appeal and the House of Lords, that assuming, which was not in dispute, that the whole block was a 'house' for the purposes of Pt II of the 1957 Act, nevertheless the freeholders were not the persons having control, and thus the notice could not be served on them. The leaseholders collectively were the persons having control. If I may interpolate, that means that g Lambeth's first attempt was wrong and that their first change of heart was well founded.

In his speech Lord Bridge said ([1986] 2 All ER 849 at 852, [1987] AC 79 at 90):

h 'The main issue has been argued both in the Court of Appeal and before your Lordships on the footing that Crown Point can properly be regarded as a "house" within the meaning of s 9 of the 1957 Act. In so far as that may involve an admission of fact by Pollway, it is, of course, open to a party to make any admission of fact he chooses. But, in so far as the matter proceeds on a concession of law that a modern purpose-built block of flats is a "house" to which the provisions we are considering apply, I am by no means prepared to accept it as necessarily correct. We have heard no argument on the point and I refrain from expressing any opinion on it one way or the other. I apprehend, however, that a building originally constructed as a single i dwelling house does not cease to be a "house" under the Act if it is internally converted into a number of separate residential units which are then sold off on long leases, as commonly happens as an incident of a familiar form of contemporary property development. Accordingly, even if we may be addressing an artificial problem in relation to Crown Point, the question how the definition applies to a building which is undoubtedly a house where the separate residential units within

the house are all let on long leases at ground rents is one that requires to be answered.' a

As I hope I have made clear, the answer which was given was to the effect that Lambeth's first attempt to serve the notice in this case was inappropriate, and that had they wanted to treat Dover Mansions as a house the proper course would have been to serve the 14 leaseholders plus the freeholder as together being the person having control of the whole house. It may be, we are told, that that is a course which Lambeth will wish to adopt. b

In my judgment Hodgson J was correct in deciding that the individual flats in this building are not each a house. In my view a flat is not a house within Pt II of the 1957 Act. A 'house' in its ordinary sense means a separate building. It may contain one dwelling, or more than one. Whether a particular purpose-built block of flats is a 'house' for the purposes of Pt II is a question of fact. In relation to this block I express no opinion; it may have to be tested later, or it may not. Lambeth may decide that it is a 'house'; if they do, they may serve notice accordingly. I assume that if they do, they will serve the notice on the person whom I have already referred to as being collectively the person having control in respect of the roof, exterior walls and common parts, and perhaps a series of individual notices on the leaseholders relating to each flat separately. But it is not for me to advise them; that is for them. c

Since it is my view that a flat is not a 'house' my view is also that route one is barred to counsel for Clayhope at its entrance, and it is therefore unnecessary to consider, and I do not propose to consider, the fascinating question whether the easements of shelter, support and way are appurtenances or not. Counsel for Clayhope, therefore, can only succeed, if at all, by way of route two. d

As I have already said, it is accepted that a repairs notice can validly be served on a leaseholder of a flat under s 9(1A) of the 1957 Act in respect of repairs to that flat. Thus, the issue is: can such a notice also be served which requires repairs to part of the building not within the demise of an individual flat? Counsel for Clayhope submits that it can. The works are, it is to be assumed, works which need to be done. He argues that Parliament must have intended that they should be done. The leaseholder has, either by express grant or by implication, the power to do the works of repair to the roof and so on if the freeholder fails to do them. This is enough to enable the notice to require the leaseholder to do such work, to be valid and effective. e

On the contrary, counsel for Lambeth argues that the legislation empowers the local authority to serve the notice on the 'person having control', because he is the person who can, and normally will, and should, undertake the repairs to his property. In relation to the roof and the common parts that person is the freeholder, Clayhope. The fact that by contract the leaseholder has power to do the work in default does not make any leaseholder the person having control. Put another way, the premises a person can be required to repair are those of which he has control; that is, the premises included in his demise and no more. f

In this respect counsel for Lambeth refers us to the provisions of ss 11(3) and 12(1) of the 1957 Act. Section 11(3), so far as material, provides: g

'On an appeal to the county court under this section the judge may make such order either confirming or quashing or varying the notice, demand or order as he thinks fit and where the judge allows an appeal against the notice under section 9(1) of this Act requiring the execution of works to a house, he shall . . .'

The rest does not matter. The passage that matters is that which requires the execution of works to a house. h

The same phrase is to be found in s 12(1): i

'Where a person has appealed against a notice under this Part of this Act requiring the execution of works to a house . . .'

a So counsel for Lambeth draws support from those passages for the proposition that the works must be to the house or, if one is going by the s 18 route, to the part of the building occupied as a dwelling, and to nothing else.

I accept the argument of counsel for Lambeth in this respect as correct. In my view a notice under s 9(1A) in relation to works on the roof and common parts, which are not within the demise of any individual leaseholder, cannot be served on the leaseholder of the flat as an individual.

b Counsel for Clayhope argues that, if this is the case, there is a gap, or lacuna, in the law, which will continue because the relevant provisions of the Housing Act 1985 contain the same definition of the 'person having control'. Hodgson J dealt with this argument in his judgment where he said:

c 'I do not myself find this lacuna (if it be one) particularly surprising. In *Pollway Nominees Ltd v Croydon London BC* [1986] 2 All ER 849 at 855, [1987] AC 79 at 95 Lord Bridge said: "I appreciate that this conclusion may cause inconvenience for local authorities. But I imagine that normally the contractual rights of the owners of long leasehold interests to enforce repairing obligations against their lessors will provide an adequate solution to the problem. This may be the explanation of the fact that, though the formula found in the definition has been in common use in statutes since at least 1847, it was not until 1982 that its application to buildings divided into units let on long leases had to be considered by the courts. The truth, I suspect, is that generations of parliamentary draftsmen have been content to use the time-honoured formula without ever contemplating its application to the circumstances presently under consideration. That must surely be true of s 39(2) of the 1957 Act which simply re-enacts the formula first used in its present context in s 17(4) of the Housing Act 1930. That Act introduced the compulsory procedure which we now see in expanded and amended form in Pt II of the 1957 Act requiring 'the person having control of the house' to effect repairs to a house which was unfit for human habitation and which was 'occupied or of a type suitable for occupation by persons of the working classes'. The draftsman in 1930 can hardly be blamed if it did not occur to him to make suitable provision for dealing with problems arising from flats let on long leases at low rents." On the facts of this case the contractual rights enjoyed by the tenants are capable of providing, and will no doubt provide, an adequate solution to the problem at which Pt II of the 1957 Act is aimed. The misfortune is that, by limiting the grant legislation to work performed under a s 9 notice, the legislature have failed to provide for the making of grants in respect of the "outside" work. Whether that comes about by oversight or intention matters not. If it is an unintentional lacuna it is for the legislature, if it wishes, to fill it; if it is an intentional restriction of grant aid (and this cannot be excluded) then, of course, whilst one may or may not think it fair, the court is in no way concerned.'

h If in a particular case a block of flats is a 'house' for the purposes of Pt II, a notice in respect of the roof and common parts can be served on the freeholder and the leaseholders together, as I have already said, following *Pollway Nominees Ltd v Croydon London BC*. But if not, and there is no person who can be required by the local authority to repair the parts not demised, like Hodgson J, I do not find this surprising. Parliament has not yet thought it right to extend this part of the legislation to all flats let out on long leases, and thus must be assumed to think it right to rely on the contractual provisions as between freeholder and long leaseholder.

j Counsel for Clayhope further argues that even if we reach, as I have now done, the conclusion set out above, we should not hold that the s 9(1A) notice is 'invalid'. He argues, too, that the part of the works which the leaseholder cannot be required to do can be severed from the rest; in other words, disregard part B and leave part A standing. I must confess that it is not totally clear to me that these are separate arguments or part and parcel of the same argument, but I believe it is the latter.

Since there is a right of appeal to the county court, counsel for Clayhope argues that that is the way in which the notice can be quashed, if it is to be quashed. The High Court should not achieve the same effect by declaring it invalid. This is not, he says (as in the *Pollway* case) a notice addressed to the wrong person; it is a notice addressed to a person to whom it can be addressed, containing extraneous material, but still valid, and thus, under s 37(1), it cannot properly be challenged save by way of appeal to the county court. a

Counsel for Clayhope refers us also to the decision of this court in *Cohen v West Ham Council* [1933] Ch 814, [1933] All ER Rep 24, which is really to the same effect as s 37(1), namely that the notices are valid unless and until an appeal against them to the county court succeeds. b

As for that argument, Hodgson J said trenchantly:

‘In my judgment a notice which required a recipient to do work which is the main part of the requirement and which the local authority have no right in law to require him to do is as invalid and void as is a notice served on the wrong recipient (see *Pollway Nominees Ltd v Croydon London BC* [1986] 2 All ER 849, [1987] AC 79).’ c

Counsel for Lambeth argues that it is clear that the purpose of these repair notices was to ensure that all the work was done. The work to the roof and common parts is, as I have already said, by far the major part. Whether the local authority would have served on the leaseholders notices requiring only the works to the interior of their flats, if they were not able to require the works to the roof and common parts to be done, must be in doubt; and he urges us not to hold that the notices remain valid. d

For my part, I accept that, having decided that the leaseholder cannot be required to do the work to the roof and common parts, the major object of the repairs notices fails. In my view, neither this court nor Hodgson J had the material on which we could sever the requirement for repairs, one part from another. If the appeals to the county court had been pursued, or if they are pursued, the county court judge can do exactly that if he thinks right. e

Counsel for Clayhope concluded his submissions by saying that although he is in form asking for mandamus, what he really wants is a declaration as to his rights. In effect, there is inherent in this judgment a declaration that a flat is not a ‘house’ for the purposes of Pt II of the 1957 Act, and that in respect of the repairs to the roof and common parts, these notices accordingly could not be served on the leaseholders. But if counsel for Clayhope means that what he really wants is a declaration, that nevertheless the notices are still valid, and if he had sought that initially, I would refuse to grant such a declaration. Whether I would actually say, as did Hodgson J, that the notices were invalid matters not. What I am quite positive about is that it would be pointless to grant a declaration that they were valid, when their major point will not be achieved. f

But a declaration is not what these proceedings are asking for. What the applicants seek is a mandamus to require the local authority to make grants to leaseholders under s 71(A) of the 1974 Act. The decision of Hodgson J on the main issue, with which I entirely agree, inevitably means that the basis for requiring payment of mandatory grants is not established. g

Accordingly, in my view the judge was right to dismiss the application, and I would therefore dismiss the appeal. h

SIR GEORGE WALLER. I agree and do not wish to add anything.

KERR LJ. I also agree that this appeal should be dismissed for the reasons given by Glidewell LJ. I only add a few words on what appears to me to be the short central issue among the many peripheral matters which have been argued. j

This is the question whether the holder of a long lease of a flat in a block of flats can be required to carry out repairs to the common parts of the block pursuant to a notice served on him individually under s 9(1A) of the Housing Act 1957.

a That provides that the notice must be served on 'the person having control'. The person having the requisite control is defined in s 39 as the person who receives, or would be entitled to receive, the rack-rent of the premises in question.

b It is, of course, clear that in relation to repairs required to be done by the long leaseholder to his own flat, a s 9(1A) notice is good. He is the person in control of the flat within the definition of s 39(2). And although s 9(1A) refers to a 'house', the proceedings can be served on him, and the same provisions apply *mutatis mutandis*, by virtue of s 18, which provides that the like proceedings may be taken in relation to 'any part of a building'. In my view it is only because of s 18, for the reasons explained by Glidewell LJ, that a s 9(1A) notice is effective to require repairs to flats to be carried out by the persons in control of them within the terms of s 39(2).

c The central issue, however, is whether such a person, by reason of such a notice served on him individually, can also be required to carry out repairs to the common parts of the block. For that purpose I take the roof of the block as an example, which is in fact of particular importance here. In what relationship does the tenant of any particular flat stand to the roof of the block?

d There are, so far as I can see, only two connections between him and the roof; and certainly no others have been mentioned in argument. Both concern rights which he has in relation to the roof. Broadly speaking, he has a right to the protection of the roof against the ingress of rain and so forth. Secondly, he has the right to repair the roof if the landlord does not do so pursuant to the terms of his lease. He may have those rights expressly by the terms of his lease, by demise as in this case. Or he may have them by virtue of the reference to 'appurtenances' in s 189 of the 1957 Act, although in my view only in the context of houses and not in the context of parts of a building. Or he may have them by virtue of s 62 of the Law of Property Act 1925, which refers to rights, e appurtenances and so forth.

f However, these factors merely involve the possible existence of *rights* enjoyed by the tenant in relation to the roof. That obviously does not have the effect of making a tenant of a flat a person who is in control of the roof for the purposes of s 9(1A) read together with s 39(2) of the Act. The Act is not concerned with rights. As shown by the heading to Pt II, it is concerned with provisions for securing the repair, maintenance and sanitary conditions of houses. Houses and parts of buildings under the control of persons defined in s 39(2) are the subject matter of Pt II; not the power to exercise rights.

g For those reasons I conclude that part B of these notices could not properly be served on the individual leaseholders of any of these flats.

I do not desire to add anything on any other issue raised on this appeal, beyond thanking counsel for their very clear arguments.

Appeal dismissed. Leave to appeal to House of Lords refused.

Solicitors: Bernstein & Co (for Clayhope); Robert G Broomfield (for Lambeth).

Wendy Shockett Barrister.

R v Southwood

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COURT OF APPEAL, CRIMINAL DIVISION

LORD LANE CJ, LEONARD AND ROSE JJ

19, 30 JUNE 1987

Trade description – False trade description – Application in course of trade or business – Disclaimer of false trade description – Secondhand car – Car dealer reducing mileage on odometer – Dealer displaying notices disclaiming odometer's accuracy – Whether dealer protected from liability by disclaimer – Trade Descriptions Act 1968, s 1(1)(a). b

Trade description – False trade description – Application in course of trade or business – Secondhand car – Zeroing odometer – Whether reducing odometer of secondhand car to zero is applying false trade description – Trade Descriptions Act 1968, s 1(1)(a). c

The appellant, a secondhand car dealer, bought a number of used cars which showed mileages on their odometers which were higher than would be expected according to the car's age. In each case the appellant turned back the odometer before selling the cars without stating original mileage. In each case the invoice handed to the purchaser had a disclaimer that 'WE DO NOT GUARANTEE THE ACCURACY OF THE RECORDED MILEAGE' while a sticker on the odometer of each car stated 'We do not guarantee the accuracy of the recorded mileage. To the best of our knowledge and belief, however, the reading is incorrect'. A notice in the sales office stated that all mileages on cars were incorrect and they were offered and sold on that understanding. The appellant was charged with ten counts of contravening s 1(1)(a)^a of the Trade Descriptions Act 1968 by applying false trade descriptions to vehicles in the course of his business by substantially reducing the mileage on the odometer before sale. He was convicted and appealed, contending (i) that he was protected from liability under the Act by the various disclaimers regarding the accuracy of the recorded mileage, and (ii) that in regard to one count, where the mileage had been reduced from 50,887 to 2,890, the mileage had been reduced so much that it was not a description of the mileage of secondhand car and no-one would be misled by the figure shown. d e f

Held – The appeal would be dismissed for the following reasons—

(1) Section 1(1)(a) of the 1968 Act was clearly intended to impose strict liability on a person who applied a false trade description in the course of business and a disclaimer by a car dealer regarding the mileage reading on a car's odometer could not provide a defence to an offence under s 1(1)(a) since, by his initial action in falsifying the description, the dealer had effectively disqualified himself from claiming that he had taken reasonable precautions to guard against a false description (see p 559 j to p 560 c and p 564 d to f, post); *Newman v Hackney London BC* [1982] RTR 296 applied; *R v Hammertons Cars Ltd* [1976] 3 All ER 758 distinguished. g

(2) A person who returned an odometer to zero was thereby applying a false trade description under s 1(1)(a) and it was irrelevant that no-one was likely to be misled by a secondhand car which had zero miles on the odometer (see p 564 j to p 565a, post). h

Notes

For applying a false trade description and disclaimers, see 48 Halsbury's Laws (4th edn) paras 284, 289, and for cases on the subjects, see 47(2) Digest (Reissue) 236–245, 1646–1685. j

For the Trade Descriptions Act 1968, ss 1, see 37 Halsbury's Statutes (3rd edn) 949.

a Section 1(1), so far as material, is set out at p 559 c d, post

Cases referred to in judgment

- a* *Corfield v Starr* [1981] RTR 380, DC.
Lill (K) Holdings Ltd (trading as Stratford Motor Co) v White [1979] RTR 120, DC.
MacNab v Alexanders of Greenock Ltd 1971 SLT 121, HC Just.
Newman v Hackney London BC [1982] RTR 296, DC.
Norman v Bennett [1974] 3 All ER 351, [1974] 1 WLR 1229, DC.
R v Hammertons Cars Ltd [1976] 3 All ER 758, [1976] 1 WLR 1243, CA.
- b* *Tarleton Engineering Co Ltd v Natrass* [1973] 3 All ER 699, [1973] 1 WLR 1261, DC.
Taylor v Smith [1974] RTR 190, DC.
Waltham Forest London BC v TG Wheatley (Central Garage) Ltd [1978] RTR 157, DC.

Case also cited

Wandsworth London BC v Bently [1980] RTR 429, DC.

Appeal against conviction and sentence

The appellant, William Francis Southwood, appealed against his conviction and sentence on 17 November 1986 in the Crown Court at Chelmsford, before Mr Recorder Freeman and a jury, on ten specimen counts, each alleging that he had applied a false trade description to a car by reducing the mileage recorded on the odometer of the vehicle, contrary to s 1(1)(a) of the Trade Descriptions Act 1968, for which he was sentenced to six months' imprisonment on each count, to run concurrently. The facts are set out in the judgment of the court.

Anthony Hidden QC and J W Haines for the appellant.

Andrew Collins QC for the Crown.

Cur adv vult

30 June. The following judgment of the court was delivered.

- f* **LORD LANE CJ.** On 17 November 1986 in the Crown Court at Chelmsford before Mr Recorder Freeman and a jury, the appellant was convicted on ten counts of an indictment, each count alleging a contravention of s 1(1)(a) of the Trade Descriptions Act 1968. He was sentenced to six months' imprisonment in respect of each of the counts, those sentences to run concurrently. He now appeals against conviction and sentence by leave of the single judge.

- g* The counts in the indictment were specimens: 27 transactions in breach of the 1968 Act were alleged by the prosecution. The case against the appellant was as follows. The appellant was the owner of a secondhand car business in Chelmsford called Woodstock Autos. In each case the appellant, so it was said, bought a motor car with a sizeable mileage displayed on the odometer. In each case he sold the car with a much lower mileage displayed on the instrument, often a tenth of the original figure. It was alleged
- h* that the appellant was responsible for these alterations. They were done by him or at his instigation. It was clear that in most cases the original mileage was higher than would be expected from the age of the motor car.

- The defence as to counts 2 to 10 was that there had been no alteration of the odometer reading whilst the car was in the appellant's possession. Somebody else, it was suggested, had altered the figures before the car was sold to him, so that the appellant was not the person who had applied the trade description. As to count 1, the defence was that the odometer had been altered from 50,887 to zero, or as near to zero as possible. The car had then been driven for some miles resulting in an eventual reading of 2,890 at the time it was resold. That was said not to be the applying of a false trade description. That contention will have to be considered hereafter.

There was a further string to the appellant's bow and that was this. Even if there was prima facie a false trade description applied to the vehicle, any breach of the Trade Descriptions Act was negated by the following matters. Firstly, in each case the invoice handed to the purchaser contained a written 'disclaimer' in small print in a box halfway down the page. This read as follows: 'CODE OF PRACTICE FOR THE MOTOR INDUSTRY. WE DO NOT GUARANTEE THE ACCURACY OF THE RECORDED MILEAGE.' That part of the notice was in small capitals. Then in lower case and in even smaller type there followed: 'To the best of our knowledge and belief, however, the reading is correct/incorrect.' The 'correct' was in some cases crossed out. In some cases neither the word 'correct' nor the word 'incorrect' was crossed out. It is to be noted that just above that box in much larger type is printed 'Mileage at time of sale' and then follows in handwriting the bogus figure which was displayed on the odometer at the time of resale.

Secondly, in each case there was also a sticker placed across the face of the speedometer and odometer, which however, with one possible exception, did not conceal the actual odometer reading. The words on the sticker were: 'We do not guarantee the accuracy of the recorded mileage. To the best of our knowledge and belief, however, the reading is incorrect.'

Thirdly, there was a notice displayed in the sales office. The notice read as follows: 'ALL MILEAGE ON CARS OFFERED ARE INCORRECT AND SOLD AND OFFERED ON THIS UNDERSTANDING.'

The recorder gave an impeccable direction to the jury on the initial questions of whether the 'clocking' (as it is called) had been done by or on behalf of the appellant and whether the alteration referred to in count 1 amounted to a description: the contention being that if the odometer is 'zeroed' (as it is called), then the nil reading is not a description of the mileage of a secondhand motor car. Even if that is so, so far as count 1 was concerned, as the recorder pointed out, the odometer was not zeroed and the buyer was presented with a reading of 2,890 miles as against the truthful mileage which was 53,777. What the recorder said on that matter was as follows:

'... it would be open to you to say that if the figure there was tiny, so tiny that it really came to nothing and was analogous to being zero, then you could come to the conclusion that there was not a trade description but that is not the case here because although it might have been wound back to a very low figure, by the time it had been driven round, we see I think the very lowest figure in this particular schedule is something like 1,300, well, is that capable of being a trade description, members of the jury? I indicate to you it certainly is open to you to come to the conclusion that it is.'

The jury by their verdict found, not surprisingly, that the appellant was responsible for the alterations to the odometer readings, and that so far as count 1 was concerned, the alteration was not 'analogous to zero', and that it was a false trade description applied to the vehicle.

The only remaining question, and the nub of this appeal, relates to the direction which the recorder gave to the jury on the subject of the so-called 'disclaimer'. Counsel for the appellant submits that the recorder's direction on this aspect of the case was wrong. The direction was as follows:

'The prosecution say of course in all of these cases, if you are satisfied that it was applied, that it was a trade description, then it was false to a material degree, because there were thousands, tens of thousands of miles different to what was actually travelled or had been travelled by the motor car in question and that which was on the mileometer. So you may think it is obvious, but it is a matter for you, that it was false to a material degree. Again let me make it perfectly clear: if you are satisfied that this defendant did apply that trade description, if he or an agent of his under his instructions or with his encouragement actually clocked the car in

a question, actually turned it back or actually caused that mileage to register something which was false to a material degree, then members of the jury there is no defence which avails the defendant at all. If he puts near to the mileometer or on the wall a disclaimer, as in the terms that we have been told about in this matter, that does not provide a defence . . . As counsel for the prosecution has told you, a disclaimer, in whatever terms and however boldly displayed, cannot be a defence and that, members of the jury, is a direction which I give to you.'

b That direction was based on a judgment of the Divisional Court delivered by Ormrod LJ in *Newman v Hackney London BC* [1982] RTR 296. It will be necessary to examine that authority, and the many authorities on this subject which led up to it, at a later stage.

However, this is a statutory offence and the first thing therefore to be examined is the wording of the 1968 Act. Section 1 provides as follows:

c '(1) Any person who, in the course of a trade or business—(a) applies a false trade description to any goods; or (b) supplies or offers to supply any goods to which a false trade description is applied; shall, subject to the provisions of this Act, be guilty of an offence.'

d The appellant was charged under s 1(1)(a). A trade description is defined in s 2(1) of the Act as follows:

'A trade description is an indication, direct or indirect, and by whatever means given, of any of the following matters with respect to any goods or parts of goods . . . (j) other history, including previous ownership or use.'

e A false trade description is defined in s 3 as follows: 'a trade description which is false to a material degree.' The following further provisions of the Act are material to the present appeal:

f '4.—(1) A person applies a trade description to goods if he—(a) affixes or annexes it to or in any manner marks it on or incorporates it with—(i) the goods themselves . . . (c) uses the trade description in any manner likely to be taken as referring to the goods . . .

23. Where the commission by any person of an offence under this Act is due to the act or default of some other person that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence . . . whether or not proceedings are taken against the first-mentioned person.

g 24.—(1) In any proceedings for an offence under this Act it shall . . . be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control . . .

h (3) In any proceedings for an offence under this Act of supplying or offering to supply goods to which a false trade description is applied it shall be a defence for the person charged to prove that he did not know, and could not with reasonable diligence have ascertained, that the goods did not conform to the description or that the description had been applied to the goods.'

j Section 1 of the Act is clearly intended to impose strict liability both on the applier of the false trade description (under section 1(1)(a)) and the supplier of the article (under s 1(1)(b)); see *MacNab v Alexanders of Greenock Ltd* 1971 SLT 121 and *Taylor v Smith* [1974] RTR 190. That strict liability is only mitigated by the provisions of s 24.

An odometer reading is at least capable of being a trade description: see *R v Hammertons Cars Ltd* [1976] 3 All ER 758 at 761, [1976] 1 WLR 1243 at 1246, where Lawton LJ said:

'In our judgment, a reading on a mileometer on a motor car is an indication of the use which it has had. It follows that it is a trade description and if the reading is false . . . it is capable of being a false trade description.'

It would seem to follow logically that if a dealer falsifies the mileage reading on a car which is offered for sale, he applies a false trade description to goods in the course of a trade, and so commits an offence under s 1(1)(a). He would have no escape under the provisions of s 24. It seems somewhat illogical to allow him to use a so-called 'disclaimer' to avoid conviction. The 'disclaimer', assuming it to be in the terms of those in the instant case, would be saying: 'This is a false trade description. I assert that it is a false trade description, and because I assert that it is a false trade description it ceases to be a false trade description applied to goods, and consequently I am not guilty of a contravention of s 1(1)(a).' The assertion does not cause the description to be any less false than it was originally, nor does it cause the description to cease to be applied to the car. It seems that on the strict wording of the Act, therefore, the so-called 'disclaimer' provides no defence to a person charged under s 1(1)(a).

Before reaching any conclusion on this aspect however, it is necessary to examine the considerable body of authority which exists on the concept of the 'disclaimer'. Most of the decisions emanate from the Divisional Court, and most of them are cases on s 1(1)(b). The most notable are as follows.

In *Tarleton Engineering Co Ltd v Natrass* [1973] 3 All ER 699 at 705, [1973] 1 WLR 1261 at 1268, Wien J said:

'We are of the opinion that where a motor car is offered for sale when the mileage recorded on the mileometer is 23,000 odd miles, that recorded mileage is capable of amounting to a trade description applied by the seller at the time of the offer for sale. If the description is in fact false because the true mileage is in excess of 40,000 miles an offence is committed by the seller who applies that description to the goods even though he is unaware of the falsity of the description. He can protect himself by some disclaimer of the accuracy of the mileometer. Without such a disclaimer he commits an offence under s 1(1)(b) of the Act of 1968.'

That dictum was approved in another Divisional Court case, *Taylor v Smith* [1974] RTR 190, already referred to. Lord Widgery CJ, having cited the passage which we have already set out, had this to say (at 194):

'That in my judgment puts the matter in a nutshell. Secondhand car sellers would be well advised to disclaim any representation as to the accuracy of the mileometer. If they merely remain silent and the mileometer gives a false reading suggesting that the car has done less mileage than it really has, then an offence under section 1 of the Act of 1968 is committed, even though the seller was not dishonest, even though the seller did not interfere with the mileometer, even though the seller had no knowledge of the falsity of the mileometer reading, and even though the purchaser was really disinterested in whether the mileometer was right or wrong. The Act must be strictly construed, and in this case the only conclusion is that the offence was committed.'

The charge in that case was under s 1(1)(b).

Norman v Bennett [1974] 3 All ER 351, [1974] 1 WLR 1229 was another Divisional Court case involving a charge under s 1(1)(b). The following passage appears in the judgment of Lord Widgery ([1974] 3 All ER 351 at 353-354, [1974] 1 WLR 1229 at 1232):

'This case raises, I think for the first time, a need for the court to think a little more deeply about the extent to which a false trade description can be disclaimed, so as to prevent the supplier of the goods from committing a criminal offence.'

Earlier authorities have recognised the possibility of such a disclaimer but have not gone in any detail into the circumstances in which that can be done. I think that where a false trade description is attached to goods, its effect can be neutralised by an express disclaimer or contradiction of the message contained in the trade description. To be effective any such disclaimer must be as bold, precise and compelling as the trade description itself and must be as effectively brought to the notice of any person to whom the goods may be supplied. In other words, the disclaimer must equal the trade description in the extent to which it is likely to get home to anyone interested in receiving the goods. To be effective as a defence to a charge under s 1(1)(b) of the 1968 Act any such disclaimer must be made before the goods are supplied.'

The next decision in point of time is *R v Hammertons Cars Ltd* [1976] 3 All ER 758, [1976] 1 WLR 1243. The first matter which the Court of Appeal then decided, as already explained, was that the reading on a car's odometer was a trade description. The court also turned to consider the question of whether a 'disclaimer' can be an effective protection to a person charged under s 1(1)(b), as the appellant in that case had been.

The judgment of Lawton LJ contains the following passage ([1976] 3 All ER 758 at 762, [1976] 1 WLR 1243 at 1248):

'Each case must depend on its own facts; but in most cases of the kind now before the court a mileometer reading is on the motor car for the prospective purchaser to see and to take into consideration when deciding whether to buy. If dealers do not want prospective purchasers to take any notice of mileometer readings they must take positive and effective steps to ensure that the customer understands that the mileometer reading is meaningless. Whether any such steps were taken, and if they were whether they were effective, is always a matter for assessment by the justices in the case of summary proceedings and by the jury when there is a trial on indictment. We should expect both justices and juries to find that a casual remark in the course of oral negotiations or "small print" in a contractual document were not effective.'

Later Lawton LJ when dealing with the appeal against sentence, said ([1976] 3 All ER 758 at 764-765, [1976] 1 WLR 1243 at 1250-1251):

'The Trade Descriptions Act 1968 was intended by Parliament to provide protection for the public against unscrupulous and irresponsible traders. Section 1(1)(a) deals with those who are proved to have been actively unscrupulous, as for example, by turning back mileometers; and s 1(1)(b) with those who do not take the trouble to check as best they can that mileometer readings are genuine.'

Although we agree respectfully that it is usually the case that s 1(1)(a) will be dealing with the dishonest trader and s 1(1)(b) with the careless trader, nevertheless that will not always be the case.

K Lill Holdings Ltd v White [1979] RTR 120 was another Divisional Court decision involving s 1(1)(b). The defendants bought a secondhand car with the odometer reading 59,000 miles. They altered the reading to 'zero' and, having made what were described as full disclaimers, they sold the car a month or two later to S. S resold the car to J, a dealer, who in his turn sold the car to M with a false trade description applied, in that the odometer by then recorded 5,000. The defendants were convicted of contravening s 23 of the 1968 Act on the basis that J in the course of trade had supplied to M a car to which a false trade description had been applied by means of the odometer contrary to s 1 of the Act and that the commission of the offence was due to the defendants' act or default. It was held that the defendants' action in returning the instrument to 'zero' did not justify the contention that the commission of the offence by J on the sale to M was due to the defendants' act or default because they ceased to be responsible before that sale took place.

The decision is clearly not strictly in point so far as the present case is concerned, but a passage in the judgment of Lord Widgery CJ, is perhaps relevant. He said (at 123):

'Whilst it is no business of ours to recommend or otherwise approve practices of the trade, I feel bound to say that I can see a good deal of merit in this method of winding back the odometer, because it does seem to me that, for the time being at all events, it puts the problem of a false odometer out of the reckoning because no one will be misled by such a record. However, that is what they did for better or worse. They also placed a disclaimer inside the cab of the motor car. That, of course, is something which has been laid down in this court as being a method of escaping responsibility for this kind of trouble. To make matters as good as possible, they also had a notice up in their office disclaiming the accuracy of the mileages displayed on their cars. They seem to have done practically everything which this court has ever recommended that dealers in motor cars should do in order to avoid this kind of problem.'

Corfield v Starr [1981] RTR 380, another Divisional Court decision, was a case where the defendant had been charged with offences under both s 1(1)(a) and s 1(1)(b). He had bought for resale a secondhand motor car whose true mileage was some 55,000 miles. He replaced the odometer with one which displayed a mileage of about 35,000 miles and attached a notice to the dashboard which read 'With deep regret due to the Customer's Protection Act we can no longer verify that the mileage shown on this vehicle is correct'. The defendant then sold the motor car. He was charged with applying a false trade description and also with supplying a car to which a false trade description had been applied. The justices came to the conclusion that the notice was as 'bold, precise and compelling' as the trade description, and that it acted as a disclaimer. They acquitted the defendant. The Divisional Court held that the so-called disclaimer was inadequate and the justices had been wrong. Bingham J (at 384), obiter, doubted whether there was any distinction to be drawn on this aspect of the matter between s 1(1)(a) and s 1(1)(b) of the Act. Donaldson LJ (at 384) took the view that some 'disclaimers' could themselves amount to a false trade description, and suggested that in appropriate cases the terms of the 'disclaimer' itself might be used as the basis of an allegation that there had been a false trade description.

Finally we come to the decision on which the recorder in the present case based his directions to the jury. That is *Newman v Hackney London BC* [1982] RTR 296, another Divisional Court case. The defendant company in the course of their business as dealers bought a secondhand motor car on which the odometer reading was some 46,000 miles. They altered the odometer to read 21,000 miles and attached a sticker to the instrument disclaiming, but not obscuring, the recorded mileage. They offered the vehicle for sale and it was bought. They were charged with contravening s 1(1)(a) of the 1968 Act, in that they had applied a false trade description to the car by altering the odometer reading. They were convicted and appealed to the Crown Court, raising the defence that no offence had been committed because the sticker neutralised the reading and amounted to an effective disclaimer. The Crown Court took the view that the doctrine of disclaimer was not applicable to an offence under s 1(1)(a), and dismissed the appeal. The Crown Court hearing took place before the publication of the decision in *Corfield v Starr*. The Crown Court judge, in a judgment which was clearly approved by the Divisional Court, having cited a passage from the judgment of Lawton LJ in *R v Hammertons Cars Ltd*, said:

'It is clear from that case that the Court of Appeal sees those who offend against section 1(1)(a) in a rather different light from those who breach section 1(1)(b). The former are unscrupulous and the latter irresponsible. In *Waltham Forest London Borough Council v TG Wheatley (Central Garage) Ltd* [1978] RTR 157 Lord Widgery CJ, sitting in the Divisional Court, dealt with the creation of the disclaimer notice

a in these cases. He said (at 162): "The disclaimer notice is a creation of the courts. It is not dealt with in the Act at all, and it has been developed in order to recognise the obvious justice of enabling a person to explain the falsity of a speedometer reading by saying, 'I am not suggesting that this is guaranteed. I disclaim any responsibility for it. You must not rely on it'". When a motor trader is the innocent purchaser of a motor vehicle to which a false trade description has been applied by a previous owner, by winding back the odometer, one can see the justice of providing enabling machinery to permit the motor trader to pass the vehicle on in the same condition without being caught up in the history of the vehicle of which he has no knowledge. There is something objectionable in convicting a man for an offence of which he had no prior knowledge and in which he has not knowingly participated. But can the same considerations be applied to the person who actually applied the false trade description—in the words of Lawton LJ . . . the person who has been "actively unscrupulous" by turning back the mileometer? Does the justice of the matter require that such a person be enabled to disclaim his own deliberate fraud in order to avoid conviction for what would otherwise be a criminal offence committed quite deliberately? We think not.'

(See [1982] RTR 296 at 300–301.)

d In the course of approving that judgment, Ormrod LJ in the Divisional Court said (at 302–303):

e "The distinction which the Crown drew was the distinction between applying and supplying. [Counsel for the defendant] submits that there is no valid distinction between those two offences for this present purpose and that the disclaimer doctrine should apply equally to those who apply a false trade description. In my judgment, there is a world of difference between the two offences. It is perfectly true that the application of a false trade description must, in some way, be related to a sale or prospective sale but, looking at the Act itself, I am disposed to take the view that the offence is committed when the false trade description is applied to the vehicle or goods and that is at the time when the odometer reading is altered to read a meaningful figure like 21,000 miles. In that light, a disclaimer has no application at all. There seems to me to be a very good reason for taking that view, as is illustrated by what happened in this case. It is quite obvious that the defendants have indulged in what can only be described as a devious piece of work for the purpose of deceiving somebody. There could be no conceivable honest motive in re-setting the odometer and then sticking a sticker on it to say that the figures on the odometer are not guaranteed, or however it was put. It is perfectly obvious that the object of altering the odometer was to suggest that this car had done only something like 21,000 miles while, at the same time, stating that that figure should not be relied upon. It is a rather naive way of evading the provisions of the section.'

h By the time that judgment was delivered, the decision in *Corfield v Starr* had been published.

j Counsel for the appellant contends that there is no proper distinction to be drawn, so far as this matter is concerned, between s 1(1)(a) and s 1(1)(b). That being so, runs the argument, the judgment of the Court of Appeal in *R v Hammertons Cars Ltd*, although it referred only to s 1(1)(b), constrains this court to hold that a proper disclaimer is effective to absolve a defendant from liability under both s 1(1)(b) and s 1(1)(a). He derives assistance, he submits, from the dictum of Bingham J in *Corfield v Starr*, which was not applied in *Newman v Hackney London BC*.

We disagree. The decision in *R v Hammertons Cars Ltd* is certainly binding on us so far as s 1(1)(b) is concerned. It is not open to us, in the light of that decision, to hold that a

disclaimer has no effect when the defendant is charged with supplying a motor vehicle with a false trade description. We take the view, however, that there is a proper distinction to be drawn between the two subsections. a

Apart from the reasons advanced by the Crown Court judge and also by the Divisional Court in *Newman v Hackney London BC*, there is the following consideration. Section 24(3) protects the defendant charged under s 1(1)(b) who did not know about any misdescription and could not have discovered it by the exercise of reasonable diligence. It does not cater for the defendant who has exercised diligence and as a result of that diligence has discovered that the odometer displays a false reading. There must be some method whereby he can protect himself. He should not be in a worse position than the man who is protected by s 24(3). b

The answer seems to lie in s 24(1)(b). That section must mean that it is a defence to show that the defendant took all reasonable precautions and exercised all due diligence to avoid (or, one must add, to attempt to avoid) the commission of an offence under the Act. Thus the defendant who by making inquiries discovers the falsity of a reading would no doubt be able to protect himself by frankly disclosing the result of his enquiries in such way that any purchaser would be in the same state of knowledge as the dealer himself. c

Turning from s 1(1)(b) to s 1(1)(a), could the same considerations apply to the dealer who has actually falsified the instrument? It seems to us to be absurd to suggest that the actual falsifier could, by any stretch of the imagination, be said to have taken all reasonable precautions to attempt to avoid the commission of an offence merely by issuing a disclaimer, however expressed. By his initial actions in falsifying the instrument he has disqualified himself from asserting that he has taken any precautions, let alone all reasonable precautions. d

We have not found this an easy matter to decide, but we have come to the conclusion that the judgment of the Divisional Court in *Newman v Hackney London BC* was correct and that there is a distinction so far as 'disclaimers' are concerned between the two subsections, and that it is not open to a person charged under s 1(1)(a) to rely on any disclaimer. e

The direction of the recorder on this aspect of the case was accordingly correct.

We would add this. Even if we had come to the contrary conclusion and had ruled that the matter of whether there had been a sufficient disclaimer should have been left to the jury, we should nevertheless have dismissed the appeal. No reasonable jury, on the facts of this case, could have come to any conclusion other than that this appellant had set out deliberately to mislead prospective purchasers into thinking that these cars of comparatively recent manufacture had been driven an average mileage for their age instead of the high mileage which was in fact the case. No reasonable jury could have come to any other conclusion than that the disclaimers were simply a colourable pretence put forward in an endeavour to escape the consequences of his undoubted fraud. We would have had no hesitation in applying the proviso to s 2(1) of the Criminal Appeal Act 1968. f

There remains the question to which we adverted at the outset, namely whether the person who 'clocks' the odometer reading to zero is in any better position than he who reduces the reading to an intermediate figure. The argument seems to be that if the reading is reduced to an absurdly low figure, no one will be misled. g

Apart from the difficulty which it would present to the jury or justices of deciding what is a sufficiently low figure, the fact that no one was misled, or was likely to be misled, is an irrelevant consideration. It seems to us that the person who 'zeroes' the instrument is applying a false trade description just as much as the man who reduces the reading to, say, 15,000 miles. If someone buys a car with a false reading already registered on the instrument the falsity of which comes to his knowledge, his protection against a charge under s 1(1)(b) will then be a suitable and candid intimation to the customer of h

j

a the falsity, thereby bringing himself within s 24(1). Our view is that clocking is not a proper method of attempting to avoid liability.

This appeal against conviction is dismissed.

[The court heard submissions against sentence and varied it by ordering that four months of the six months' sentence be suspended.]

b *Appeal against conviction dismissed. Appeal against sentence allowed and sentence varied.*

Solicitors: Toller Hales & Colcutt, Peterborough (for the appellant); Crown Prosecution Service.

N P Metcalfe Esq Barrister.

Pagnan SpA v Tradax Ocean Transportation SA

d COURT OF APPEAL, CIVIL DIVISION
DILLON, WOOLF AND BINGHAM LJJ
10, 12 JUNE 1987

e *Sale of goods – Duty of seller – Export licence – Absolute or qualified duty – Force majeure – Quota restrictions on export – Sellers required to 'provide for export certificate' – Quota exhausted and sellers unable to obtain certificate – Whether sellers under absolute obligation to provide export certificate – Whether sellers merely required to use best endeavours to obtain export certificate.*

f *Force majeure – Sale of goods – Government intervention beyond seller's control – Contract containing force majeure clause and special condition imposing absolute obligation on sellers to provide export certificate – Quota system governing exports – Quota exhausted and sellers unable to obtain export certificate – Whether obligation to provide export certificate overriding force majeure clause – GAFTA Form 119, cl 19.*

g By a contract of sale dated 23 November 1982 the sellers agreed to sell to buyers in Italy 35,000 tonnes of Thai tapioca. It was a special condition of the contract that the sellers would 'provide for [an] export certificate' thereby enabling the buyers to obtain the necessary import licence for the tapioca to be imported into the EEC. The contract also incorporated the terms of GAFTA Form 119, cl 19 of which was a standard force majeure clause providing that in the case of the 'prohibition of export . . . or . . . any executive or legislative act done by . . . the government of a country of origin . . . restricting export' h such restriction would be deemed by both parties to apply to the contract to the extent that the restriction prevented fulfilment of the contract and to that extent the contract or any unfulfilled part of it would be cancelled. The contract also contained an 'inconsistency clause' which stated that special terms and conditions of the contract were to prevail over the standard terms and conditions. Shortly before the contract was made a quota system was introduced by agreement between Thailand and the EEC governing the export of j tapioca from Thailand to the EEC, the quota to be enforced by regulations promulgated in Thailand. Under the quota system the annual quota was divided into quarterly sub-quotas. By March 1983 the sub-quotas for the first two quarters of that year were exhausted and accordingly the sellers were unable to make agreed shipments in April and May 1983. The buyers declared the sellers in default and claimed damages. The

claim was referred to arbitrators, who upheld it and awarded damages to the buyers. Subsequently, that award was set aside by the GAFTA Board of Appeal, which held that the buyers' claim failed, on the ground that the sellers were relieved of liability by cl 19 of GAFTA Form 119, which operated to cancel both the April and May portions of the contract because fulfilment thereof was prevented by the executive act of the Thai government. The buyers' appeal was dismissed by the judge and they appealed to the Court of Appeal. The questions arose (i) whether the special condition in the contract imposing the duty on the sellers to 'provide for' an export certificate thereby imposed on the sellers an absolute obligation or merely an obligation to use their best endeavours, and (ii) if the obligation was absolute in character, whether the special condition overrode the force majeure clause contained in cl 19 of GAFTA Form 119.

Held – The special condition was to be construed fairly in the context of the contract as a whole and in its factual setting in order to ascertain the true intention of the parties. On its true construction, the special condition imposed an absolute obligation on the sellers to obtain an export certificate, and prima facie there had been a breach of that obligation. It followed that if there was inconsistency between the special condition and cl 19 of GAFTA Form 119 then, applying the inconsistency clause, the special condition would prevail and the sellers would be liable for their failure to obtain an export certificate. However, the mere fact that an apparently wide and absolute provision was subject to limitation, modification or qualification by other provisions did not necessarily make those other provisions inconsistent or repugnant, since for inconsistency to arise the clauses in question had to be incapable of being sensibly read together. In the circumstances, the special condition could be read in combination with cl 19 so that in the events specified in cl 19, but not otherwise, the sellers would be released from their contractual obligation to obtain a certificate and the contract or any unfulfilled part of it would be cancelled. Since the circumstances which prevented the sellers from obtaining the export certificate fell within the closely circumscribed ambit of cl 19, it followed that the sellers were excused from liability by cl 19. The appeal would accordingly be dismissed (see p 572 c g j to p 573 a, p 574 c, p 575 a b d to h, p 576 e f and p 577 d e g to p 578 c f g, post).

Société Co-op Suisse des Céréales et Matières Fourragères v La Plata Cereal Co SA (1947) 80 Ll L Rep 530 and *Walton (Grain and Shipping) Ltd v British Italian Trading Co Ltd* [1959] 1 Lloyd's Rep 223 considered.

Per Dillon LJ. When the rival contentions of the parties to an appeal have been clearly set out in the skeleton arguments it is unhelpful to have lengthy oral arguments on each side (see p 577 j, post).

Decision of Steyn J [1987] 1 All ER 81 affirmed.

Notes

For force majeure clauses, see 9 Halsbury's Laws (4th edn) para 457, and for a case on the subject, see 12 Digest (Reissue) 502, 3505.

For contracts made subject to licence, see 9 Halsbury's Laws (4th edn) para 459, and for cases on the subject, see 12 Digest (Reissue) 501, 3498–3500.

Cases referred to in judgments

Anglo-Russian Merchant Traders Ltd and John Batt & Co (London) Ltd, Re an arbitration between [1917] 2 KB 679, CA.

Bremer Handelsgesellschaft mbH v J H Rayner & Co Ltd [1979] 2 Lloyd's Rep 216, CA.

Cassidy (Peter) Seed Co Ltd v Osuustukkukauppa IL [1957] 1 All ER 484, [1957] 1 WLR 273.

Coloniale Import-Export v Loumidis Sons [1978] 2 Lloyd's Rep 560.

Forbes v Git [1922] 1 AC 256, PC.

Gesellschaft Burgerlichen Rechts v Stockholms Rederiaktiebolag SVEA, The Brabant [1966] 1 All ER 961, [1967] 1 QB 588, [1966] 2 WLR 909.

Love and Stewart v Rowter Steamship Co Ltd [1916] 2 AC 527, HL.

Société Co-op Suisse des Céréales et Matières Fourragères v La Plata Cereal Co SA (1947) 80 Ll L Rep 530.

Walton (Grain and Shipping) Ltd v British Italian Trading Co Ltd [1959] 1 Lloyd's Rep 223.

a

Appeal

The plaintiffs, Pagnan SpA (the buyers), appealed with leave granted pursuant to s 1 of the Arbitration Act 1979 against the judgment of Steyn J ([1987] 1 All ER 81) given on 24 June 1986 whereby he dismissed their appeal against the award of the GAFTA Board of Appeal dated 23 September 1985 whereby they held that the buyers' claim for default against the defendants, Tradax Ocean Transportation SA (the sellers), failed on the ground that the sellers were relieved from liability by reason of cl 19 of GAFTA Form 119. The facts are set out in the judgment of Bingham LJ.

b

David Johnson QC and Christopher Hancock for the buyers.
Bernard Rix QC and Nicholas Hamblen for the sellers.

c

Cur adv vult

12 June. The following judgments were delivered.

d

BINGHAM LJ (giving the first judgment at the invitation of Dillon LJ). This is an appeal by buyers, Pagnan SpA, against a decision of Steyn J ([1987] 1 All ER 81) dismissing their appeal against a reasoned award of the board of appeal of the Grain and Feed Trade Association in favour of sellers, Tradax Ocean Transportation SA. The appeal is brought with the leave and certificate of the judge under s 1(7)(a) and (b) of the Arbitration Act 1979, which were also granted to the sellers on a point which they have argued.

e

The issues before the judge and before us were primarily issues of contractual construction, but to appreciate how these issues arise some recapitulation of the facts is called for. By a contract made on 23 November 1982 the sellers agreed to sell to the buyers 35,000 tonnes, plus or minus 5% at buyer's option, of Thailand tapioca pellets for shipment fob Sriracha, a Thai port. There were to be three shipments of 10,000, 10,000 and 15,000 metric tonnes respectively to be made in February, April and May 1983. The appeal concerns the last two of those shipments.

f

There are three terms of the contract which are of particular importance to the issues on this appeal. Firstly, there is a special condition to this effect:

'Sellers to provide for export certificate enabling Buyers to obtain import licence into EEC under tariff 07.06 with a 6% import levy.'

g

I shall hereafter describe that as 'the special condition'. It is to be noted that that is a typed clause and does not form part of any standard form.

Secondly, the contract provided that its general conditions should be according to GAFTA Contract Form 119/125. Form 125 regulates GAFTA arbitrations and raises no issue in this appeal. Form 119 is the general fob contract form and attention must be drawn to cl 19 of that form which is in these terms:

h

'Prohibition—In case of prohibition of export, blockade or hostilities or in the case of any executive or legislative act done by or on behalf of the government of a country of origin, or of the territory where the port or ports of shipment named herein is/are situate, restricting export, whether partially or otherwise, any such restriction shall be deemed by both parties to apply to the Contract to the extent of such total or partial restriction to prevent fulfilment whether by shipment or by any other means whatsoever and to that extent this contract or any unfulfilled portion thereof shall be cancelled. Sellers shall advise Buyers without delay with the reasons therefor, and if required, Sellers must produce proof to justify the cancellation.'

i

Thirdly, the contract made provision for a possible conflict between the terms of the printed form and special terms introduced by the parties. The clause was to this effect:

'Special terms and conditions contained herein and/or attached hereto shall be treated as if written on such contract form and shall prevail in so far as they may be inconsistent with the printed clauses of such Contract Form.'

I shall hereafter refer to that as 'the inconsistency clause'.

The heart of this case lies in the question whether there is inconsistency between the special condition and cl 19 of GAFTA Form 119.

I shall also refer briefly to four provisions relied on by the sellers in the course of their construction argument. Clause 8 of GAFTA Form 119 entitles the buyers on notice to extend the contract date for shipment by up to 30 days. There was provision in the contract under which the sellers guaranteed that a berth would be suitable for vessels up to a certain length. There was, furthermore, a clause under which the sellers guaranteed to load the vessel at a specified average rate. Finally, in addition to the special condition which I have mentioned, there was also under the heading 'Special Conditions', a further clause which read: 'Sellers to supply phytosanitary certificate'. These last three provisions were relied on by the sellers for the contrast between their language and the language of the special condition.

Having given that brief summary of the contract terms, I go on to consider the international commercial and regulatory background to the contract, which is of major importance in this case.

Tapioca is an important crop in Thailand, whose economy is to a large extent dependent on it, but there is effectively only one foreign market into which tapioca can in practice be exported, and that is the EEC. The reason for this is that tapioca pellets are a component in animal feeding stuff compounds. As such they compete with grain, but grain is cheaper almost everywhere in the world, so there is no economic incentive for compounders to buy tapioca. It is only in the EEC, where the price of grain is artificially maintained, that Thai tapioca can effectively compete. Even then, it can only compete if it is allowed to enter the EEC on preferential terms, that is, without being subjected to the heavy duty ordinarily imposed on barley and other foreign cereals. There is thus an obvious clash of interest, the interest of Thailand being to get as much tapioca as possible into the EEC on preferential terms, and the interest of the EEC being to limit, so far as it fairly can, the quantity so admitted. This clash was reconciled in a co-operation agreement made between the EEC and the government of Thailand in July 1982 pursuant to a EC Council decision of 19 July. The co-operation agreement fixed an export quota for Thai tapioca for each of the years 1982 to 1986. The EEC agreed to levy on quota quantities of Thai tapioca a levy at the rate of 6% ad valorem. There was, furthermore, in cl 5 of the co-operation agreement, this provision:

'Thailand shall ensure that the quantities covered by the Agreement do not exceed the limits specified therein by ensuring that export certificates are not issued for any amount beyond such limits.'

The implementation of the co-operation agreement called for a framework of governmental regulation, both in the EEC and in Thailand. In the EEC regulations were made for quota quantities to be treated under tariff heading 07.06 with the 6% levy, and a system was introduced for the issue of import licences against Thai export certificates.

On 30 September 1982 the Thai government introduced a regulation. It imposed a framework of which the main features were these, so far as the relevant period is concerned. First, the year 1983 was divided into four quarters, beginning on 1 January, and the annual quota was divided, albeit somewhat unevenly, between the four quarters of the year. Secondly, there was a requirement that exporters of Thai tapioca should be registered. Thirdly, it was required that export licences should be issued to registered exporters before loading of cargoes destined for the EEC. Fourthly, provision was made for the issue of export certificates on the submission of evidence of loading of vessels by means of submission of a bill of lading. Only goods covered by an export certificate

a would qualify for preferential treatment within the EEC. This was the regulation in force when the buyers and sellers made this contract. They were both, as was found by the board of appeal, well aware both of this and of later regulations. The finding of the board was to this effect:

b 'Both parties would have been well aware of all these Regulations and Notices as and when issued, the Sellers because they were part of the Cargill Group which has a major facility in Thailand for the production of tapioca pellets and the use of the warehouse and loading facility at Sriracha, mentioned above, for the purpose of exporting large quantities of Thai tapioca pellets; the Buyers because they are major traders in constituents for animal feedingstuffs who purchase large quantities of Thai tapioca pellets for import into the EEC for this purpose.'

c Subsequently, the regulatory position in Thailand changed. It is not necessary to rehearse all the details of the changes, but it was apparent, as from December 1982 and January 1983, that the quota was being exceeded and that the Thai government was concerned at the prospect of continuing shipments in excess of quota.

On 28 January 1983 new Thai regulations were introduced superseding those of 30 September. A new para 3.3 of the regulations was introduced which provided:

d 'The Foreign Trade Department may issue an export license in advance for each period of issuing export certificates. However, export certificates shall only be issued for products loaded aboard the vessels as from the date fixed by the Foreign Trade Department and by prior notice of not less than 15 days.'

e This was a change made because excessive quantities were being licensed and exported and the quota was being exceeded.

On 31 January 1983 there was a further change. By a notice of that date the Foreign Trade Department declared that export certificates for the second quarter, 1 April to 30 June 1983, would be issued exclusively in respect of goods loaded on board vessels from 24 February 1983 pursuant to export licences issued for that quarter.

f On 11 February 1983 there was yet another change. A regulation of that date decreed that export certificates for the second quarter of the year would be issued only to vessels which had (a) arrived before 24 February 1983 and (b) been completely loaded between 23 February 1983 and 13 March 1983. The regulation further indicated that export licences for the second quarter would be available from 21 February.

On 16 March 1983 there was a further notice in these terms:

g 'Now that the Foreign Trade Department has gathered evidence of the loading of the tapioca products on board the ship [between] February 24–March 13, 1983, the number is 1,470,477.255 tons therefore, additional loading of tapioca products on board the ship shall not be permitted for lot April–June 1983 and the notice fixing for the date of loading of tapioca products on board the ship for the issuance of certificate lot 3 (July 1–September 30, 1983) will be announced.'

h It was later announced on 12 May that export certificates would be issued for the period 1 July to 30 September 1983 exclusively for products to be loaded on vessels from 2 June onwards, for which export licences would be issued in advance from 30 March.

The effect was therefore to prevent export of Thai tapioca to the EEC in the period March to May 1983. The board of appeal made these important findings.

j '34. From the evidence which was placed before us, which included various letters from the Foreign Trade Department (including those mentioned above) and also oral evidence given, by the Sellers' Manager in Thailand (see below), it is evident that the Thai authorities made it clear to all exporters, from the 16th March 1983 through April and May 1983, that they were not going to allow any tapioca products at all to be loaded for export to the E.E.C., although there was no restriction on such

products destined for countries other than the E.E.C. There was no question of any shortage of tapioca products; indeed, the evidence was that there were plenty of supplies waiting to be shipped . . . a

36. The Buyers, on the other hand, submitted evidence obtained from certain officials of the Thai Government which indicated that in fact export licences (but not export certificates) would have been issued if applied for, but we do not accept that this was the case. On the contrary, we accept evidence from the Sellers that in practice no further loading of tapioca products took place after midnight on the 13 March 1983 and that all vessels which had been loading up to that time at Koh-Sichang left with part empty holds, and that barges and lighters still loaded with Thai tapioca pellets, which were at shipside at that time, had to return to godown or warehouse and unload.' b

I can now return to the contractual story. The February shipment was duly made under the contract and gave rise to no problem and no claim. On 1 April 1983 the buyers nominated a ship for the April shipment to be loaded in the period 20 to 27 April. The sellers at once replied that no loading for export would be allowed throughout the month of April, and they relied on cl 19 of GAFTA Form 119. The buyers declared the sellers in default. c

On 29 April 1983 the buyers nominated a further ship for the May shipment to be loaded in the period 15 to 18 May. The sellers again replied that no loading would be allowed during May, and they again relied on cl 19. The buyers accordingly declared the sellers in default. d

A dispute having arisen, arbitrators were appointed, and on 9 January 1985 first-tier arbitrators made an award in favour of the buyers on grounds not now material. The buyers appealed to the board of appeal and there was a four-day hearing with leaders on both sides. The board of appeal gave a full and clear reasoned award on 23 September 1985. They set out the history and the background and summarised the submissions of the parties and they concluded with these finding which are so crucial that I think I must recite them in full: e

'39. There is no doubt in our minds that the Contract was one for certificated goods, and was not merely one for goods to be shipped on the basis that the Sellers were to be liable for getting an export certificate, or be liable in damages if they failed to obtain an export certificate. We find that in fact not only the Sellers, but also the Buyers knew perfectly well that no goods at all could be either loaded or certified for export to the E.E.C. from after midnight on the 13th March 1983 until the end of May 1983, this being clear from the Buyers' nomination of the "KERVAN" (chartered subject to stem), as set out at Paragraph 24 above, showing that the Buyers understood perfectly well that the vessel could not be accepted and loaded, so that the nomination was only made subject to stem, which could not be made available. f

40. The Buyers complained that the Sellers never actually made application for export licences following the nominations for the April and May deliveries (q.v. supra) and that they should have been able to demonstrate that they used their "best endeavours" to obtain both an export licence and then an export certificate for those deliveries. However, in our view, the question never arose. By the time the Buyers made their nomination for the April delivery on 1 April 1983 (see paragraph 24 above), it had already been made abundantly clear to the Sellers by the Thai Authorities, and by Mr. Danai of the Foreign Trade Department in particular, that no applications for an export licence for E.E.C. destination would be entertained by the Foreign Trade Department. The Thai Government did not want to permit even uncertificated goods to be exported to the E.E.C. (the application for an export licence had to show the country of destination). A *fortiori*, the Thai Government position was even clearer by the time of the nomination for the May portion on g

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a 29th April 1983, and in neither case do we feel that any purpose would have been served by the Sellers making an application for an export licence. The Foreign Trade Department's position remained throughout April and May 1983 that no applications would be entertained. The Buyers knew this (we find) and lost no time in declaring the Sellers in default in each instance, on 11th April 1983 for the April delivery (see paragraph 25(7) above) and on 6th May 1983 for the May delivery (see paragraph 26 above), from which dates respectively the Sellers' obligations for the respective portions were terminated by the Buyers' declarations of default.

b 41. Thus the Sellers had only to show that, between 1st April and 11th April 1983 for the April portion and between 29th April and 6th May 1983 for the May portion, fulfilment of the contract was prevented by an executive or legislative act done by or on behalf of the Government of Thailand (being both the country of origin and of shipment) as provided for in Clause 19 of GAFTA 119.

c *WE FIND* that fulfilment was so prevented and that notwithstanding the contractual obligation imposed on the Sellers "to provide for export certificate enabling Buyers to obtain import licence into E.E.C. under tariff 07.06 with 6% import levy", the provisions of Clause 19 of GAFTA 119 nevertheless operated to cancel the Contract so far as the April and May 1983 portions were concerned as a result of the actions of the Thai Government.'

d Before the judge and before us two issues were argued. The first of these issues, taking them in their logical order, concerned the construction of the special condition. The issue was this: whether, on the true construction of the special condition, the obligation to provide for export certificate was an obligation to use best endeavours to supply an export certificate or an absolute obligation to do so. This was an issue not expressly addressed by the board of appeal, although I infer from the rest of their award that the board of appeal viewed the obligation as being absolute.

e Steyn J approached the matter in this way. He pointed out that the special condition placed the burden of obtaining an export certificate on the sellers. He held that it was a question of construction, not implication, whether the duty was absolute or a duty to use due diligence. He held that he should not start with an a priori assumption that the parties were more likely to have had a due diligence duty in mind, and held that the natural meaning of the language used suggested to him an absolute obligation. He found no assistance in the language of other clauses in the contract. He accepted that the uncertainty in the date of loading was a relevant consideration affording some assistance to the sellers' argument, but he viewed it as being outweighed by the consideration that the sellers, having a substantial business presence in Thailand, were better placed to assess the risk of failing to obtain a certificate. If two interpretations were equally acceptable, he accepted that it was proper for the court to select the less burdensome of those obligations, but held that that was not the present case, where on his construction the clause properly construed imposed an absolute obligation.

f The sellers before this court criticised that finding. They pointed out, quite correctly, that a clause of this kind may deal with two questions: the question as to whose duty it is to deal with the export certificate; and the question of what standard of obligation such party is under in respect of it. They argued that in the present case the clause was concerned with the first of those questions only and that therefore the second question must be a matter for implication and that the court should imply the less onerous obligation. But if contrary to that submission the clause did deal with the standard of obligation, they urged that on a proper construction the clause imposed a duty of due diligence only. The sellers contrasted the language of the special condition with the language of other clauses where guarantees were given. They relied on the other special condition dealing with the phytosanitary certificate. And they placed particular reliance on the judgment of Lloyd J in *Coloniale Import-Export v Loumidis Sons* [1978] 2 Lloyd's Rep 560.

The buyers generally supported the judge's approach to this matter and contended that the language was apt to impose an absolute obligation. a

Both parties sought support for their contentions in the factual and contractual context. For example the buyers emphasised that the export certificate was vital, in that goods were of no use to the buyers without such a certificate and that nothing short of an absolute duty would serve their contractual purposes. The sellers, on the other hand, pointed to the uncertainty of the date of shipment, capable of extension under cl 8 of GAFTA Form 119, and urged that the sellers could not have accepted a duty to provide a certificate as an absolute duty without knowing the date within the shipment periods when shipment would be called for. b

The task of the court plainly is to construe the special condition fairly in the context of the contract as a whole and in its factual setting in order to ascertain the true intention of the parties. I remind myself of the words in question: 'Sellers to provide for export certificate enabling buyers to obtain import licence into EEC under tariff 07.06 with 6% import levy'. The first, and obvious, point is that the clause lays the responsibility for seeing to the provision of the export certificate on the sellers. That is what one would expect. They were the exporters. They were on the spot and they were the obvious people to deal with it. But in my view the clause does not stop there and is also intended to define the standard of duty to which the sellers were to be subject. c

The second, and self-evident, point is that the clause makes no express reference to best endeavours or due diligence, nor does it contain any language to similar effect. That is a point which requires no elaboration. d

The third point is that the parties have chosen, in my judgment, to use unemphatic language to define the sellers' obligation. They have not used the language of guarantee which they have employed in respect of other obligations, and there is nothing in the language used to suggest that this is an entrenched clause intended to override or supersede any other clause of the contract. I respectfully agree with the judge that one should not approach the clause with any a priori assumption as to what the parties meant. This is not like a case in which an export certificate is needed if the contract is to be performed, but where the contract is altogether silent as to the certificate or as to which party is to obtain it. There the question is one of implication and it naturally follows that the court will imply the least onerous obligation necessary to give the contract business efficacy. In the end, as always with questions of construction, the question boils down to the impression which is made on one's mind by the language in question read in context. I find myself in full agreement with the judge that this clause imposed more than an obligation to use best endeavours or due diligence. Accordingly, I agree that the clause imposed an absolute obligation on the sellers to provide for the export certificate, save in so far as any other clause of the contract might modify the sellers' obligation or relieve him from the consequences of breach. e

The authority *Coloniale Import-Export v Loumidis Sons* on which the sellers relied does not in my view assist. In so far as Lloyd J was dealing with the nature of the term to be implied where there was no express term defining the duty to which a party obtaining the licence was subject, I agree with him, but that is not this case. In so far as he was construing the clause before him, all turns on the particular wording and circumstances of the contract, which in that case were quite different. In my judgment his decision cannot assist us. f

In the upshot, therefore, I agree with the judge and I also, I infer, agree with the board of appeal, which is not an immaterial consideration where the commercial understanding of a clause such as this is in issue. g

I turn, therefore, to the second issue which was expressed by the judge as being 'Does cl 19 override the special condition?' I am not sure that I very much like that way of expressing the issue, and I think it may be better to ask whether the special condition is inconsistent with cl 19 or whether cl 19 protects the sellers if they fail, for reasons falling within cl 19, to provide for an export certificate. If there is inconsistency between the h

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a special condition and cl 19, then, as the judge rightly held, the special condition prevails because the parties agreed in the inconsistency clause that it should.

The judge said ([1987] 1 All ER 81 at 89):

b 'The question is therefore whether the special condition and cl 19 are inconsistent. This question must be approached on the basis that the court's duty is to reconcile seemingly inconsistent provisions if that result can conscientiously and fairly be achieved. It follows that the critical question is whether the special condition and cl 19 are manifestly inconsistent.'

He held that they were not and he gave his reasons for so concluding in this passage (at 89-90):

c 'On balance I have come to the conclusion that the special condition is not inconsistent with cl 19. The starting point must be that there is an absolute obligation to obtain an export certificate. Breach of this obligation gives rise to a prima facie liability for damages. On the other hand, the sellers will be excused from liability if they can prove the necessary facts to bring the case within the scope of cl 19. Viewed from the buyers' point of view this conclusion no doubt detracts from the value to them of the absolute contractual duty placed on the sellers to obtain an export certificate. It is, however, a construction which assigns a meaningful interpretation to both clauses, and does not treat them as in conflict. In my view it is to be preferred to a construction which treats them as in conflict. Moreover, and looking at the matter from the point of view of the particular words used in the special condition, the language (viz the sellers' duty "to provide for" export certificate), although sufficient to create an absolute duty, falls short of evincing a clear intention to override cl 19. In my judgment therefore the special condition does not override cl 19. The question whether the sellers were excused by reason of the provisions of cl 19 was one of fact. The board of appeal answered that question in favour of the sellers. Prima facie that is the end of the matter.'

f The buyers submitted that the judge had correctly construed the special condition as absolute in its effect. If the special condition was treated as subject to cl 19, they submitted that its effect was cut down and indeed that the clause was denuded of effect. That, they argued, was contrary to the obvious intention of the parties in agreeing the special condition. Therefore, they submitted, cl 19 is inconsistent with the special condition and, by virtue of the inconsistency clause, the special condition is to prevail over cl 19. The judge was, they submitted, wrong in the light of the inconsistency clause to attempt to reconcile the special condition with cl 19; he should have approached the matter with an entirely neutral mind, found the clauses to be inconsistent and held that the special condition prevailed.

g The sellers argued that there was no inconsistency between the special condition and cl 19. Even if the special condition imposed an absolute duty, they submitted that it was not an unqualified duty, and they argued that absolute contractual duties are often qualified, as this one is. Effect should only, they said, be given to the inconsistency clause as a maxim of construction of last resort, and the proper course was to read the contract as a whole, if this could reasonably be done, and not treat the clauses as mutually inconsistent unless on a fair construction they clearly appeared to be so. There was nothing, they said, in the language of the special condition to suggest that it superseded cl 19.

j It would in my judgment be quite wrong to approach this question of construction with any predisposition to find inconsistency between the special condition and cl 19. They are all part of the same contract, and the parties expressly chose to make their contract subject to the terms of GAFTA Form 119. Moreover, the same contractual document which contains the inconsistency clause also contains this provision:

'This contract is made upon the terms, conditions and rules, including the Arbitration Clause and Rules, in Contract Form No. 119/125 of GAFTA in force at date of contract, of which the parties admit that they have knowledge and notice, and the details above given shall be taken as having been written into such Contract Form in their appropriate place.'

On the other hand, it is wrong to approach the contract on the assumption that there is no inconsistency. By including the inconsistency clause, the parties have acknowledged that there may be. One should, therefore, approach the documents in a cool and objective spirit to see whether there is inconsistency or not.

The judge found the arguments on this issue finely balanced, but concluded that there was no inconsistency as submitted by the buyers. I agree with his conclusion, but I have less hesitation in reaching it. It is a commonplace of documentary construction that an apparently wide and absolute provision is subject to limitation, modification or qualification by other provisions. That does not make the later provisions inconsistent or repugnant.

We were referred to a number of authorities in which inconsistency and repugnancy (treated as interchangeable terms in *Chitty on Contract* (25th edn, 1983) vol 1, para 784) have been discussed. In *Love and Stewart v Rowtor Steamship Co Ltd* [1916] 2 AC 527 at 535, Lord Sumner spoke of terms as being 'in antithesis' because it was impossible to give effect to both sets of words. In *Forbes v Git* [1922] 1 AC 256 at 259, Lord Wrenbury, giving the advice of the Privy Council, said:

'If a later clause says in so many words or as a matter of construction that an earlier clause is to be qualified in a certain way, effect can be given and must be given to both clauses.'

In *Société Co-op Suisse des Céréales et Matières Fourragères v La Plata Cereal Co SA* (1947) 80 Lloyd's Rep 530 at 537 Morris J said:

'The real issue that was joined between the parties on this part of the case concerned the true interpretation of the contracts and the meaning and effect of the annexed special conditions which the contract states are to be treated as if written on Form 64. If written on such form, the special conditions must, in my judgment, supersede any conditions with which they cannot be reconciled, but they must take their place in the company of those conditions with which they can march in step.'

Later, he said (at 538):

'The competing submissions both on this and on the other important aspects of this case, were made, if I may be allowed to say so, with great skill and thoroughness. The problems of construction of the contractual documents are not easy of solution and I doubt whether the parties gave to the compilation of these documents one hundredth part of the thought which has been devoted to their explanation. The printed extension clause must not lightly be jettisoned, and in my judgment the contract can reasonably be construed if regard is had both to the printed extension clause and to the special clauses.'

In *Gesellschaft Burgerlichen Rechts v Stockholms Rederiaktiebolag SVEA, The Brabant* [1966] 1 All ER 961 at 966, [1967] 1 QB 588 at 602 McNair J held terms to be inconsistent because, as he put it—

'to hold that the clause so construed applied on the facts of the present case to cl. 28 as I have construed it, would be almost entirely to deprive the clause of any effect and, in particular, would be in direct conflict with the express terms as to risk contained in that clause.'

In *Bremer Handelsgesellschaft mbH v J H Rayner & Co Ltd* [1979] 2 Lloyd's Rep 216, because of the terms of the clause under construction, the court considered whether

terms were 'in contradiction' and that is the expression also used by *Scrutton on Charterparties* (19th edn, 1984) p 20, art 10. But the inquiry is very much the same.

a These cases are only of significance as helping to define inconsistency and illustrating how courts have approached that question in the past. It is not enough if one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses. This point is illustrated by *Walton (Grain and Shipping) Ltd v British Italian Trading Co Ltd* [1959] 1 Lloyd's Rep 223 at 237, where Diplock J said:

'But even if, Lord Porter's implied doubts as to the correctness of the decision in *Re an arbitration between Anglo-Russian Merchant Traders Ltd and John Batt & Co (London) Ltd* ([1917] 2 KB 679) were right, they would not, in my view, avail the buyers in this case, for the undertaking by the sellers to ship was not an absolute undertaking, but was qualified by the *force majeure* clause, and in particular by the reference in that clause to prohibition of export, which, for the reasons I have already indicated in the events that occurred, excuses the sellers for their inability to ship the goods.'

d Diplock J was there using 'absolute' in a different sense from that used in the present case, and was certainly not meaning that the obligation to ship was a best endeavours or due diligence obligation. But he plainly did not regard the obligation to ship as inconsistent with the *force majeure* clause simply because it was qualified by it.

e The natural construction of this contract in my judgment is that the sellers were to provide for the export certificate, but, in case of prohibition of export or in case of any executive or legislative act done by, or on behalf of, the government of Thailand (as the country of origin and shipment) restricting export, the unfulfilled portion of the contract was to be cancelled. That construction does not deprive the special condition of effect. The obligation to provide for the export certificate remained on the sellers. If the certificate was not provided for as a result of oversight, error, mishap, bureaucratic inefficiency or delay, and probably also if the certificate was not provided for simply because the Thai authorities failed to issue it, the sellers would remain liable. But, if the sellers were unable to provide for the certificate because of any impediment falling within the carefully-defined ambit of cl 19, they were relieved of their contractual obligation because that is what cl 19 says and there is no indication whatever that cl 19 is not to apply to this as to all other contractual obligations.

g Having reached that conclusion as a matter of construction, it is necessary to test it against the touchstone of commercial common sense: is this an apportionment of risk which the parties could reasonably be supposed to have intended? I think it is. It is one thing to accept responsibility for the possibility of oversight, error, mishap, bureaucratic inefficiency or delay or mere failure to issue, but it is quite another to accept responsibility where an export certificate cannot be provided for because the licensing system has for the relevant period been entirely abrogated or suspended by governmental decree. I have no doubt that the judge's conclusion on this matter was right, and I agree with it. I am again fortified in that conclusion by the fact that it commended itself to the board of appeal, who saw nothing uncommercial in the result.

j I should briefly mention three arguments with which I have not expressly dealt. Firstly, in reliance on observations of Diplock J in *Walton (Grain and Shipping Ltd v British Italian Trading Co Ltd)* [1959] 1 Lloyd's Rep 223 at 236, the buyers submitted that the special condition was an express warranty that performance of the act the sellers had contracted to perform would be lawful at the place of performance. That was a collateral warranty and therefore it was argued that, even if failure to perform was not a breach of the main contract, it was a breach of the collateral warranty for which the sellers were liable. That was not an argument addressed to the judge and was not a contention which was the subject of his leave or certificate; nor was it adumbrated in the notice of appeal. It is, in my judgment, a bad argument anyway, because the special condition was not a

warranty that performance would be lawful at the place of performance. At the date of the contract the parties had no reason to suppose that shipment without an export certificate would be unlawful, even if it would be non-contractual. With an export licence, shipment of non-quota goods to the EEC could be made. In any event, if the special clause and cl 19 are read together, as I think they should be, the sellers were not warranting that it would be lawful to ship, but only undertaking to provide for an export certificate if that was not prohibited by a cl 19 event. a

Secondly, the buyers wished to argue that cl 19 did not protect the sellers against failure to provide for an export certificate where that failure was caused by an exhaustion of the quota, which, they said, was the real reason why the sellers could not, or did not, perform here; in other words, the real cause of the sellers' non-performance was exhaustion of the quota, a matter with which the special condition was specifically intended to deal. This was not, I think, an argument fully deployed before the judge, nor an argument for which his leave or certificate were given. It involved a challenge to the factual conclusions of the board of appeal as I have recited them, and the court accordingly ruled that it was not open to the buyers to pursue this argument on this appeal. b

Thirdly, the sellers said that this was not a case of failing to provide for an export certificate, but a case in which the whole process of export (the issue of the export licence, the loading of the vessel and the issue of the export certificate) were prohibited by governmental action. Therefore, even if the special condition had the effect for which the buyers contended, it did not avail them in this case where non-fulfilment was prevented by governmental action which had a much more fundamental effect than merely preventing the sellers providing for an export certificate. I see some force in this argument, but it was not, I think, fully developed before the judge; nor was it the subject of any certificate or leave, and in my judgment it is preferable that we should deal with the case on the same basis as he did. c

At the end of the day, therefore, the question boils down to a very short one on the construction of the contract, which I have given. Was there a prohibition of export or any executive or legislative act done by, or on behalf of, the government of Thailand restricting export? The board of appeal's clear answer to that question was Yes, with the result that the contract was cancelled, and that is in my judgment the correct outcome. d

I would therefore dismiss this appeal. e

WOOLF LJ. I gratefully adopt the analysis and clarification of the facts and issues contained in the judgment of Bingham LJ. To someone labouring under the handicap of not having extensive experience of GAFTA contracts and litigation relating to such contracts, the argument of the buyers appears to elevate the special condition under consideration to a status which is quite remarkable. f

In any contract in which there are standard terms and special terms, it is desirable to have a provision to avoid conflict between the standard and special terms. If the parties do not agree expressly how such a conflict is to be resolved, then the common law will provide an answer to resolve the conflict. If the parties do make express provision, the court has to give effect to that express provision. So far I have done no more than state the obvious. Here the parties have made express provision. The relevant term provides: g

'Any special terms and conditions contained herein and/or attached hereto shall be treated as if written on such contract form and shall prevail in so far as they may be inconsistent with the printed clauses of such Contract Form.'

It is to be noted that this clause provides no more than that the special condition is to prevail where there is conflict; it does not provide that the printed term, which is in conflict, is to be of no effect or void. Furthermore, it only applies in so far as the printed term is inconsistent with the printed clause. The special condition under consideration is in terms which are brief. It provides: 'Sellers to provide for export certificate enabling Buyers to obtain import licence from EEC under tariff 07-06 with 6% import levy.' The need for the special condition would appear obvious. If the contract was to be performed h

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a in the manner the parties intended, there would be the need for an export certificate of the nature referred to in the special condition. One of the parties had to obtain that export certificate, and it was sensible that the contract should specify by whom it should 'be provided for'. Here the sellers were under the obligation, and there was good reason why the sellers should be made responsible.

b The special condition does not go on to specify the time within which the export certificate had to be provided; nor does it expressly deal with what was to happen if there should occur a situation which made it difficult or impossible to obtain the export certificate. The contract did, however, contain what I will describe as 'a standard force majeure' or 'frustration clause', that is cl 19. That clause comes into operation in the circumstances which it specifies, which are, inter alia, where there is a prohibition on export, a blockade or hostilities, or in the case of any executive or legislative act done by, or on behalf of, the government of the country of origin, and it provides that in those c circumstances the contract shall be cancelled to the extent that fulfilment is no longer possible.

Clause 19, if allowed to operate, does not directly deal with the sellers' obligations to obtain an export certificate, but it clearly can affect that obligation of the sellers, since in some circumstances, if cl 19 operates, the export certificate will no longer be required. However, this qualification does not mean that cl 19 is inconsistent with the special d condition; on the contrary, cl 19 supplements the special condition and deals expressly with circumstances with which the special condition could have dealt but did not deal.

In my judgment the special condition and cl 19 cannot only march together side by side, but they can do so in step. Clause 19 does not cut down or detract from the benefits to the sellers under the special condition. Counsel for the buyers seeks to elevate the special condition to a status where it amounts to a warranty, not only that an export e certificate would be provided, but that the contract would be capable of being performed as was contemplated with the benefit of an import licence into the EEC under tariff 07·06 with the benefit of the 6% import levy. This is not justified and in my judgment this case is clearly distinguishable from the sort of situation referred to by Diplock J in *Walton (Grain and Shipping) Ltd v British Italian Trading Co Ltd* [1959] 1 Lloyd's Rep 223 at 236, and the case to which he refers of *Peter Cassidy Seed Co Ltd v Osuustukkukauppa IL* f [1957] 1 All ER 484, [1957] 1 WLR 273. In the latter case Devlin J held that there was a collateral warranty where there had been an assurance given by the seller that the obtaining of the licence would be a pure formality.

The special condition contained in this contract could not be regarded as amounting to such a warranty. Having regard to the view that I have formed with regard to the first issue, it is not strictly necessary to express any view about the issue raised by the sellers. g However, the relationship between cl 19 and the special condition throws light on the extent of the sellers' obligations under the special condition. The presence of cl 19 underlines the fact that there is no need to qualify the obligation of the sellers under the special condition by limiting that obligation to what amounts to a requirement that they should only exercise their best endeavours.

h For the reasons that I have given, as well as those given by Bingham LJ with which I agree, in agreement with the judge and the board of appeal, I agree that these appeals should be dismissed.

DILLON LJ. This appeal raises what I regard as short questions of construction of a particular agreement. I have not found it helpful in considering those questions to be referred, as we were, to a fairly large number of authorities where different words have been considered by other judges; nor indeed have I found the length of the oral arguments on each side very helpful, when the rival contentions had already been clearly set out in written submissions of a length which makes rather a mockery of the term 'skeleton arguments'.

j Looking at the words 'Sellers to provide for export certificate' in their context in this contract, I am wholly unable to construe them as just a 'best endeavours' clause; on the

contrary, they must be an absolute obligation in the sense in which that phrase has been used in the course of the argument. But standing, as the special condition does, on its own, it is not expressed to override other clauses, nor, as it stands, is it to be construed as a warranty, come hell or high water, that notwithstanding anything past, present or future, the contract will be performed by the sellers and the export of the goods will take place so that the export certificate will then be issued. It is just a special condition of the contract. a

Under the printed terms of the contract it is to be treated as if written on the GAFTA contract form. If the condition and the terms of the GAFTA Form, in particular cl 19, were all written out in the one contract, there would be no difficulty at all in reading them together. Neither the special condition nor cl 19 would be rejected as totally repugnant to the other, but cl 19 would be read as qualifying the special condition so that, in the events provided for by cl 19, the contract or any unfulfilled portion thereof would be cancelled. If the contract is thus cancelled, then obviously the sellers are released from their obligations under the special conditions. The finding of the board of appeal is clear that there has been an event within cl 19. Bingham LJ has set out the relevant paragraphs in the decision of the board of appeal, particularly para 41. Neither party can go behind that finding or look into the facts. b
c

We have therefore merely to consider the printed words of the contract that the special condition is to prevail in so far as it may be inconsistent with the printed clauses of the GAFTA contract form. What is meant by inconsistency? Obviously there is inconsistency where two clauses cannot sensibly be read together, but can it really be said that there is inconsistency wherever one clause in a document qualifies another clause? A force majeure clause, or a strike and lock out clause, almost invariably does qualify the apparently absolute obligations undertaken by the parties under other clauses in the contract; so equally with an extension of time clause, for instance in a building agreement. So equally, with a lease, the re-entry clause qualifies the apparently unconditional demise for a term of years absolute, but no one would say that they were inconsistent. d
e

In my judgment the first task is to see if the clauses can sensibly be read together. If they cannot, there is inconsistency and the special condition is to prevail over the other clause in the printed form. But, if they can be read together, they should be and there is no inconsistency. f

Here, as I have said, there is no difficulty in reading the clauses together. I agree with the approach and conclusion of the judge and I would dismiss this appeal.

I would add that the parties are in my judgment limited to the points of law for which leave to appeal and a certificate under s 1(7)(b) of the Arbitration Act 1979 were given by the judge. That is confirmed, in the case of the sellers, by the very limited terms of the respondents' notice which has been served. The parties are not entitled to launch out into further issues, and in particular are not entitled to go behind the findings of fact of the board of appeal. g

I too would dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: Middleton Potts & Co (for the buyers); Sinclair Roche & Temperley (for the sellers).

Vivan Horvath Barrister.

Attorney General v Wright and others

CHANCERY DIVISION

HOFFMANN J

27, 28, 29 JULY 1987

Injunction – Interlocutory – Undertaking as to damages – Attorney General – Charity proceedings – Proceedings by Attorney General against trustee of charity – Attorney General seeking interlocutory injunction – Whether Attorney General required to give cross-undertaking as to damages as condition of grant of injunction.

In an action brought against the trustees of an educational charity, the Attorney General sought an interlocutory injunction to restrain the first defendant from disposing of various properties and bank accounts in his name. The question arose whether it should be a condition of the granting of the injunction that the Attorney General give or procure the giving of a cross-undertaking in damages. The Attorney General contended that, since he had brought the action on behalf of the Crown as *parens patriae* in the exercise of his right and duty to protect the interests of charity for the benefit of the public, he was not required, in the absence of special circumstances, to give a cross-undertaking as to damages. The first defendant contended that, since the Attorney General was seeking to recover what were alleged to be assets of the charity, his position was no different from that of any other litigant who sued as a trustee and in the absence of special circumstances he was required to give a cross-undertaking as to damages as a condition of being granted an interlocutory injunction.

Held – The exercise by the Attorney General of the Crown's power to act as protector of charity was not an assertion by the Crown of any proprietary or contractual claim of its own and accordingly a cross-undertaking as to damages would not be demanded from the Attorney General as of course in such a case. However, since the Crown was seeking to recover property alleged to belong or to be owed to the charity and was asserting proprietary rights on behalf of the charity, and since there was no presumption that the first defendant had acted unlawfully and serious factual issues remained to be tried, it was right to protect the interests of the first defendant by a cross-undertaking as to damages limited to the funds of the charity. Although there was a difficulty about requiring such an undertaking from the Attorney General, since it was by no means clear that he would have a right *ex officio* to resort to the charity funds for reimbursement of payments made in consequence of the cross-undertaking, there was a receiver of the charity who had been appointed by order of court and who would have such a right. An injunction would therefore be granted to the Attorney General conditionally on the receiver giving a cross-undertaking as to damages, but limited to such amount, if any, as the receiver was entitled and able to recover by way of indemnity from the funds of the charity (see p 581 f to j, post).

Notes

For an undertaking in damages as a condition of being granted an interlocutory injunction, see 24 Halsbury's Laws (4th edn) para 1072, for undertakings by the Crown, see *ibid* para 1075, and for cases on the subject, see 28(2) Digest (Reissue) 1133–1136, 1332–1377.

Case referred to in judgment

Hoffman-La Roche (F) & Co AG v Secretary of State for Trade and Industry [1974] 2 All ER 1128, [1975] AC 295, [1974] 3 WLR 104, HL.

Cases also cited

A-G v Magdalen College Oxford (1854) 18 Beav 223, 52 ER 88; *rvsd on other grounds* (1857) 6 HL Cas 189, 10 ER 1267. a

National Anti-Vivisection Society v IRC [1947] 2 All ER 217, [1948] AC 31, HL.

Post Office v Estuary Radio Ltd [1967] 3 All ER 663, [1968] 2 QB 740, QBD and CA.

Motion

In the course of an action brought by Her Majesty's Attorney General against the defendants, (1) Paul Wright, (2) Brian Anthony French, (3) John Bridge and (4) Timothy G Feather, the trustees of Slindon College, an educational charity, the Attorney General applied by motion for an interlocutory injunction to restrain the first defendant until trial or further order from disposing of certain bank accounts and of certain properties and assets, and from removing any such asset outside the jurisdiction. Peter Benthall Shone, the receiver and manager of the charity, appeared at the hearing of the application. The facts are set out in the judgment. b c

Peter Crampin for the Attorney General.

R W Ham for the receiver.

Michael Lyndon-Stanford QC and *R M Deacon* for the first defendant.

R M Deacon for the third and fourth defendants.

The second defendant did not appear. d

Cur adv vult

29 July. The following judgment was delivered. e

HOFFMANN J. There are before the court three motions for interlocutory relief in an action commenced by the Attorney General against the trustees of an educational charity known as Slindon College. These include a motion for an injunction against the first defendant, who is both a trustee and the headmaster of the college, restraining him from disposing of various properties and bank accounts in his name. The injunction is based both on the *Mareva* jurisdiction and also on alleged proprietary claims of the charity to some of the injuncted assets. It is not necessary for me to state the facts in greater detail. Save for one point, the parties have agreed on the terms of the relief to be granted pending a speedy trial. The outstanding issue is whether it should be a condition of granting the injunction that the Attorney General should give or procure the giving of a cross-undertaking in damages. f

Counsel for the Attorney General says that he has brought the action on behalf of the Crown as *parens patriae* in the exercise of his right and duty to protect the interests of charity for the benefit of the public. This has an analogy with the power of the Attorney General to take proceedings in the public interest for an injunction to restrain breaches of the law. In such cases, counsel submitted, the decision of the House of Lords in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128, [1975] AC 295 showed that in the absence of special circumstances the Attorney General should not be required to give a cross-undertaking. There were in his submission no special circumstances in this case. g h

Counsel for the first defendant said that the Attorney General was seeking to recover what were alleged to be assets of the charity. In that respect his position was no different from any other litigant who sues in a trustee capacity. In the absence of special circumstances such a plaintiff is required to give the cross-undertaking in damages as a condition of being granted an interlocutory injunction. There were in his submission no special circumstances in this case. j

I do not think that it would be desirable for me to formulate any kind of general rule, even qualified by exceptions. There is no dispute that the court has a wide discretion in

a the matter. It may require a cross-undertaking from the plaintiff in the usual form or limit it in amount or by reference to the assets under his control. It may accept an undertaking from a third party or require it to be supported by bank or other guarantee. It may, as in the *Hoffmann-La Roche* case, dispense with the cross-undertaking altogether.

b As Lord Diplock explained in the *Hoffmann-La Roche* case [1974] 2 All ER 1128 at 1150, [1975] AC 295 at 361 the purpose of the cross-undertaking is to avoid or mitigate the risk of injustice to a defendant against whom a court has granted an interlocutory injunction without full investigation of the facts or law. If it appears at the trial that the plaintiff was not entitled to relief, the cross-undertaking enables him to be compensated for loss which he has been caused by the existence of the injunction. The principle is therefore that the court should protect the interests of a defendant whose liberty may turn out to have been unjustly restricted.

c But in cases in which the Crown seeks an interlocutory injunction, there is another potentially conflicting principle to be taken into account. This is that Crown officials should not be inhibited from performing their duty to take action to enforce the law by the fear that public funds may be exposed to claims for compensation by people who have thereby been caused loss. Not everyone will find this principle particularly attractive (in *Hoffmann-La Roche* [1974] 2 All ER 1128 at 1148, [1975] AC 295 at 359 Lord Wilberforce regarded it as indicative of an undeveloped system of administrative law) but its potency cannot be denied. Its effect is that, in what Lord Diplock described as law enforcement injunction proceedings, the Crown is not required to give the cross-undertaking as a matter of course. Instead, 'the propriety of requiring such an undertaking from the Crown should be considered in the light of the particular circumstances of the case' (see [1974] 2 All ER 1128 at 1153, [1975] AC 295 at 364).

e On its facts, the *Hoffmann-La Roche* case was a rather unusual case. The defendants did not deny that what they proposed to do was contrary to the law as embodied in an order purportedly made by the Secretary of State under statutory powers. Their defence was that the order was ultra vires and therefore not law at all. The majority in the House of Lords do not appear to have been very impressed by this defence and said that the defendants' actions must be assumed to be unlawful until the contrary was shown. This presumption of the validity of the order was the principal reason why no cross-undertaking was required from the Crown.

f The exercise by the Attorney General of the Crown's power to act as protector of charity plainly has much in common with law enforcement proceedings. The Crown is not asserting any proprietary or contractual claim of its own. It is therefore not a case in which the cross-undertaking will be demanded as of course. On the other hand, in this case at any rate, the Crown is seeking to recover property alleged to belong or to be owed to the charity. On behalf of the charity, it asserts proprietary rights. Furthermore, this is not a case in which there can be any presumption that the first defendant has acted unlawfully. There remain serious factual issues to be tried. If the principle of not inhibiting law enforcement tends against requiring a cross-undertaking which may put general public funds at risk, there seems to me less reason why the funds of the charity itself should not be used to compensate someone who may have been unjustly damnified by an attempt to protect the charity's interests.

h In the particular circumstances of this case, I therefore think that it would be right to protect the interests of the first defendant by a cross-undertaking limited to the funds of the charity. There is a difficulty about requiring such an undertaking from the Attorney General since it is by no means clear that he would have a right ex officio to resort to the charity funds for reimbursement of payments made in consequence of a cross-undertaking. But there is a receiver of the charity who has been appointed by order of Mervyn Davies J and he would have such a right. I would therefore propose in the first instance to make the grant of an injunction to the Attorney General conditional on the giving of a cross-undertaking by the receiver, but limited to such amount, if any, as the receiver is entitled and able to recover by way of indemnity from the funds of the charity.

I will ask counsel to agree the draft of the undertaking, but the object should be to make the receiver's right of indemnity against the fund the limit of the first defendant's rights under the cross-undertaking and not to expose the receiver to further personal liability. a

Order accordingly.

Solicitors: *Treasury Solicitor*; *Thomas Eggar & Son*, Chichester (for the receiver); *Bennett & Quelch*, Ferring (for the first, third and fourth defendants). b

Evelyn M C Budd Barrister.

National Coal Board v Ridgway and another c

COURT OF APPEAL, CIVIL DIVISION

MAY, NICHOLLS AND BINGHAM LJJ

4, 5, 6, 7 NOVEMBER, 16 DECEMBER 1986

Industrial relations – Trade union membership and activities – Rights of worker as against employer – Unfair industrial practice by employer – Action short of dismissal – Action taken against employee as an individual – Employer paying wage increase to members of one union but not to members of another union doing same job – Whether failure to pay wage increase to members of other union ‘action short of dismissal’ – Whether employer’s action taken against employees as ‘individuals’ – Whether action to prevent employees joining a particular union permissible – Employment Protection (Consolidation) Act 1978, ss 23(1)(a), 153(1). d
e

Court of Appeal – Appeal – Issue no longer live – Extent to which court may hear appeal when issue between parties no longer live.

The National Union of Mineworkers (the NUM) was the only union representing miners in the coal mining industry until 1985, when, during a miners' strike, the Union of Democratic Mineworkers (the UDM) was formed in breakaway areas of the NUM. The National Coal Board, the national employer in the coal industry, negotiated increased rates of pay with the UDM, and decided that it would pay the increased rates of pay to both UDM and NUM members at pits where UDM members were in the majority. Subsequently, as a result of a change of policy, the board decided that at one particular colliery UDM members would be paid the increased wage on proof of membership of that union but NUM members at the same pit doing the same work would not. The appellants, two NUM members employed at that colliery, complained to an industrial tribunal that the refusal to pay them the same wage as UDM members amounted to an infringement of their right under s 23(1)(a)^a of the Employment Protection (Consolidation) Act 1978 not to have ‘action (short of dismissal) taken against him as an individual by his employer for the purpose of . . . preventing or deterring him from being . . . a member of an independent trade union, or penalising him for doing so’. The industrial tribunal held (i) that the omission to pay NUM members the wage increase paid to UDM members was ‘action (short of dismissal)’ within s 23(1), having regard to the fact that by s 153(1)^b of the Act ‘action’ included an omission, (ii) that the omission to pay the wage increase to NUM members was capable in law of being action taken against a particular employee ‘as an individual’ since the appellants’ own wages were affected by the decision f
g
h
j

^a Section 23(1) is set out at p 585 j to p 586 a, post

^b Section 153(1), so far as material, provides: ‘In this Act, except so far as the context otherwise requires . . . “action” . . . includes omission . . .’

a to pay UDM members higher wages even though they were doing the same work and, accordingly, the action taken, although against a group, was also directed against the appellants as individuals and (iii) that s 23(1)(a) could apply even where there was a dispute between two independent trade unions. The tribunal further held that it was to be inferred in the circumstances that the purposes of the omission to pay the UDM increase to NUM members was to penalise the appellants for being members of the NUM. The tribunal accordingly upheld the appellants' complaint. The board appealed to the Employment Appeal Tribunal, which allowed the appeal on the grounds that s 23(1) did not apply to inter-union disputes and accordingly the appellants had no claim against the board in law and, further, that the action taken by the board had not been taken against the appellants 'as individuals'. The appellants appealed to the Court of Appeal. The board cross-appealed, contending (i) that 'omission' in s 153(1) did not mean mere failure to act but referred to the denial of a benefit which the employee could reasonably expect and the appellants could not reasonably expect to be paid the wage increase agreed with another union, (ii) that an action could not be said to have been taken against an employee 'as an individual' unless it was directed against the employee personally and it was not enough that the individual was affected by the action complained of, so that where the action was taken in a collective as opposed to an individual context the action was not taken against the employee 'as an individual' even though he was affected by it, (iii) that the industrial tribunal's finding that the board's purpose in not paying the appellants the UDM increase was to penalise the appellants because of their membership of the NUM was perverse and (iv) that 'an independent trade union' in s 23(1)(a) referred to any independent trade union and therefore taking action for the purpose of preventing an employee from being a member of a particular trade union was permissible.

e

Held (May LJ dissenting) – The appeal would be allowed for the following reasons—

(1) For the purposes of ss 23(1) and 153(1) of the 1978 Act 'omission' was to be given its ordinary and natural meaning and meant nothing more than a failure or neglect to act. In particular, the non-payment of money or denial of a benefit could be an 'omission' even though the employer was not obliged to make the payment or give the benefit and the employee could not reasonably expect to receive it. It followed that payment of the wage increase to members of the UDM but not to the appellants, who were doing the same work, constituted 'action (short of dismissal)' for the purposes of s 23(1) of the 1978 Act (see p 595 a b and p 605 c d f g, post); *Carlson v Post Office* [1981] ICR 343 approved; *Rath v Cruden Construction Ltd* [1982] ICR 60 disapproved.

(2) On the true construction of s 23 of the 1978 Act the words 'as an individual' were intended to preclude adverse action taken against a union being treated ipso facto as action taken against an employee. Accordingly, adverse action taken against a union was not, by reason only of any consequential effect it might have on members or officers of the union, to be treated as being action taken against any individual employees, and to fall within s 23 the action had to affect the employee otherwise than merely as a member or officer of the union. However, since an employee's pay was paid to and received by him as an individual and not as a member of a union, even if the amount of pay might be affected by negotiations between the union and his employers, it followed that the board's action in paying a wage increase to UDM members but not to NUM members affected the appellants as individuals (see p 595 e, p 596 f to j and p 607 h to p 608 d, post); *Post Office v Union of Post Office Workers* [1974] 1 All ER 229 considered.

(3) Furthermore (May LJ concurring), the tribunal's finding that the board's purpose in its omission to pay the UDM increase to the appellants was to penalise the appellants because of their membership of the NUM, by putting them at a disadvantage compared with the UDM members at the colliery, was not perverse and accordingly the court would not interfere with it (see p 591 h, p 598 d e h j, p 599 b and p 609 c, post).

(4) Furthermore (May LJ concurring), on its natural and ordinary meaning s 23(1)(a)

of the 1978 Act referred to the situation where the employer's purpose was to prevent the employee from being a member of a particular union (so long as it was an independent trade union) as well as the situation where the employer's purpose was to prevent the employee from being a member of any independent trade union whatsoever (see p 591 j to p 592 a, p 593 d, p 599 j to p 600 b, p 601 j, p 603 b, p 609 g h, p 610 b c and p 611 c d f, post).

Observations on the circumstances in which the Court of Appeal may hear an appeal when the issue between the immediate parties to the appeal is no longer live (see p 588 e f, p 589 h j, p 593 j to p 594 a and p 604 d to g, post); *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 considered.

Notes

For the rights of employees in respect of trade union membership and activities, see 16 Halsbury's Laws (4th edn) para 786:8 and 47 *ibid* paras 500, 519, and for cases on the subject generally, see 47(1) Digest (Reissue) 421-434, 1855-1888.

For the Employment Protection (Consolidation) Act 1978, ss 23, 153, see 16 Halsbury's Statutes (4th edn) 403, 545.

Cases referred to in judgments

Brassington v Cauldon (Wholesale) Ltd [1978] ICR 405, EAT.

Carlson v Post Office [1981] ICR 343, EAT.

Cheall v Vauxhall Motors Ltd [1979] IRLR 253, Ind Trib.

Duport Steels Ltd v Sirs [1980] 1 All ER 529, [1980] 1 WLR 142, QBD, CA and HL.

IRC v Joiner [1975] 3 All ER 1050, [1975] 1 WLR 1701, HL.

Kirkness v John Hudson & Co Ltd [1955] 2 All ER 345, [1955] AC 696, [1955] 2 WLR 1135, HL.

Meade v Haringey London BC [1979] 2 All ER 1016, [1979] 1 WLR 637, CA.

Post Office v Union of Post Office Workers [1974] 1 All ER 229, [1974] 1 WLR 89, HL; *affg* sub nom *Crouch v Post Office* [1973] 3 All ER 225, [1973] 1 WLR 766, CA.

Rath v Cruden Construction Ltd [1982] ICR 60, EAT.

Sun Life Assurance Co of Canada v Jervis [1944] 1 All ER 469, [1944] AC 111, HL.

Westminster City Council v Croyalgrange Ltd [1986] 2 All ER 353, [1986] 1 WLR 674, HL.

Cases also cited

Carrington v Therm-A-Stor Ltd [1983] 1 All ER 796, [1983] 1 WLR 138, CA.

Hughes v Dept of Health and Social Security [1984] ICR 557, CA; *rvsd* [1985] AC 776, HL.

West Midlands Co-op Society Ltd v Tipton [1985] ICR 444, CA; *rvsd* [1986] 1 All ER 513, [1986] AC 536, HL.

Appeal and cross-appeal

Peter Thomas Ridgway and Paul Fairbrother appealed from so much of the judgment of the Employment Appeal Tribunal (Popplewell J, Mr R Lewis and Mr A D Scott) delivered on 31 July 1986 as, on an appeal by the respondents, the National Coal Board, from a decision of an industrial tribunal (chairman Mr C J Goodchild) on 28 May 1986, adjudged (i) that s 23(1)(a) of the Employment Protection (Consolidation) Act 1978 had no applicability to inter-union disputes and the appellants had no claim in law and (ii) the action taken by the respondents, the National Coal Board, against the appellants was not action taken against them as individuals and for that reason also the appellants' claim failed. By a respondent's notice dated 28 August 1986 the board cross-appealed against the decision of the Employment Appeal Tribunal. The facts are set out in the judgment of May LJ.

John Hendy and Tim Kerr for the appellants.

Charles Falconer and Nicholas Underhill for the board.

16 December. The following judgments were delivered.

- a** **MAY LJ.** This is an appeal with leave against a judgment of the Employment Appeal Tribunal of 31 July 1986. That appeal tribunal had before it an appeal from a decision of an industrial tribunal sitting in Leicester between 19 and 28 May 1986. Over that period the industrial tribunal heard complaints from the two present appellants before us that their rights under s 23(1)(a) of the Employment Protection (Consolidation) Act 1978 had been infringed. The industrial tribunal decided that the complaints succeeded and they adjourned the question of compensation. The Employment Appeal Tribunal allowed the appeal of the National Coal Board against the finding of the industrial tribunal and dismissed the present appellants' complaints. The appellants now appeal to this court against the decision of the Employment Appeal Tribunal, asking that the decision of the industrial tribunal should be reinstated.
- b** The case arises out of the miners' dispute and the facts giving rise to the issues are for present purposes well summarised by the Employment Appeal Tribunal. Until the strike the National Union of Mineworkers (the NUM) was the only union representing miners in the industry. After the end of the strike the Union of Democratic Mineworkers (the UDM) was formed from the breakaway Nottingham and South Derbyshire areas of the NUM. In the autumn of 1985 the board negotiated increased rates of pay with the UDM.
- d** After a dispute had arisen between the board and the NUM about certain changes which the former desired to the rules of the mineworkers' pension fund, but to which the NUM refused to agree, the board decided that it would pay the increased rates of pay to both UDM and NUM members at pits where the UDM could establish that its members were in the majority. This the industrial tribunal described as even-handed and, given the circumstances, a sensible policy.
- e** In mid-January 1986 the election for the president of the Leicestershire area of the NUM was due to take place. It was regarded as an area which might break away from the NUM, as had the Nottingham and South Derbyshire area miners at an earlier stage. However at an election on 17 January the UDM candidate did not win. All those taking part in the ballot at that time were members of the NUM. Nevertheless at a particular pit, known as Ellistown colliery, it was thought that more than half the members had in fact supported the UDM candidate, though this later turned out to be inaccurate. Against this background there was a meeting on 26 January between senior executive members of the UDM and some members of the board. At it the UDM members made it clear that they were concerned about their position and particularly about their membership drive. They threatened the board with legal action. They were disenchanted with the even-handed approach which I have described. They contended that UDM members should be paid UDM rates wherever they worked. After lunch, during which the board representatives went away to consider the position, the chairman of the board gave a handwritten note to the UDM representatives. This was to the effect that the board's previous policy was to be changed in relation to Ellistown colliery and their UDM members would be paid the increased wages on proof of membership, but NUM members at the same pit would not be paid the increase.
- g** This changed policy was in fact put into practice at Ellistown. Two of the NUM members working there were the present two appellants. Subject to what I say hereafter, they were paid at the reduced rate. As a result they claimed that their rights under s 23 of the 1978 Act had been infringed. I need only quote s 23(1) as amended in 1980 and 1982:
- h**
- j** '(1) Subject to the following provisions of this section, every employee shall have the right not to have action (short of dismissal) taken against him as an individual by his employer for the purpose of—(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so; or (b) preventing him or deterring him from taking part in the activities of an independent trade union at any appropriate time, or penalising him for doing

so; or (c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.' a

The amended complaints of the appellants read:

'The actions of the National Coal Board in paying wage increases to members of the Union of Democratic Mineworkers and refusing to make the same pay award to members of the National Union of Mineworkers is action short of dismissal and intended to deter my membership of the NUM and persuade me to become a member of the UDM or penalise me from becoming or remaining a member of the NUM.' b

Before the industrial tribunal the board took as a preliminary point the issue whether in law the facts alleged in the appellants' complaints were capable of constituting a breach of s 23 of the 1978 Act. On this preliminary point, the industrial tribunal held that the omission to pay NUM members the increase which the UDM members were paid was 'action (short of dismissal)' within the meaning of that phrase in s 23(1), having regard to the definition of 'action' in s 153(1) of that Act, which provided that that word included omission. c

The industrial tribunal then held that the omission to pay a wage increase to the NUM members was capable in law of amounting to action taken against the particular employee 'as an individual'. The appellants own wages were affected by the decision to pay the UDM members higher wages, even though doing the same work. Thus the action taken, although against a group, was also in the view of the industrial tribunal directed against the individual appellants as individuals. d

Another argument directed to the industrial tribunal was that s 23(1)(a) cannot apply when the employer's purpose is to penalise the employee from belonging to one independent trade union as opposed to another. It was contended that the section could not be relied on where the real dispute was an inter-union one, between two independent trade unions. The industrial tribunal said that they could not see any restriction imposed by the wording of the relevant section prohibiting its use in inter-union disputes and accordingly rejected this particular argument. e

The industrial tribunal then recorded that the NUM was clearly an independent trade union and they turned to consider the facts and merits of the case. By virtue of s 25(1)(a) the onus is placed on the employer on the hearing of a complaint of the nature with which this case is concerned to show the purpose for which the action or omission complained of was taken. The industrial tribunal held that in these two cases the board had not satisfied them as to the purpose for which the differential wage rates were imposed. The inference which they drew from all the facts was that the purpose of the omission to pay NUM members at the same rate as UDM members was to penalise the appellants for being members of the NUM. In the result the industrial tribunal concluded that the appellants' complaints against the board succeeded. f

On the board's appeal to the Employment Appeal Tribunal, the latter held that there were no grounds for disturbing the industrial tribunal's finding of fact that the purpose of the differential payment of wages was to penalise the appellants because of their membership of the NUM by putting them at a disadvantage compared with the UDM at Ellistown. The Employment Appeal Tribunal also agreed with the industrial tribunal that the omission to pay the same increase in wages to the appellants that was paid to the UDM members was 'action (short of dismissal)'. However the Employment Appeal Tribunal differed from the industrial tribunal on the question whether as a matter of law s 23(1)(a) was applicable to inter-union disputes; it held that it was not and that in consequence the appellants had no claim against the respondent board in law. Finally, the Employment Appeal Tribunal also differed from the industrial tribunal on the question whether the action taken by the employers was taken against the appellants 'as individuals'; it held as a matter of law that it was not and for that reason also the appellants' claims failed. g
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a As I have said, the appellants now appeal to us seeking to have the decision of the industrial tribunal reinstated. By a respondent's notice by way of cross-appeal the board gave notice that on the hearing of the appellants' appeal they would seek orders, first, that the Employment Appeal Tribunal's decision to uphold the industrial tribunal's finding of fact to which I have referred should be reversed and that consequently that finding of fact by the industrial tribunal should be held to be perverse and, secondly, that the decision of the Appeal Tribunal that the board's omission to pay the same increase in wages to the appellants as was paid to members of the UDM constituted an 'action (short of dismissal)', within the meaning of s 23(1) of the 1978 Act, should also be reversed.

b Before we began the substantive hearing of this appeal, counsel for the board took a preliminary point. Since the hearing before the Employment Appeal Tribunal the two appellants have either been paid the full UDM rates originally denied to them fully backdated to the relevant date in November 1985 or, if not, the board have made it clear c that they will be paid the full rates. This was conceded by counsel for the appellants. In these circumstances counsel for the board submitted that the result of this appeal could now only be academic, that there was no continuing *lis* between the parties and that accordingly we should not proceed to hear the appeal.

d He referred us to the decision in the House of Lords in *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469, [1944] AC 111. In that case the conditions which had been imposed by the Court of Appeal on its giving leave to appeal to the House of Lords had the result that there was no longer anything real in issue between the parties. The House was in the circumstances being asked to answer what had as a result become an academic question. Viscount Simon LC said ([1944] 1 All ER 469 at 470-471, [1944] AC 111 at 113-114):

e 'If the House undertook to do so, it would not be deciding an existing *lis* between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties . . . No doubt the appellant company is concerned to get, if it can, a favourable decision from this House because it fears that other cases may arise under similar documents in which others who have taken f out policies of endowment assurance with it will rely on the decision of the Court of Appeal. But, if the appellant desires to have the view of the House of Lords on the issue upon which the Court of Appeal has pronounced, its proper and more convenient course is to await a further claim, and to bring that claim, if necessary, up to the House of Lords with a party on the record whose interest it is to resist the appeal. The research which has been given to the matter does not discover any g previous decision in which the House of Lords has undertaken, on the petition of an unsuccessful appellant, to review the decision below when the opposite party has been finally settled with, and I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.'

h Counsel for the board also referred us to the note headed 'Hypothetical cases' in *The Supreme Court Practice* 1985, vol 1, para 59/1/9.

i Anticipating that the appellants might contend that if they succeeded in this appeal the compensation to which they would have been entitled might have been more than just the arrears of wages, counsel for the board also referred us to *Brassington v Cauldon Wholesale Ltd* [1978] ICR 405. That was a case involving a claim for a breach of s 53 of the Employment Protection Act 1975 and the assessment of compensation for that breach under s 56 of the same Act. These sections were the predecessors of the ones with which we are concerned in the instant appeal. In giving the judgment of the Employment Appeal Tribunal Bristow J said (at 414):

'In our judgment sections 54 and 56 empower the industrial tribunal to award compensation as they think just and equitable in the circumstances for such injury

other than injury to your pocket caused by the employer to the employee by the action by which the section 53 right was infringed. Such action might be very easily shown to have caused injury to the individual other than injury to his pocket. The stress engendered by such a situation might easily cause injury to health. The tribunal might think it to be just and equitable to compensate you if, by reason of the action, your deep and sincere wish to join a union, with all the benefits of help and advice which that might entail, had been frustrated. If the employer's action against you had resulted in the union failing in respect of a "recognition issue" under section 11, that again might be an injury to you which the tribunal might think warranted compensation under section 54(3). Parliament has not sought to categorise the injuries, other than to the pocket, for which compensation may be awarded if the tribunal think it just and equitable in the circumstances. But the employee who claims compensation must in our judgment first satisfy the tribunal not only that his right has been infringed. If he shows that and no more then mandatory declaration is his remedy. He must go on to show injury resulting from the employer's action which infringed his right, before the discretionary remedy of an award of compensation is in play.'

However counsel for the board submitted that this part of the decision in *Brassington's* case was wrong in law. He pointed out that an aggrieved employee cannot obtain damages for injury to feelings or the like in wrongful or unfair dismissal claims and that a fortiori this form of compensation was not available in actions based on less serious matters, such as the claims under ss 23 and 26 with which we are concerned in the instant appeal. Nevertheless counsel did accept that there were still outstanding a substantial number of similar claims on which this court's decision on the instant appeals might well have an important bearing.

In reply, counsel for the appellants referred to a further part of Viscount Simon LC's speech in the *Sun Life* case [1944] 1 All ER 469 at 471, [1944] AC 111 at 114 where the comment was made that the position in the Court of Appeal was different from that in the House of Lords. In my opinion, however, the reference there was not to the point in issue on the preliminary objection which was taken before us, but merely to the effect that the Court of Appeal is stricter in not allowing conditions to be imposed on parties to litigation prior to an appeal to it because, different from appeals to the House of Lords, appeals to the Court of Appeal are as of right. I do not think that this further reference to the *Sun Life* case is of assistance to us on this point.

Counsel for the appellants also referred to *Meade v Haringey London BC* [1979] 2 All ER 1016, [1979] 1 WLR 637. Briefly the facts in that case were that two trades unions notified the local authority's chief education officer that their members would be taking strike action and that in consequence 'all educational establishments' in the borough would be closed. After this had happened for four weeks the plaintiff, a parent of a child affected, issued a writ asking for an injunction and for appropriate declarations that the authority had failed in their duty. After the matter had been before Goulding J on an interlocutory application the plaintiff appealed. On the first day of the hearing of the expedited appeal before this court all members of the staff on strike resumed normal working and all the schools opened. Lord Denning MR said ([1979] 2 All ER 1016 at 1023, [1979] 1 WLR 637 at 645):

'In one sense the appeal had succeeded. The strike had been called off. There was no longer any need for an order by the court. But we proceeded to hear the case for two reasons: one, because the costs of the legal proceedings would depend on whether the parents were justified or not in making their applications; second, because it was of importance to all concerned that the legal position should be ascertained. In case the same thing should happen again next year. It is of much importance to parents, and to society at large, to know whether or not the parents

can come to the courts when their children are deprived of their education in this way.'

On this point Eveleigh LJ pointed out that in the circumstances only a declaration would at that stage be of any use to the plaintiff and that the court certainly could not give one in those interlocutory proceedings before the issues raised had been decided by a proper trial (see [1979] 2 All ER 1016 at 1029, [1979] 1 WLR 637 at 651). I respectfully think that Sir Stanley Rees took the same view (see [1979] 2 All ER 1016 at 1035, [1979] 1 WLR 637 at 658). Relying on this authority, and particularly the dictum of Lord Denning MR to which I have referred, counsel for the appellants submitted that in appropriate circumstances this court would hear cases, even though there may no longer be a lis between the parties, where important questions of law arise in the instant appeals; for instance, the proper construction of 'an independent trade union' in s 23(1)(a) of the 1978 Act as amended is such an important issue. Further, a decision in the instant appeals would also affect the industrial relations position between the board and these two appellants, and others in similar situations. A decision in these appeals would show the extent to which, if at all, the board could discriminate against the NUM in favour of the UDM. Counsel submitted that the quantum of any compensation to which these appellants, if they succeed, would be entitled has not been agreed. In particular he did not accept that no financial compensation would be payable even though the lost wages had now been made good.

In so far as damages for injury to feelings or stress or frustration were concerned, he referred us to a decision of an industrial tribunal in *Cheall v Vauxhall Motors Ltd* [1979] IRLR 253, in which in an inter-union dispute which affected the applicant, that he could show no actual financial loss, the tribunal awarded him the sum of £50 on account of his frustration and stress for not being allowed to have his case presented by his own representative whilst he was still a member of one particular trade union.

Finally, counsel for the appellants submitted that it was at least arguable that these two appellants would still be entitled to interest on the unpaid wages for the period for which they had not been received and that this again meant that it could not properly be said that all the issues between the appellants and the board had by now been settled.

In reply, counsel for the board accepted that there had been no formal agreement as to compensation, but contended that there was no dispute about the fact that the full wages had now been paid to the appellants. He submitted that the contention that these appellants might be entitled to some compensation for stress or frustration was a bogus one only put forward to keep this appeal alive. He also contended, as in my experience is the position, that interest is never given on compensation awards either by an industrial tribunal or by the Employment Appeal Tribunal. He suggested that the substantial question to be asked and answered was whether there was still a real issue alive between the parties to these appeals.

For my part I respectfully took the view that the part of the decision in *Brassington's* case to which I have referred, as also the decision in *Cheall v Vauxhall Motors Ltd*, were wrongly decided, and now that the board had rescinded and backdated the pay cuts which they had imposed on these appellants in the circumstances outlined, there was in truth no continuing lis between the parties and that we should decline to hear these appeals further. Further, in my opinion, the argument that until the appeal is heard the costs of it cannot properly be provided for merely begs the question. However, Nicholls and Bingham LJJ disagreed with my view on these points and accordingly we proceeded to hear the substantive appeal on its merits.

There are thus four issues which arise on this appeal. (1) Was the board's decision not to pay an increase of wages to the appellants because they were NUM members, when they did pay the increase to UDM members in the same colliery, 'action (short of dismissal)' taken by the board against the appellants? (2) If it was, was it taken against

each appellant 'as an individual'? (3) Was the industrial tribunal's finding that the board's purpose in not paying the appellants the increase in wages was to penalise the appellants because of their membership of the NUM instead of the UDM a perverse one? (4) Can the phrase 'an independent trade union' in s 23(1)(a) of the 1978 Act as amended be construed as 'a particular independent trade union', or is it to be construed as 'any independent trade union'? In other words, must the action by the employer which is complained of be directed at the employee's trade unionism generally or is it sufficient if the action is directed at the employee being or becoming a member of a particular trade union, in this case the NUM? Does s 23(1)(a) have any applicability to inter-union disputes? a

As to the first issue both the industrial tribunal and the Employment Appeal Tribunal held that, because s 153(1) of the 1978 Act defines 'action' as including omission, the answer had to be in the affirmative. The appellants do not challenge these findings. Indeed they contend that the conclusion by both the tribunals amounted to findings of fact which are unchallengeable on this appeal to this court. b

The board submitted, on the other hand, that a mere failure to do something, for instance to pay someone some money, does not itself constitute an 'omission' on the ordinary meaning of the word. There must be something more. The payment which in fact was not made to NUM members could only be said to constitute an 'omission' on the part of the board if the NUM members could at the least have reasonably expected payments to be made. Thus, counsel for the board contended, both tribunals erred in law. In so far as the question of fact which the point raises is concerned, the industrial tribunal did not go into it nor make any finding. c

For my part, I prefer the construction of the word 'omission' which was contended for by the board. It is not every failure to act that is an omission. An act, something done, can be seen and recognised as such. A 'non-act' can only be identified and recognised as such, and thus be properly described as an 'omission', against a background or in a context which enables one to see of what the 'non-act' is comprised. The process of identifying as an 'omission' within the Act the fact that the board did not originally pay the present appellants the UDM rates of pay necessarily involves at the least finding that the appellants were NUM members employed at Ellistown on the same work as other employees doing the same work as UDM members. By so finding one has begun to sketch in the context in which the non-payment of UDM rates can be viewed. Without at least this, the inquiry is both fruitless and irrelevant. Is the factual finding about the appellants to which I have referred of itself sufficient to enable one to categorise the non-payment of UDM rates to them an 'omission' within the Act? Why should it be? Only if such finding necessarily implies, or one is able to make, the further finding of fact that in the circumstances they did not get what they ought or might have expected, or perhaps what the objective observer might have expected them to get. There must at the least have been some obligation to pay or some expectation of receipt to enable one to categorise the non-payment of UDM rates to these appellants as an 'omission' on the part of the board to make such payments. As a further example, the non-payment to these appellants of UDM rates plus 10% would not have been an 'omission' to do so within the Act unless there was some form of obligation or expectation of such over-payments. How firm the obligation, how well founded the expectation, how clearly drawn the context, before someone who does not do something can be said to have omitted to do it within the Act will, of course, depend on the circumstances of the given case. d

On these points the industrial tribunal made no findings because of the interpretation which they put on the word 'action' in s 23(1)(a) of the 1978 Act. It might be said in consequence that we should allow this appeal and remit the case to the industrial tribunal to make the appropriate findings of fact. However, on the facts that were found by the industrial tribunal and the general view which they took of the case, I feel forced to the conclusion that if we did remit this case there could only be one result. In my opinion, although the industrial tribunal erred in law in their approach to what constitutes an e

a omission sufficient to be included within the words 'action (short of dismissal)' in s 23(1)(a), nevertheless had they adopted the approach which I think was the correct one they could only have reached one conclusion, namely that there had been an 'omission' properly considered in point of law.

b In so far as the second issue is concerned, the respective contentions can be shortly stated. For the appellants it was argued that any action taken against a union other than in relation to negotiating rights was action against each member of that union as an individual. An alternative contention was that an action which affects an employee outside the area of his relationship with his union, such as paying him less, or paying non-members more, is action 'taken against him as an individual'; albeit that action taken against his union qua union which affects the employee individually only in the area of his relationship with his union, such as the withdrawal of a notice board facility, is not.

c The board contended that it is not enough that the individual is affected by the action complained of. Before it can be said to be action taken against an employee 'as an individual' the action has to be directed against, targeted at, the employee personally as an individual.

d The Industrial Relations Act 1971 as construed by the House of Lords in *Post Office v Union of Post Office Workers* [1974] 1 All ER 229, [1974] 1 WLR 89 had the effect that discrimination against a union was also discrimination against the members of that union themselves. The words 'as an individual' thereafter enacted by Parliament in the relevant provision, which is now s 23(1)(a) of the 1978 Act as amended, were intended to show that in this connection something more was required. It was contended that the insertion of the phrase was intended to draw a distinction between actions against a union and an action against an individual, concepts which in *Post Office v Union of Post Office Workers* had been held to amount to the same thing.

e I again prefer the argument for the board. The phrase was clearly inserted for a purpose, and having regard to the state of the relevant law at the time I think that the purpose could only have been the one for which the board contends. In my opinion the provisions of s 25(1)(a) ('On a complaint under section 24 it shall be for the employer to show—(a) the purpose for which action was taken against the complainant . . .'), and the provision in s 26(5) relating to the contributory action on the part of the complainant supports this contention. Further, I think that the passages from the judgment of Slynn J in *Carlson v Post Office* [1981] ICR 343, to which I shall refer in another context a little later in this judgment, also support the view I have taken.

f In my opinion, therefore, if, as I think, the board's decision not to pay NUM members UDM rates of pay is properly considered to be action taken by the board against the appellants, it was not taken against them 'as individuals'. I would therefore dismiss the appeal on this point and uphold the Employment Appeal Tribunal's decision on it, with the result that the appellants' claim must fail.

g The third issue in this appeal can be dealt with very shortly. As the Employment Appeal Tribunal said, it did not see the witnesses giving evidence as did the industrial tribunal. The question of the purpose behind the board's decision reached over lunch on 26 January 1986 was essentially a matter for the industrial tribunal sitting as a jury, to be decided on the evidence and documents put before them. In my opinion, the contention that the industrial tribunal's decision on this point was a perverse one is, with respect to the arguments advanced to support it, in truth unarguable.

h I have found the substantial question of law which arises in this case as the fourth and final issue by no means easy to answer. As I have already indicated, the board's contention throughout has been that the phrase 'an independent trade union' in s 23(1)(a) of the 1978 Act as amended means 'any independent trade union', so that an employee is only entitled to mount a claim thereunder when the employer's action complained of was directed at the employee's trade unionism generally. The opposing contention which found favour with the industrial tribunal but not with the Employment Appeal Tribunal is that 'an independent trade union' means just what it says and that an employee is

entitled to relief whenever his employer seeks to prevent him from being, for instance, a member of a particular trade union, in this case the NUM, or in another case a trade union of his choice. Each side has sought to rely on the legislative history preceding and indeed subsequent to the enactment of the 1978 Act to support their respective arguments. I regret that I have not found this substantially helpful, because the various enactments and their subsequent amendments have depended so much on the political approach and beliefs of the various administrations under whose majorities in the House of Commons they have been enacted. Further, I think that most of the amendments that have been enacted over the years have related to the 'closed shop' and the way, in a given political climate, this was or is to be treated. In particular our attention was drawn to the effect of the amendments which the legislature has made to s 23(1) of the 1978 Act by the later Employment Acts of 1980 and 1982. The latter have clearly removed from the protection of s 23(1) union activities where there is a statutory closed shop and those activities are in respect of a union different from that operating the closed shop. The amending provisions have however not removed the s 23(1) protection in relation to trade union membership in such a case. This is entirely consistent with the contention that the general thinking of the legislature on this point is that a man may be and remain a member of the union of his own choice.

In this connection counsel for the appellants pointed to a possible result if the employer were entitled to choose the union he would permit his employees to join. If the board's contention was correct a shipowner could tell his seamen that they could join any union they liked except the National Union of Seamen. The result would be that his ship would be unmanned.

As a matter of pure drafting also, it is noticeable that where the legislature has intended to deal with a particular or a specified trade union, for instance in sub-ss (1A), (1B) or (2A), this has been clearly stated. Nothing like this has occurred in s 23(1)(a).

Similar comments can be made in relation to the analogous s 58(1) of the 1978 Act. It is only when one moves on to s 77 that one finds the phrase 'a particular independent trade union'. This section provides that interim relief may be granted to an employee who complains of unfair dismissal when the reason for his dismissal was for instance that he was a member of a 'particular' independent trade union. This makes it quite clear that the organisation contemplated by s 58(1)(a) and therefore by analogy by s 23(1)(a) was intended to be identifiable, a particular or a specified trade union. If this is correct then it is inconsistent with the wide non-specific construction of s 23(1)(a) for which the board contended.

Further, save in a closed shop context, I find it a much more acceptable concept that an employee should be or become a member of a trade union of his own choice, rather than one of his employer's choice, which he may be compelled to join. Indeed if s 23(1)(a) has the construction contended for by the board, in my opinion it does not lie comfortably where it is alongside s 23(1)(c).

In so far as the authorities to which we were referred on this point are concerned, that of *Carlson v Post Office* [1981] ICR 343 is directly in point and persuasive against the board's contention on this issue. In his judgment Slynn J said (at 345):

'It is important in these cases to bear in mind, before a breach is established, that what is done must (a) amount to action taken by an employer; (b) be against an employee as an individual; (c) be for the purpose of penalising the employee for being a member of an independent trade union.'

Then towards the end of his judgment he underlined the point (at 347):

'What has to be found for there to be a breach is that the purpose of the action taken is to penalise an individual for membership of a particular union.'

It was suggested that *Rath v Cruden Construction Ltd* [1982] ICR 60 was persuasive to the contrary view. However, the report shows that, if this were so, it would only by way

a of concession against interest in the course of argument. Neither of these two decisions is binding on this court, but I for my part, with respect to the Employment Appeal Tribunal, prefer to follow the former.

Each side in this appeal referred to various authorities on the proper approach to the construction of statutes dealing with industrial relations, but in the end both accepted the dictum of Lord Diplock in his speech in *Duport Steels Ltd v Sirs* [1980] 1 All ER 529 at 541, [1980] 1 WLR 142 at 157:

b 'Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution it is Parliament's opinion on these matters that is paramount.'

c If, with that in mind, one expands s 23(1)(a) of the 1978 Act, what has to be shown by an employee to be entitled to relief is that (a) some action (short of dismissal) has been taken against him (b) as an individual (c) by his employer (d) for the purpose, inter alia, of deterring him from being (e) a member of a trade union which has the quality of independence as defined by s 153(1).

d Having done so I am forced to the conclusion that the construction preferred by the industrial tribunal was correct and that the Employment Appeal Tribunal was wrong to take a different view.

e Nevertheless, as I have said, I do not think that the decisions taken by the board to pay UDM rates at Ellistown only to UDM members and not to NUM members was action (short of dismissal) taken by the board against the present appellants 'as individuals'. If, therefore, this appeal was maintainable in any event, then on this one short point I think with respect that it should fail. However, I have had the advantage of reading the judgments of Nicholls and Bingham LJ in draft, and as they take the contrary view it follows that this appeal succeeds and the original decision of the industrial tribunal must be restored.

f **NICHOLLS LJ.** This appeal raises important questions on the construction of s 23 of the Employment Protection (Consolidation) Act 1978, but at the outset counsel for the respondent National Coal Board submitted that the appeal had become academic and should not be entertained. We were told that there are pending some 350 other complaints against the board based on alleged contraventions of s 23, arising out of the wage increase arrangements made by the board with the Union of Democratic Mineworkers (the UDM) earlier this year, and that amongst those complaints are cases which remain wholly alive despite the wage increase award announced by the board on 8 September 1986. In those cases, and indeed with regard to all the 350 or so complaints, the same questions of statutory construction arise as in the present appeal. If, on the present appeal, those questions were decided adversely to the present appellants that would dispose of numerous other complaints in limine, although the converse would not necessarily be true: a decision on the points of construction in favour of the present appellants would not mean that the other complaints would be sure to succeed, because the board's decision of 26 January 1986 in point in the present case related only to one colliery, the Ellistown colliery.

j That a decision on the points of construction raised on this appeal would be of assistance in disposing of other complaints made by members of the National Union of Mineworkers (the NUM) against the board, or in disposing of at least some of the issues in those other complaints, does not furnish justification for this court proceeding with this appeal if indeed there is no longer any live issue between the parties to this appeal. If the outcome of this appeal would be wholly academic so far as the appellants are concerned, the court

ought not to hear the appeal even if the decision would be far from academic in other cases.

However in my view it is not right to regard this as a case in which there is no longer any matter in actual controversy between the parties. The amount of the compensation payable to the two appellants under the decision of the industrial tribunal, should that decision stand, was never formally agreed, nor has it been considered or determined by the industrial tribunal. Following the board's announcement on 8 September 1986 the appellants will now receive payment of the wage increase, non-payment of which led to their complaints, duly back dated, and they will do so whatever the outcome of this appeal. But the amount of compensation which the appellants may obtain if this appeal succeeds is not necessarily limited to the amount of the lost wages. Under s 26 of the 1978 Act the amount of the compensation is such amount as the tribunal consider just and equitable in all the circumstances having regard to the infringement of the complainant's right under s 23 by the employer's action complained of and to any loss sustained by the complainant attributable to that action. In this court, in reliance on the decision of the Employment Appeal Tribunal in *Brassington v Cauldron (Wholesale) Ltd* [1978] ICR 405, the appellants have asserted a claim to compensation for frustration and stress, from having to work alongside others who were being paid more for doing the same work. They have also asserted a claim to interest on the unpaid sums over the not inconsiderable period of months involved.

I accept that these claims for further compensation are artificial to the extent that I do not doubt that, were it not that the NUM, which is supporting the appellants, was concerned with the wider implications of the questions of law raised on this appeal, these appellants would not have proceeded with this appeal after 8 September 1986 solely to obtain, if successful, the opportunity to present the claims for further compensation that have now been adumbrated. But, whatever might be the position in other circumstances, in the circumstances as they are there is before the court an appeal against the decision of the Employment Appeal Tribunal the effect of which was to dismiss the appellants' s 23 claims. Although resisting the continuance of this appeal, the board have not offered to agree to that decision being reversed so that the appellants should be entitled to whatever compensation the industrial tribunal might fix with regard to these s 23 claims. The claims for further compensation, exiguous though they may be, are still alive and extant, and cannot be disregarded as de minimis. I was not, and am not, persuaded that, if the appeal were to succeed, the appellants will not pursue these claims for further compensation or that these claims will be bound to fail. The board submitted that the observations in *Brassington's* case were wrong, but full argument on this case was not addressed to us, and I express no view either way on this submission.

In those circumstances, although the financial fruits coming to the appellants if their appeal were to succeed would be, at best, comparatively insignificant, I did not and do not think that this court was entitled to refuse to hear this appeal if the appellants wished to pursue it.

'Action'

The first of the four questions raised by the appeal is whether the failure of the board to pay each appellant wages at the increased rates agreed with the UDM constituted 'action', short of dismissal, taken against him as an individual for the purpose of penalising him for being a member of the NUM.

It was common ground before us that this failure could only be 'action' within s 23(1) by virtue of the extended meaning given to that word by s 153(1), whereby action includes 'omission'. The board submitted that an omission cannot be looked at in a vacuum, and that 'omission' does not mean mere failure to act. To be an omission the benefit denied must be one which the employee could reasonably expect. Here the appellants could not reasonably have expected to be paid the wage increase agreed with another union and, in any event, the industrial tribunal did not consider this point.

a I cannot accept this submission. For an act to constitute 'action' within s 23 there does not need to be any reasonable expectation by the employee that the employer would not so behave. This being so, I see no justification for adding this requirement as a gloss on the language of the statute in the case of an 'omission'. To be within s 23 the conduct complained of has to have been done 'for the purpose of [etc]'. If it is for one of the requisite purposes that an employer omits to do something vis-à-vis the complainant employee as an individual then, whatever is the nature of the omission, it is impermissible.

b Moreover, to draw the suggested distinction between action and omission would produce absurd results. Take the case of an employer who provides car parking permits for employees but not as part of the terms of their employment. If he were to give permits only to such of his employees as did not belong to a trade union, for the purpose of penalising other employees for belonging to a union, on the board's argument the failure to provide car parking permits for the union members could only constitute an 'omission' if the union members had a reasonable expectation that they too would receive the permits. But if the sequence of events were altered, and all employees had received car parking permits and then, for the purpose of penalising the union members, the employer withdrew their permits, that would constitute 'action' and would be remediable under s 23 regardless of whether the complainants had any reasonable expectation that they would continue to hold the permits. That cannot be right.

d 'As an individual'

The second issue is whether the action was taken against each appellant 'as an individual'. The board submitted that action is not taken against an employee 'as an individual' unless it is 'directed' or 'targeted' against him. When action is taken in a case where the true context is collective as opposed to individual, the action is not against the employee 'as an individual' even though he is affected. That is this case: the appellants were caught in the cross-fire of an engagement between the UDM and the NUM.

e I cannot accept this. It seems reasonably clear that the phrase 'as an individual' was included in s 53 of the Employment Protection Act 1975 (which was the forerunner of s 23 of the 1978 Act) to exclude from the ambit of the right conferred on employees by that section conduct of the kind found in *Post Office v Union of Post Office Workers* [1974] 1 All ER 229, [1974] 1 WLR 89). There the Post Office refused facilities for trade union activities on its premises to one particular union, and Mr Crouch, who was a local branch organiser of that union, made a complaint under s 5 of the Industrial Relations Act 1971. Under s 5(2) it was an unfair industrial practice for an employer to 'discriminate against a worker' by reason of his exercising any of his statutory rights. The section contained no words corresponding to the phrase 'as an individual'. Nevertheless it was argued that any discrimination there was against the union and not Mr Crouch personally.

g That argument was rejected. Lord Reid said ([1974] 1 All ER 229 at 238, [1974] 1 WLR 89 at 97):

h 'It was argued that here any discrimination is against the TSA and not against Mr Crouch personally. But discrimination against a man's trade union generally affects him personally. The prejudice to the man himself may be so small as to be negligible. But where it is substantial and a necessary consequence of the discrimination against the trade union and this must have been known to the employer the employer has in fact so acted as to worsen the man's position in comparison with that of a man in another union against which there has been no discrimination. That appears to me to be well within the mischief against which this provision is directed and to come within its terms.'

i Likewise in the Court of Appeal, Lord Denning MR said that by discriminating against the TSA the Post Office discriminated against every member of it (see [1973] 3 All ER 225 at 232, [1973] 1 WLR 766 at 775). In a helpful passage Stephenson LJ said that the real question was—

'whether an employer discriminates against a worker if he discriminates against his trade union, or whether he discriminates against a worker if he discriminates against him as an officer of his trade union. Is discrimination against a worker limited to discrimination against him in his employment only, his pay, his hours of work, and any other benefits or incidents of his actual employment?' a

(See [1973] 3 All ER 225 at 238, [1973] 1 WLR 766 at 781.)

Stephenson LJ found it extraordinary that those who had framed the 1971 Act did not make clear whether they were or were not adopting the American limitation, in the Wagner Act (the National Labor Relations Act (1935)), which made it an unfair labour practice by discrimination 'in regard to hire or tenure of employment' to encourage or discourage membership in any labour organisation. His conclusion was that in its context in the 1971 Act— b

'discrimination to be unfair contrary to the Act cannot be confined to discrimination against the worker qua worker and that Mr Crouch is entitled to rights equivalent to those given by the Post Office to local branch organisers of the UPW ...' c

(See [1973] 3 All ER 225 at 238, [1973] 1 WLR 766 at 781–782.)

Scarman LJ adverted to the same distinction. He posed the question whether discrimination in the 1971 Act was limited to terms of employment, promotion, pay and conditions, and concluded that it was not. He said that there was no substance in the distinction between discrimination against the union and discrimination against the worker ([1973] 3 All ER 225 at 245, [1973] 1 WLR 766 at 790): d

'The worker suffers when restrictions are imposed on his union; and, if another union is free of these restrictions, he is discriminated against, when his position is compared with that of those of his fellow workers who are members of the unrestricted union.' e

Against that background it seems to me that the expression 'as an individual' in what is now s 23 of the 1978 Act was intended to preclude adverse action taken against a union being treated ipso facto, on the reasoning adopted in *Post Office v Union of Post Office Workers*, as action taken against the employee. Adverse action taken against a union is not, by reason only of any consequential effect it may have on members or officers of the union, to be treated as action against individual employees. To be within the section the action has to affect the employee otherwise than merely qua member or officer of a union. But an employee's pay comes to him as an individual employee and not as a member of a union, even if its amount may be affected by negotiations between his union and his employer. Indeed, I find it difficult to think of an action, short of dismissal, which could be taken by an employer against an employee which could more obviously qualify as action taken against him as an individual than a reduction in, or a failure to increase, his pay. f

The board's contention involves investigating why the employer took the action complained of against the employee. If the only reason was that he was a member of a particular union, then the action was not taken against him as an individual. In my view that is to confuse the reason why the action was taken with the nature of the action taken. I cannot read into the expression 'as an individual' the notion that if an employee is selected for discrimination because of some characteristic which he shares with others, such as membership of a particular union, then the action is, for the purposes of the statute, not action taken against him as an individual. g

'For the purpose'

The third question relates to the particular facts of this case. As developed in argument, the issue is whether the industrial tribunal misdirected themselves when reaching the h

a conclusion that the board's purpose, in not paying to NUM miners at Ellistown the wage increase paid to their UDM colleagues, was to penalise them for being members of the NUM.

b It is pertinent to have in mind the background facts, as set out by the industrial tribunal in their reasons. In 1985, when the miners' strike ended, there was in Nottinghamshire and South Derbyshire, and also in Durham, a majority group of disaffected members of the NUM who thought that the strike was wrong and who were not prepared to accept the national leadership of the NUM. In October 1985 the National Coal Board gave the Nottinghamshire and South Derbyshire area unions of the NUM sole negotiating rights within their areas. In the negotiations which then ensued with these area unions and with the national leadership of the NUM, the board made to both groups the same pay offer but subject to a precondition that a commitment to an incentive-based pay scheme be given. The NUM, initially, rejected the condition. The c disaffected area unions accepted the condition and the pay offer. All miners in those two areas were then paid the new rates.

d On 6 December 1985 the breakaway movement formed the UDM as a separate trade union, with the intention of recruiting members outside the established areas of Nottinghamshire, South Derbyshire and Durham. This placed the board in a difficult position. It was also a novel position. Ever since the nationalisation of the coal mining industry 40 years ago, the NUM had been substantially the only union representing the interests of the men who actually worked the coalmines. But now the breakaway area unions, as replaced by the UDM, had an agreed wage increase, and the NUM had no agreement. Clearly, if the UDM could have secured that its members, wherever they were, would be paid the rates agreed with the old Nottinghamshire and South Derbyshire area unions of the NUM, that would have been a substantial incentive to mineworkers to leave the NUM and join the UDM. In most places where the UDM, in succession to the e Nottinghamshire and South Derbyshire area unions of the NUM, had negotiating rights this would have presented little problem. The problems would have arisen, as the board were aware, in those places where the miners were split between membership of the NUM and the new UDM. To have two men working side by side doing the same work but on different rates of pay, something which had not happened in the coal mines since f the 1939-45 war, would be a recipe for industrial disharmony.

The board determined, so far as they could, to avoid this. On 16 December 1985 they decided that for the foreseeable future they would pay the increased rates to all miners, whether members of the UDM or of the NUM, at pits where the UDM could establish 50% plus one of the membership of that particular unit. The industrial tribunal regarded this as an even-handed and, given the circumstances, sensible policy.

g I now come to the crucial events of January 1986. On 17 January the Leicestershire area union of the NUM held an election for its president. Because of the Leicestershire area's history during the strike, this was regarded as a legitimate area for recruitment by the UDM, and there was some feeling that this area might break away from the NUM and join the UDM. In the event, the pro-UDM candidate for the presidency did not win the overall area vote but, wrongly as it later turned out, he appeared to have received a majority of the votes cast at the Ellistown colliery in Leicestershire.

h On Sunday, 26 January 1986 a meeting was held between Mr MacGregor, chairman of the board, Mr Hunt, head of industrial relations, and two area directors on the one hand and senior executive members of the UDM on the other hand. The purpose of the meeting was to discuss the progress of the UDM. The officers of the UDM were very concerned about the recent events and the way ahead for the UDM. They were concerned about the UDM's membership drive. They expressed their concern forcibly to the chairman and representatives of the board. They said, and to my mind this is a very important part of the history, that they were not getting sufficient support from the board in return for the co-operation they had given the board; they felt that they were not getting the favouritism they deserved. They were disenchanted with the 'even-

handed' approach, and wanted the rates of pay applicable in Nottingham and South Derbyshire to be paid to their members wherever they were. They threatened legal action. a

After an adjournment the chairman of the board presented to the UDM officers a handwritten note, the effect of which was to change the decision made on 16 December 1985 so far as Ellistown colliery was concerned. Henceforth, on the basis that the UDM had 50% plus one support at Ellistown, UDM members would be paid the wage increase but NUM members at the same pit would not, so that, at Ellistown, two men doing the same job would be paid different rates depending on which union each belonged to. In this way it came about that the two appellants, members of the NUM, did not receive the pay increase which was then paid to the members of the UDM with whom they worked at Ellistown. b

I come now to the board's submissions on this point. The board submitted that the burden of their evidence to the industrial tribunal concerning the purpose of their decision of 26 January 1986 was that they made this decision, not for this or that specific reason or objective, but in order to settle their negotiations with the UDM. The board had no purpose other than to give ground in the negotiations. It was submitted that the industrial tribunal failed to consider that evidence, but sought instead to consider whether the board had shown their purpose to be one or other of a number of purposes mentioned in para 21 of the tribunal's decision. c

I am unable to accept this. Had the board's intention been as plain and simple as was submitted to us, one might have expected Mr Hunt, the board's witness, to have said so when asked (as he was) the direct question, 'What was the purpose of the decision?' The implications of this would then have been explored in the evidence. Instead his answer was that he could not 'distil into short terms' the reasons for the decision. In cross-examination he elaborated on this, and in their decision the tribunal considered and rejected what he then said. In those circumstances I can see no ground for thinking that the industrial tribunal misdirected themselves with regard to the evidence before them on this issue. d

The board further submitted that, having rejected the board's evidence as to their purpose, the industrial tribunal then, wrongly, inferred from that failure, coupled with the evident consequence of the omission to pay the wage increase to members of the NUM, that the board's purpose was to penalise members of the NUM. Having rejected Mr Hunt's explanations the industrial tribunal did not go on to consider, as they should have done, what the evidence as a whole showed was the purpose of the board. It was pointed out that, although under s 25(1)(a) of the 1978 Act it is for the employer to show the purpose for which action was taken against the complainant, s 25(1)(b) was deleted by the Employment Act 1980, so that it is no longer incumbent on an employer to show that the purpose was not one of those referred to in s 23(1). e

There is nothing in this point. The industrial tribunal recorded that they had spent over five hours in retirement considering Mr Hunt's evidence and the supporting documents. Having stated that they were not satisfied with Mr Hunt's explanation, the tribunal added: f

'We were left, put bluntly, with more than a suspicion that the purpose may well have been to deter miners from being members of the NUM or to penalise them [for] being members.'

It was but a small step from there to the tribunal's ultimate conclusion that that was the board's purpose. Reading their reasons as a whole, I can see no ground for believing that in taking that step they misdirected themselves by not having regard to the evidence as whole. g

The board further submitted that in asking themselves why the board departed from their 'even-handed' policy, the tribunal misdirected themselves because that was a h

a misleading and 'loaded' formulation which showed a biased approach to the facts. I can see nothing in this point either. The decision made on 26 January 1986 represented a change from the existing policy. I am unable to read into the industrial tribunal's use of the shorthand description of that policy as 'the even-handed policy' the connotation contended for.

In my view the board's challenge to the industrial tribunal's decision on this ground fails.

b *'An independent trade union'*

c The remaining question concerns the true construction of the expression 'an independent trade union' in s 23(1)(a) of the 1978 Act. That phrase was present in the section when it was enacted in 1978, and therefore it will be helpful to set out s 23(1) in its original form, and also s 58(1), the two subsections being parallel provisions, s 58 dealing with dismissal and s 23 dealing with action short of dismissal. It is obvious, and it was common ground before us, that the expression 'an independent trade union' bears the same meaning in the two sections.

Section 23(1) provided:

d 'Subject to the following provisions of this section, every employee shall have the right not to have action (short of dismissal) taken against him as an individual by his employer for the purpose of—(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so; or (b) preventing or deterring him from taking part in the activities of an independent trade union at any appropriate time, or penalising him for doing so; or (c) compelling him to be or become a member of a trade union which is not independent.'

e Section 58(1) provided:

f 'For the purposes of this Part, the dismissal of an employee by an employer shall be regarded as having been unfair if the reason for it (or, if more than one, the principal reason) was that the employee—(a) was, or proposed to become, a member of an independent trade union; (b) had taken, or proposed to take, part at any appropriate time in the activities of an independent trade union; or (c) had refused, or proposed to refuse, to become or remain a member of a trade union which was not an independent trade union.'

In short, an 'independent trade union' is a trade union which is not dominated or liable to interference by employers (see s 153(1)).

g The rival constructions of s 23(1)(a) are that, on the one hand, 'an independent trade union' means any independent trade union and, on the other hand, that the expression comprehends not only any independent trade union but also a particular trade union. Under the former construction, for which the board contended, taking action for the purpose of preventing an employee from being a member of a particular independent trade union is permissible. What is impermissible is taking action for the purpose of preventing an employee from being a member of any trade union whatsoever. Under the alternative construction, for which the appellants contended, taking action for either of the two purposes just described is impermissible.

h I start by considering the words of the statute. Paring down the language to the relevant essentials, s 23(1)(a) provides that '... every employee shall have the right not to have action taken against him ... by his employer for the purpose of preventing him ... from being ... a member of an independent trade union'. Thus the subsection confers on every employee a right not to have action taken against him for a stated purpose. When one then considers the scope of the proscribed purpose, it seems to me that, giving the language its ordinary meaning, para (a) is as apt to cover a case where the employer's

purpose is to prevent the employee from being a member of the XYZ union (so long as it is an independent trade union) as the case where the employer's purpose is to prevent the employee from being a member of any independent trade union whatsoever. If the organisation of which the employee is or is seeking to become a member is an independent trade union, then the paragraph applies, and in respect of his membership of that body he has the stated statutory protection. Reading the words as they appear in the statute, I can see no justification for construing them in such a way as to cut down what seems to me to be their natural scope so that, even if the XYZ union is an independent trade union, the employer's purpose of preventing the employee from being a member of that union is permissible, and the proscribed purpose is to be limited to the case where the employer's intention is to prevent the employee from being a member of any independent trade union whatever.

To my mind, and like most points of construction the matter is largely one of impression, the same comments are equally applicable when one considers 'detering' and 'penalising' in s 23(1)(a). Likewise, but if anything even more clearly, with s 23(1)(b): action taken for the purpose of preventing an employee from taking part in 'the activities of an independent trade union' is impermissible. In contemplation in this paragraph are the actual activities of a trade union which, in this instance, must be one particular trade union. Similarly with s 23(1)(c): the wording is as appropriate to a case of compulsion to be a member of a particular non-independent union as to be a member of any non-independent union.

When one turns to the corresponding provisions in s 58, to my mind what one finds leaves no room for any lingering doubt. On the plain wording of the section, if the reason for which an employee is dismissed is that he is a member of the XYZ union, and that union is an independent one, he falls four-square within s 58(1)(a). I can see nothing in the language to support giving to s 58(1)(a) the narrower construction for which the board contended, under which s 58(1)(a) would not apply in the case just mentioned but would be confined to the case where the reason for the dismissal was that the employer objected to the employee being a member of any independent trade union. I do not see how s 58(1)(a) admits of that construction. Similarly with s 58(1)(b) and (c).

Moreover, if the legislature had intended to draw the distinction for which the board contended it would surely have done so explicitly.

I turn to consider whether any other provisions in the 1978 Act furnish a context which shows or suggests that the words in question in ss 23(1) and 58(1) were intended to bear the meaning advanced by the board. Four provisions are material here. Firstly, s 23(7). This subsection provides that in s 23, unless the context otherwise requires, references to a trade union include references to a branch or section of a trade union. Section 58(14) contains a corresponding provision regarding s 58. In my view these two subsections provide some support for the appellants' construction. They would operate if, for example, an employee was dismissed because he was, or proposed to become, a member of a particular branch or section of a trade union. Scope for their operation is not easy to perceive on the board's construction of the phrase in issue.

Secondly, s 23(3) and (4). These subsections have now been repealed. Their broad effect was that, where there was a closed shop, the right conferred by s 23(1)(b) extended to activities of a union on the employer's premises only if that union was a closed shop union. Section 23(3) and (4) contained no provision for a corresponding limitation on the right conferred by s 23(1)(a). The board relied on this, pointing out that the appellants' construction gives rise to the result that in a case within sub-ss (3) and (4) there would be no remedy under s 23(1)(b) if the activities in question were not those of a closed shop union, but there would be a remedy under s 23(1)(a) even where the membership in question was of a non-closed shop union. In response the appellants suggested that the distinction made sound industrial sense: employees are entitled not to be discriminated against for membership of a non-closed shop union but they may only be active on behalf of a closed shop union.

a I feel unable to obtain any clear guidance from these provisions. Essentially this is an 'anomaly' argument, and in this field it is necessary to be very cautious before concluding that a particular consequence is an anomaly and could not have been intended. The fact is that in s 23(4) Parliament expressly legislated to confine the s 23(1)(b) right, but made no reference to the s 23(1)(a) right. Furthermore, sub-ss (3) and (4) cut the other way as well. These subsections assumed that, but for sub-s (4), the right conferred by s 23(1)(b) would have extended to the activities of a non-closed shop union. But, on the board's construction of s 23(1)(b), that would not have been so. On the board's construction an employee has no protection against discrimination regarding activities of different independent unions: he is protected only where the employer is seeking to prevent activities of all independent trade unions.

c Thirdly, a somewhat similar point arises on s 58(3). The effect of this subsection was that, unless an employee objected on grounds of religious belief to being a member of a trade union, dismissal was to be regarded as being fair where there was a closed shop and the employee was dismissed for not being a member of a closed shop union. The board pointed out that, on the appellants' construction of s 23(1)(a), action short of dismissal against such an employee would be unlawful. It was submitted that it would be an anomaly if an employee could complain of action short of dismissal but not about dismissal itself. On the board's construction no such anomaly would arise, because, where d a closed shop was being operated, action short of dismissal in respect of membership of a non-closed shop union would not fall foul of s 23(1)(a).

e This is a more formidable anomaly argument. It is possible that Parliament intended the distinction, the employer being free to dismiss the employee in such a case but, if he did not do so, he was not to discriminate against the employee. But I recognise that on this the appellants' construction produces a somewhat odd result.

f Here again, however, I note in passing that on a close analysis the terms of s 58(3) can be said also to contain an indication against the board's construction. The subsection assumed that, but for the subsection, the circumstances in which it applied would have been within s 58(1)(c). But on the board's construction of s 58(1)(c) that would not be so, s 58(1)(c) only applying where the employee had refused to become a member of *any* trade union.

Fourthly, s 77. Under this section interim relief may be given pending determination of a complaint of unfair dismissal. When enacted, s 77(1) provided:

g 'An employee who presents a complaint to an industrial tribunal that he has been unfairly dismissed by his employer and that the reason for the dismissal (or, if more than one, the principal reason) was that the employee—(a) was, or proposed to become, a member of a particular independent trade union; or (b) had taken, or proposed to take, part at any appropriate time in the activities of a particular independent trade union of which he was or proposed to become a member; may, subject to the following provisions of this section, apply to the tribunal for an order under the following provisions of this section.'

h In my view this provision strongly supports the appellants' construction of s 58(1) and, hence, of s 23(1). Clearly, s 77(1) is directed at dismissals falling within s 58(1)(a) and (b). The similarity of the language makes this plain. Thus it assumes that, for instance, s 58(1)(a) would include the case where the reason for the dismissal was that the employee was a member of 'a particular independent trade union'.

j Weighing these indications and contra-indications I am left in no doubt that, taken together, they do not show or suggest that the legislature intended the expression 'an independent trade union' in ss 23 and 58 to bear some meaning other than the one which, as I have sought to set out above, seems to me to be its natural meaning.

In addition to these statutory provisions, each party addressed argument to us on the practical implications of the alternative constructions. For the board it was submitted that, if the appellants' construction is correct, the consequence would be that every time

different wage settlements were made with different unions the union which came off worst (or thought it did) could instigate s 23 claims and compel the employer to reveal why there was a differential. The industrial tribunal would find itself having to judge the reasonableness of an employer's stance on this, even whilst collective bargaining was still taking place. Parliament could not have intended this. On the other hand, for the appellants it was submitted that the board's construction would permit a shipowner to penalise seamen who wished to join the National Union of Seamen with the justification that he tolerated all unions save that particular one. Parliament could not have intended this. Other arguments of this nature were addressed to us. On all these I will say only that I do not find any of them materially assist in ascertaining what Parliament must be taken to have meant when using the phrase 'an independent trade union' in ss 23 and 58.

I come next to the antecedent legislation: the Industrial Relations Act 1971. The board placed particular reliance on the wording of s 5(1)(a), which conferred on every worker the right to be a member of 'such trade union as he may choose'. This form of words was contrasted with para 6 of Sch 1 to the Trade Union and Labour Relations Act 1974 (which was the forerunner of s 58 of the 1978 Act). There, omitting the word 'independent', the phrase used was simply 'trade union'. In my view the absence of the words 'as he may choose' from para 6(4)(a) in the later Act, which repealed the earlier Act, is sufficiently explained by the difference in the linguistic format of the two sets of provisions. The change in the language does not betoken a change in meaning as contended.

I turn to the subsequent legislation, prefacing my comments on this by observing that, since I have reached a clear view on the meaning of the relevant expression in the 1978 Act, strictly the terms of the subsequent legislation are not admissible as an aid to interpreting that expression. It is not suggested that the amendments made to ss 23 and 58 have operated to give the relevant expression a meaning different from the one it bore when enacted in 1978. Accordingly amendments made by the Employment Acts of 1980 and 1982 are not legitimate aids in the construction of the relevant expression, surviving unamended as it has in s 23(1)(a): see *Kirkness v John Hudson & Co Ltd* [1955] 2 All ER 345 at 350-351, 362-366, [1955] AC 696 at 710-712, 730-736 per Viscount Simonds and Lord Reid.

Nevertheless in view of the weight attached by the Employment Appeal Tribunal to the form of the amendments made by the 1982 Act, I will comment briefly. The 1982 Act was preceded by the 1980 Act, which widened the scope of the employee's right not to be compelled to join a trade union: the phrase 'which is not independent' was deleted from s 23(1)(c), but the right still did not apply in the case of certain closed shops. Thereafter the 1982 Act amended s 23(1)(c) to read:

'compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.'

No corresponding amendment was made to s 23(1)(a). Similar amendments were made to s 58(1)(c), although here they took the form of substituting in 1982 a new s 58 for the existing s 58. Thus, as the legislation now stands, there is a marked contrast drawn between 'trade union' (I omit the word 'independent') in s 23(1)(a) and 'any trade union or ... a particular trade union or ... one of a number of particular trade unions' in s 23(1)(c). The thrust of the board's submission was that this contrast shows that a different meaning was intended, but that on the appellants' construction the expressions just quoted have the same meaning and, moreover, the amendment made to s 23(1)(c) was unnecessary.

The nature of the mischief perceived by the legislature and intended to be remedied by the amendment to s 23(1)(c) by the 1982 Act did not emerge clearly before us. If the reason was that the amendment to s 23(1)(c) was made for avoiding doubt, I can see no satisfactory explanation of why a like amendment was not equally called for and equally

a appropriate in the case of s 23(1)(a). Despite this, and whatever might have been the position if s 23(1) had been enacted originally in its present form, I do not think that the form of the amendment made to s 23(1)(c) is an adequate basis for concluding that the board's construction of s 23(1)(a) is to be preferred, given the existence of the indications to the contrary in ss 77 and 23(7) and given also and more particularly the lack of ambiguity in the relevant expression.

b In my view, therefore, and differing from the Employment Appeal Tribunal, the appellants' construction of s 23(1)(a) is correct. It follows that in my judgment the observations of the Employment Appeal Tribunal on this point in *Carlson v Post Office* [1981] ICR 343 were right and that the concession to the contrary on this point in *Rath v Cruden Construction Ltd* [1982] ICR 60 was wrongly made.

For these reasons, for my part I would allow this appeal and restore the decision of the industrial tribunal.

c **BINGHAM LJ.** In this judgment I shall refer to the appellant mineworkers as 'the appellants', to the respondents as 'the board', to the National Union of Mineworkers as 'the NUM', to the Union of Democratic Mineworkers as 'the UDM', to the Leicester Industrial Tribunal which heard the applications as 'the tribunal' and to the Employment Appeal Tribunal as 'the EAT'. I shall refer to the Industrial Relations Act 1971, the Trade Union and Labour Relations Act 1974, the Employment Protection Act 1975, the Employment Protection (Consolidation) Act 1978, the Employment Act 1980 and the Employment Act 1982 as (respectively) the 1971, 1974, 1975, 1978, 1980 and 1982 Acts.

Preliminary

e After the decision of the EAT but before the opening of the appeal in this court the board announced that the increased wage rates negotiated with the Nottinghamshire and South Derbyshire areas would, with effect from 1 November 1985, be paid to all mineworkers who had worked throughout the strike. This included the appellants. We were told that for administrative reasons the appellants had not yet been paid but would be paid at the end of November 1986. At the outset of the hearing before us, the board accordingly submitted that this court should not hear the appeal because there was no longer a genuine dispute between the parties. In reliance on *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469, [1944] AC 111 it was argued that the court should not decide an academic question the answer to which could not affect the parties in any way. Counsel for the appellants resisted this contention. There were, he submitted, unresolved issues between the parties which, if minor in financial terms, were none the less sufficient to prevent the outcome of the appeal being regarded as academic. Further, there were a considerable number (possibly a huge number) of claims and potential claims which would necessarily fail if the EAT's legal ruling were to stand.

g Tempting though the board's submission was, I did not and do not think it was open to this court to accede to it. I naturally reached that conclusion with hesitation, knowing that May LJ had concluded otherwise. But I will briefly state my reasons. Although no agreement was ever reached between the board and the appellants on the arrears of wages to which they were entitled, I do not regard this as a matter of such significance. The board had put forward figures. These were never challenged, although there was plenty of time for the appellants to consider the figures and raise any query they wanted. I have no reason to suppose that the board would not have been willing to consider any reasonable argument, and there seems every probability that agreement on the appropriate wages figure could quickly and easily have been reached. But the appellants contend that they are also entitled to seek from the tribunal an award of interest, to reflect the period of some months during which they will have been out of pocket, and also an award to reflect the stress and injury to their feelings which they suffered.

j The board argued that the tribunal could not and would not award interest for a

breach of s 23(1)(a) of the 1978 Act. I do not think it right to express a concluded view on the law or the practice. Section 26 of that Act does, however, provide for an award of compensation of 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the infringement of the complainant's right under section 23 by the employer's action complained of and to any loss sustained by the complainant which is attributable to that action'. It is not obvious to me that that provision (or the subsections which follow) precludes an award of interest by a tribunal, and if it is not clear as a matter of law that that is so I do not think this court would be justified in preventing the appellants pursuing their claims for what, if anything, they turn out to be worth. a
b

The board submitted that there was no warrant in the 1978 Act for an award of compensation reflecting non-pecuniary damage such as stress and injury to feelings. They may well be right, and I do not wish to be taken as expressing a view either way. But there is EAT authority in the appellant's favour (*Brassington v Cauldon Wholesale Ltd* [1978] ICR 405) and I think the appellants are entitled to seek to rely on this authority unless or until it is overruled. We have not, I think rightly, heard detailed argument on the question. c

More generally, the board submitted that these were not genuine claims but mere pretexts designed to keep the appeal alive. The appellants have never particularised their damage claims, but it may very well be that these claims are an afterthought which would never have been pursued but for the appellants' desire to argue the appeal. That does not, however, even if true, entitle this court to brush the claims aside as being illegitimate or of no consequence. Nor can I regard the desire of the appellants (or their union) to argue the appeal as vexatious or reprehensible. The tribunal's decision and the judgment of the EAT contain rulings on questions of legal principle which will or may affect a significant number of other cases. The parties have spent time and money litigating these questions up to this level. Much of that time and money would have to be spent all over again if, in any later case raising the same questions, it were sought to challenge the existing ruling of the EAT. That would not in my view be creditable to our legal system. All cases must of course be viewed in the light of their own peculiar circumstances, but I do not think that this could ever have been seen as a case in which the argument on one side or the other was likely to go by default because there was any lack of concern about the outcome. In the event, I am quite sure that the appeal could not have been argued with greater care and skill if the board's offer to pay the arrears of wages to the appellants had never been made. I do not, however, regard this as being a case in which the court had a choice whether to hear the appeal or not: so far as I know, no agreement had been reached concerning the costs of the appeal, and it would seem that that of itself provides sufficient *lis* to keep the appeal alive (see *Westminster City Council v Croyalgrange Ltd* [1986] 2 All ER 353 at 354, [1986] 1 WLR 674 at 678 per Lord Bridge). d
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The issues

The appellants' complaint was that by paying wage increases to members of the UDM and refusing to pay them at the same increased rate the board as their employer took action (short of dismissal) against each of the appellants as individuals for the purpose of deterring them from being or penalising them for being members of the NUM, an independent trade union, thereby infringing their right under s 23(1)(a) of the 1978 Act not to have such action taken against them. The tribunal, after a six-day hearing, upheld that complaint. The EAT, on two legal grounds argued before it, allowed an appeal against the tribunal's decision. h
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Four issues arose on this appeal against the EAT's ruling, all of them except the third arising on the construction of s 23(1)(a) of the 1978 Act. The issues were these. (1) Did the board's failure to pay the UDM wage increase to the appellants amount to 'action' within the meaning of the subsection? (2) If so, was it taken against each appellant 'as an

individual' within the meaning of the subsection? (3) Were the tribunal entitled to find as a fact that the board's purpose was to penalise the appellants for being members of the NUM? (4) If so, was action taken for that purpose action taken to penalise the appellants for being members of an independent trade union within the meaning of the subsection? I shall consider these issues in turn.

1. 'Action'

The tribunal construed 'action' in accordance with s 153(1) of the 1978 Act as including 'omission'. In ruling on a preliminary point the tribunal first of all concluded, without doubt, that the payment of a wage increase to UDM members doing the same work and the omission to pay the same increase to the appellants could in law amount to an action short of dismissal. The tribunal made no further detailed findings of fact on this matter, but concluded that the board's omission to pay the appellants the rise in wages that they paid to the UDM was an action short of dismissal. This conclusion seems to me entirely consistent with the approach of Slynn J in *Carlson v Post Office* [1981] ICR 343. It does not seem to have occurred to him in that case that refusal of a parking permit was not capable of amounting to 'action' within the meaning of the subsection.

Before the EAT the board criticised this approach. They argued that omission to do an act does not always result from an act not being done. There must be some arrangement or intention or duty to do the act which has not been done. There must be some form of obligation to do the act which is not in fact done. The tribunal had considered this question as one of law but had not made the necessary findings of fact.

The EAT saw force in this criticism, but thought it clear that the tribunal had found that there was an 'omission'. It concluded that in the light of all the circumstances, including the previous negotiations, there was sufficient obligation in the tribunal's findings of fact to justify the conclusions as a matter of law that there was an omission. Before us, the board advanced very much the same argument that they addressed to the EAT, save that more emphasis was laid on reasonable expectation than on obligation.

It is natural for lawyers to think of omissions in terms of failure to perform a duty. That is how omissions feature in the law of negligence. It is also an acceptable dictionary definition. But it is not a necessary definition. An omission need be no more than a mere failure or neglect to act. This, I think, is the natural meaning here, where 'omission' appears as the simple converse of 'action'. No notion of duty or obligation attaches to the concept of 'action'. Nor should it, I think, to 'omission'. If, of course, that which the employer has omitted to do is something which he would not have been expected to do and would not in the ordinary way have done, a tribunal is unlikely to conclude that the omission was for an objectionable purpose within the subsection. I do not, however, think that that is a reason for giving this familiar word anything other than what seems to me its natural and straightforward meaning. Since non-payment of the UDM increase to the appellants was, as a fact, admitted, I think the tribunal were entitled to go straight from their legal conclusion to their ruling on this point.

If, contrary to my view, the tribunal could only conclude this point against the board if they found as a fact that the board's failure to pay this increase to the appellants was contrary to the appellants' reasonable expectation that they would receive the increase, it would be necessary to send the case back to the tribunal for a finding of fact on the matter. This might turn out to be somewhat futile, in an industry which had not in living memory seen different rates paid to men doing the same job at the same pit, and in the light of the board's earlier indication that UDM rates would be paid to all mineworkers at pits where the UDM had a majority (if they had worked through the strike), but it might be unavoidable. On the view which I prefer, the need does not arise.

2. 'As an individual'

When s 23(1) of the 1978 Act was first enacted as s 53(1) of the 1975 Act, the subsection included the words 'as an individual', as it still does. The immediate ancestor of the

section was s 5 of the 1971 Act. That section gave an employee certain rights to belong or not to belong to a trade union and to take part in trade union activities. It also provided in s 5(2) that it should be an unfair industrial practice for an employer 'to dismiss, penalise or otherwise discriminate against a worker by reason of his exercising any such right'. Section 5 of the 1971 Act was the subject of decision by the Court of Appeal in *Crouch v Post Office* [1973] 3 All ER 225, [1973] 1 WLR 766, affirmed by the House of Lords sub nom *Post Office v Union of Post Office Workers* [1974] 1 All ER 229, [1974] 1 WLR 89. Both sides were agreed that the inclusion of the words 'as an individual' in s 53(1) of the 1975 Act was a legislative response to the decision in *Crouch's* case and no other explanation suggests itself.

Mr Crouch was employed by the Post Office, which had recognised the Union of Post Office Workers (the UPW) as the only union with which it would negotiate wages and conditions. Mr Crouch was a local branch organiser of a much smaller union, the Telecommunications Staff Association (the TSA), which, unlike the UPW, was registered under the 1971 Act. The Post Office refused to allow Mr Crouch to carry on his organisational activities as a branch officer on its premises. Mr Crouch complained to an industrial tribunal that the Post Office was guilty of an unfair industrial practice in that it had discriminated against him by reason of his exercising his right conferred by the 1971 Act to take part in the activities of his union. The industrial tribunal substantially upheld this complaint. The National Industrial Relations Court reversed this decision, holding among other things that such discrimination as there was had been against the TSA and not against Mr Crouch 'as a worker'. The Court of Appeal rejected this reasoning. All three members of the court concluded that by discriminating against the TSA the Post Office discriminated against every member of it, including Mr Crouch. The Post Office appealed against that decision to the House of Lords, but unsuccessfully. In a speech with which the other members of the House (subject to one minor reservation) agreed, Lord Reid said ([1974] 1 All ER 229 at 238, [1974] 1 WLR 89 at 97-98):

'It was argued that here any discrimination is against the TSA and not against Mr Crouch personally. But discrimination against a man's trade union generally affects him personally. The prejudice to the man himself may be so small as to be negligible. But where it is substantial and a necessary consequence of the discrimination against the trade union and this must have been known to the employer the employer has in fact so acted as to worsen the man's position in comparison with that of a man in another union against which there has been no discrimination. That appears to me to be well within the mischief against which this provision is directed and to come within its terms. Then it was argued that there was no discrimination against Mr Crouch because it is the policy of the Post Office to favour the UPW in order to promote good industrial relations and that they were entitled and indeed bound to do. I cannot see that it matters why they preferred members of one union to those of another. If what they in fact did made Mr Crouch worse off than members of the UPW then they were not entitled to do it. Then it was said that any discrimination against Mr Crouch was not against him in his capacity as a person working under a contract of employment (relying on the definition of "worker" in s 167). I am not sure that I understand the argument and the definition is obscure. I think the distinction sought to be relied on was between a man in his capacity as an employee and in his capacity as a trade unionist. But that will not square with the terms of s 5(2)(b). What this provision forbids is discrimination by reason of the man exercising his rights under sub-s (1) and one at least of these rights is given to him not as an employee but as a member of a trade union.'

So Mr Crouch succeeded. His position was a strong one, since the Post Office had in a rather obvious way discriminated against him by reason of his seeking to exercise his

a right to take part in the activities of his union as local branch organiser. It would, however, follow from the reasoning of the Court of Appeal and the House of Lords that Mr Crouch would have been entitled to succeed even if his only claim had been as a member of a union which had been discriminated against.

b The purpose of including the words 'as an individual' in s 53(1) of the 1975 Act and then in s 23(1) of the 1978 Act was, as I infer, to make plain that the action (short of dismissal) of which an employee is entitled to complain must be taken by his employer against him as an individual and that he cannot complain of action which only affects him in his capacity as a member of an organisation or body which is the subject of action. It is to exclude indirect or derivative complaints.

c The board drew a distinction between action directed against the appellants and action which merely affected them, and urged that the purpose of these words was to exclude action where the true context of the action was collective. Reliance was placed on an authoritative statement of the late Mr Jon Harvey QC in his work on *Industrial Relations and Employment Law* (para I [1033]):

'... the individual cannot complain if he is wounded in what is a genuine collective engagement; but he can complain if the employer tries to pick him off by sniper fire.'

d The EAT substantially accepted this submission. It said:

e 'It is clear that Parliament was intending to make a distinction between action taken against the union and therefore its members on the one hand, and action taken against individuals who happened to be members of the union on the other. In this case it is clear that the action was being taken by the board against the NUM. It undoubtedly affected the [appellants] as individuals, but on a proper construction of the language it does not seem to us that it can be said that it was action being taken against them as individuals. It was action which affected them as members of the union, which is quite different. The contrast with the previous statutory provisions and with the decision in *Crouch's* case is quite marked. The industrial tribunal took the view that because it was action which affected the individual it was therefore action taken against the individual. We think on the proper construction of the section that is wrong in law. This was an action taken against the NUM which affected all their members at Ellistown. It was the result of an agreement made between the board and the UDM and the failure of the board to come to an agreement with the NUM. Effectively it was the result of a dispute between the NUM, the UDM and the board. It was not as a result of a dispute between the board and either of the [appellants].'

g The EAT then quoted the passage from *Harvey* that I have quoted, and concluded that what the board did in relation to the NUM was not action taken against either appellant as an individual.

h While synonym and metaphor may of course be valuable in illuminating the meaning of an obscure phrase or provision, there is a danger in straying very far from the language which Parliament has used to express its meaning, the more so when that is simple and familiar language. That is the case here. The expression 'against him as an individual' is not difficult to understand. The questions to be asked by the tribunal here were twofold: (1) is the action (assuming it to be such) complained of capable in law of being regarded as taken against this applicant 'as an individual'? (2) if so, is it on all the facts correct so to regard it?

j The tribunal duly posed and answered the first of these questions. They said:

'The second question we ask ourselves therefore is: can the omission to pay a wage increase to a group, in this case NUM members, be capable in law of amounting to

action taken against the employee as an individual? The applicants' own wages are affected by the decision to pay the other group, doing the same work, more. In our view the action taken, although against a group, was also directed against the individual applicant as an individual. It follows that the second question we have asked must be answered in the affirmative.' a

Save that I would myself have been inclined to identify the relevant action as the withholding of the pay increase from the appellants, I find no error in the question or the answer of the tribunal. The non-payment being admitted, the tribunal did not consider the second question at length, but concluded that the board's omission to pay the appellants the rise in wages that they paid to UDM members was directed against and affected the individual appellants. Again, I find no error. The loss of money from their pay packets which the appellants suffered was not something which affected them only in their capacity as members of an organisation or body which was the subject of action. It was a direct loss to them as individuals. Their complaint was not indirect or derivative. Whatever the context, the deliberate withholding of wages from a man's pay packet can in my view be quite properly regarded as action taken against him as an individual, and that was plainly the view which the tribunal took. It again seems to me to be entirely consistent with the approach of Slyn J in *Carlson v Post Office* [1981] ICR 343. It is with diffidence that I take a view different from the EAT and from May LJ, but I do not think the tribunal erred. b
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d

3. 'For the purpose': the facts

The tribunal drew the inference that the board's purpose in omitting to pay UDM rates to the appellants was to penalise the appellants because of their membership of the NUM by putting them at a disadvantage compared with the UDM members at Ellistown. The board attacked this conclusion before the EAT as being perverse. The EAT said: '... we cannot possibly interfere with it on the ground that it is perverse.' e

Recognising the difficulty of persuading this court to brand as perverse a conclusion of fact reached by one expert tribunal and held not to be perverse by another, the board in this court put their criticism of the tribunal's factual conclusion primarily on the ground of misdirection. f

First, it was said that the tribunal had never really considered the board's basic contention that they were trying to settle the negotiations with the UDM on the best terms possible and had erred in asking a series of questions which the evidence did not provoke. I could not, given the obvious care which the tribunal gave to this case, conclude that the most careful thought had not been given to all the board's evidence and contentions. But I do not think it in any way concludes this point in the board's favour if they were trying to settle the negotiations with the UDM on the best terms possible. According to a finding of the tribunal which the board do not criticise, the UDM complained at the emergency meeting held on 26 January 1986 that they were not getting the favouritism they deserved. In other words, they wanted to be singled out for preferential treatment as compared with NUM members. The board could well have decided to settle with the UDM by conceding such preferential treatment at Ellistown. I do not regard the tribunal's conclusion as inconsistent with the board's contention. g
h

Secondly, it was said that the tribunal had wrongly drawn an inference hostile to the board from the board's failure to discharge the limited onus imposed on them by s 25(1)(a) of the 1978 Act. I think this is a misreading of the decision. The tribunal held that it was for the board to show the purpose for which the action was taken against the appellants. Being dissatisfied with the board's evidence, the tribunal held that the board had failed to discharge that onus. The tribunal did not draw an inference against the board because of that failure, but the failure did oblige the tribunal to draw whatever inference they thought right on all the evidence and it so happened that the inference they drew was adverse to the board. I trace no hint of misdirection in the tribunal's j

a reasoning and the inference which they drew was (as it seems to me) plainly open to them.

Thirdly, it was said that the tribunal approached the crucial question in a biased way by asking the loaded question what was the purpose of the board's decision to depart from the policy of even-handedness instead of simply asking what was the board's purpose in taking the action they did. It is true that a question in the latter form would have followed more closely the language of the 1978 Act, but the tribunal had the object of their inquiry plainly in mind. I agree with the EAT that what the tribunal were really asking was: what was the purpose in January 1986 of now paying to the UDM members the increase and of not paying it to the NUM members? The tribunal were simply using 'even-handed policy' as a shorthand way of referring to the traditional practice of paying all employees doing the same job at the same rate. It would not in my view be fair to infer that the tribunal put the question in a tendentious way because they had already formulated or wished to justify an answer adverse to the board.

c I agree with the EAT and with May and Nichols LJ on this issue.

4. *'An independent trade union'*

d The longest and (to my mind) most difficult issue in this appeal concerned the correct construction of the words 'preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so'. The difference between the parties on this point was fundamental, although not altogether easy to state. It is convenient to begin by indicating the common ground. The appellants and the board were agreed that ss 23(1)(a) and 24 of the 1978 Act give a remedy to an employee who has action short of dismissal taken against him by an employer whose purpose is to prevent, deter or penalise, in a general way, membership of any independent trade union whatsoever. Thus an employer moved by antipathy to any manifestation of independent trade unionism who gives effect to that antipathy by taking action for one of the specified purposes will be liable to compensate an employee individually affected by that action. An employer whose attitude is that he will have no truck with independent trade unionism in his works cannot with impunity translate his thoughts into deeds vis-à-vis his employees. So much the parties agree. But, in the submission of the board, that is the limit of what s 23(1)(a) proscribes. Provided the employer is not hostile to independent trade unions generally, he is (they submit) entitled to take action to prevent or deter an employee from being or seeking to become a member of a particular independent union to which the employer is for any reason antipathetic and may with impunity penalise an employee who is or seeks to become a member of such a union. So long as he is not hostile to independent unions generally, an employer may (the board submitted) reflect in his deeds vis-à-vis his employees a determination to have no members of a specific independent union or unions in his works. This submission the appellants radically challenge. They argue that on a fair and sensible reading sub-s (1) proscribes not only action reflecting a general hostility towards independent trade unions but also action reflecting hostility towards specific or particular trade unions. The relevance of this divergence in the present case is clear: it could not be said that the board were hostile to independent trade unions generally, as their relations with the UDM and other independent unions showed; but it could be said, and the tribunal found, that the board did on this occasion wish to penalise members of a specific union, the NUM.

Both sides submitted that the first impression made by s 23(1) was in accordance with the construction which they advanced. I am not sure that this is a helpful approach. First, after poring over a legislative provision for some days it is not easy to recall with accuracy the impression which it made on one's fresh and untutored mind. Secondly, while I agree that sub-s (1) does immediately convey an impression of being general in its scope, that does not advance the argument because the parties are agreed that it does have that general scope. The point at issue is whether the subsection extends further, from the general to the particular, and that involves the asking of further questions which will not

be reliably answered by first impression. The only proper course is to seek to give effect to the intention of Parliament as expressed in s 23(1) by eliciting the natural and ordinary meaning of the words used in the context of the 1978 Act as a whole, bearing in mind so much of the background as may properly be taken into account. a

Both sides made extensive reference (as did the EAT) to the legislative history of s 23(1)(a) of the 1978 Act and related provisions. Since the 1978 Act is a consolidating Act, there may be some doubt whether this is appropriate (see *IRC v Joiner* [1975] 3 All ER 1050 at 1056–1058, [1975] 1 WLR 1701 at 1707–1709). But no objection was taken to this course, and I do not think that the words we have to construe are, as they stand, wholly clear. Some help is in my view to be gained from the preceding legislative history. Having read and listened to the written and oral argument on both sides, and despite the contrary conclusion reached by the EAT, I prefer the construction put on s 23(1) by the appellants. My reasons are these. b

(1) A statutory right to belong to and take part in the activities of a trade union was first conferred by s 5(1) of the 1971 Act, which provided (so far as relevant); c

‘Every worker shall, as between himself and his employer, have the following rights, that is to say,—(a) the right to be a member of such trade union as he may choose . . . (c) where he is a member of a trade union, the right, at any appropriate time, to take part in the activities of the trade union . . .’ d

Consistently with the fundamental scheme of the 1971 Act ‘trade union’ meant a trade union registered (or provisionally registered) under the Act, but it is plain that Parliament intended to confer a substantial right and it gave the employee, as between himself and his employer, an unfettered choice of trade union. The protection of this right was covered by s 5(2): e

‘It shall accordingly be an unfair industrial practice for any employer . . . (a) to prevent or deter a worker from exercising any of the rights conferred on him by subsection (1) of this section, or (b) to dismiss, penalise or otherwise discriminate against a worker by reason of his exercising any such right . . .’

The 1971 Act was wholly repealed by the 1974 Act, but certain of its provisions were re-enacted. Section 5(1) of the 1971 Act was not re-enacted. Nor, in terms, was s 5(2). But an employee’s right not to be unfairly dismissed was preserved, and para 6(4) of Sch 1 to the 1974 Act contained this provision: f

‘. . . the dismissal of an employee by an employer shall be regarded as having been unfair if the reason for it . . . was that the employee—(a) was, or proposed to become, a member of an independent trade union; (b) had taken, or proposed to take, part at any appropriate time in the activities of an independent trade union . . .’ g

It was here that the words to be construed in this appeal made their first statutory appearance. No detailed argument was devoted to the 1974 Act at the hearing before us, but I do not think the parties would, or logically could, contend that the correct construction of s 23(1)(a) of the 1978 Act would not apply to these words also. So in seeking to determine the effect of the 1974 Act the choice is clear. On the appellants’ construction, the effect was to remove an employee’s express right to membership of and participation in the activities of the union of his choice but to protect him against dismissal for membership of or participation in the activities of his chosen union. On the board’s construction, the effect was to remove the employee’s express right and to protect him against dismissal for membership of or participation in the activities of his chosen union only where the employer was moved by a general antipathy to trade unionism which, because of its generality, embraced the employee’s chosen union. The appellants’ is in my judgment the more acceptable construction. There is no ground for saying that the wish of employees to be members of and participate in the activities of independent unions of their choice formed any part of the mischief at which the 1974 Act was aimed. h
j

(2) What is now s 23(1)(a) of the 1978 Act was first enacted as s 53(1)(a) of the 1975 Act. It has not been amended since its first enactment in 1975 and its meaning now must be the same as it was then. I have already commented on the general terms in which s 23(1)(a) (or s 53(1)(a)) is drawn. It is usually appropriate to treat the general as comprehending the particular unless there is some reason why it should not. I see no such reason here. It is accepted that s 23(1) proscribes general manifestations of anti-trade unionism. Such general manifestations must therefore be regarded as undesirable. I do not understand why manifestations of hostility towards a particular trade union (in the absence of a general hostility) should be regarded as any less undesirable or any less worthy of proscription. This is a section concerned with employees' rights, and it does not seem likely that a general right to be an active trade unionist would be of much value to an employee if he could not join and take part in the activities of his chosen union. The board's construction would allow an employer to penalise an employee because he was a member of a particular union but not because he was (in general) a trade unionist. I cannot think that that was where Parliament intended to draw the line. It would involve industrial tribunals called on to decide s 23(1)(a) claims in deciding whether an employer's antipathy was towards trade unionism generally or towards a particular union or unions. This would not seem a very fruitful exercise, least of all from the employee's point of view.

(3) If one concentrates on the parts of s 23(1)(a) which have a prospective quality, the board's construction has some plausibility. Thus, in so far as s 23(1)(a) debar an employer from taking action against an employee for the purpose of 'preventing or deterring him from . . . seeking to become a member of an independent trade union, or penalising him for doing so', the board's construction is not altogether inapt. It is, however, as I think, less apt if applied to the remaining words of sub-s (1)(a) of s 23 which debar an employer from taking action against an employee for the purpose of 'preventing or deterring him from being . . . a member of an independent trade union, or penalising him for doing so'. (There is, I think, a grammatical solecism here, but neither party drew attention to it, and the case has throughout proceeded on an assumption shared by all that an employer may not penalise an employee for being a member of an independent trade union.) I find no warrant in the statutory words for inferring that an employer's conduct in penalising an employee for being a member of an independent trade union is only proscribed if the employer is motivated by hostility to trade unionism in general.

(4) Section 23(7) of the 1978 Act provides:

'In this section, unless the context otherwise requires, references to a trade union include references to a branch or section of a trade union.'

It was not suggested that the context of s 23(1)(a) otherwise required. The result, on ordinary principles of statutory construction, is that the reference in s 23(1)(a) to an independent trade union should be understood as if there were added 'or a branch or section thereof'. An employer may not, therefore, penalise an employee for being a member of an independent trade union or a branch or section thereof. This reading, I think, fortifies the inference that the subsection is not confined to proscribing general manifestations of hostility to trade unionism and particular manifestations of a general hostility.

(5) Section 23(1)(b) is concerned not with union membership but with union activities. To that extent its subject matter is different from that of s 23(1)(a). But much of its language is common: ' . . . preventing or deterring him from . . . of an independent trade union . . . or penalising him for doing so.'

Plainly the construction of the two subsections must for present purposes be the same. The contrary was not, I think, suggested. An employer may not under sub-s (1)(b) penalise an employee for taking part in the activities of an independent trade union or any branch or section thereof. For reasons already given I think it would be strange if this were to be

read in the limited way for which the board contended. An employee cannot take part in activities unless they are activities of a particular union. a

(6) The unfair dismissal provisions of the 1974 Act, which I have set out in part in (1) above, were re-enacted in exactly the same terms in s 58(1) of the 1978 Act. The language is also close to that of s 23(1)(a) and (b) and both parties accepted that the same construction must apply to both sections. The expression 'trade union' was again to include reference to a branch or section. The difficulties and improbabilities which, as I think, arise on the board's construction arise here also. But there is here an additional pointer towards the correctness of the appellants' construction. Section 77(1) of the 1978 Act provides: b

'An employee who presents a complaint to an industrial tribunal that he has been unfairly dismissed by his employer and that the reason for the dismissal (or, if more than one, the principal reason) was that the employee—(a) was, or proposed to become, a member of a particular independent trade union; or (b) had taken, or proposed to take, part at any appropriate time in the activities of a particular independent trade union of which he was or proposed to become a member; may, subject to the following provisions of this section, apply to the tribunal for an order under the following provisions of this section.' c

Later subsections provide for verification of the employee's allegations by an official of the independent trade union in question and authorise an industrial tribunal to give interim relief if the employee's application appears to the tribunal to be likely to succeed. Since paras (a) and (b) of s 77(1) reproduce paras (a) and (b) of s 58(1), there can be no doubt that s 77 harks back to the earlier s 58, as a 1982 amendment has made explicit. It follows that s 58(1)(a) and (b), and therefore s 23(1)(a) and (b), can be relied on where an employer penalises or dismisses an employee because of his membership of or participation in the activities of a particular independent trade union. The board accept this, as they must, but insist that the employer's conduct is only proscribed where his opposition to the particular union is an expression of his general opposition to all trade unions. I do not find this argument convincing. d

(7) It is not hard to think of areas of industrial life in which, for a particular grade of employee, there is only one effective union. The appellants argued that the board's construction would enable an employer, by preventing or penalising membership of that union, to deprive employees of that grade of any effective trade union representation. The board's answer was that in such a case the employer would in all probability be found to be hostile to trade unionism generally. I do not think that such a result would necessarily follow. The employer might well be able to show that many other grades of his employees were organised in independent trade unions with whom his relations were entirely amicable. But I do think that the board's resort to this rather unpersuasive answer underlines the fallacy of their construction. e

(8) The decision on this issue cannot rest on previous authority alone, but the appellants' construction gains some support from the only decision on s 23(1) that there is, *Carlson v Post Office* [1981] ICR 343, a reserved decision of the EAT in which judgment was delivered by Slynn J. Mr Carlson, a Post Office employee, was a member of a minority union not recognised by the Post Office. He applied for and was refused a parking space. The industrial tribunal found as a fact that Mr Carlson was so refused because he was a member of this union. In the course of his judgment, which dealt with other questions also, Slynn J said (at 347): f

'What has to be found for there to be a breach is that the purpose of the action taken is to penalise an individual for membership of a particular union.' g

The board's present argument, if correct, would have been a complete answer to the claim. It appears that the argument was either not advanced, or was advanced and rather summarily rejected. The board submitted that this case was wrongly decided and instead relied on *Rath v Cruden Construction Ltd* [1982] ICR 60, an EAT decision in which the h

judgment was given by Browne-Wilkinson J. That decision was on s 58(1)(a), but is by analogy directly relevant. Mr Rath was a member of the Union of Construction, Allied Trades and Technicians (UCATT), an independent trade union. He was (he said) pressed, but refused, to transfer to another independent union, the Transport and General Workers Union [the TGWU]. He was dismissed and claimed that he had been unfairly dismissed. Certain observations early in the judgment seem to be unhelpful to the board. For example, the judge said (at 62):

‘Only if the reason for the dismissal was that the employee was a member of UCATT would the claim fall within section 58(1)(a).’

And again (at 62):

‘We therefore think that when one approaches section 58(1)(a), one has to consider whether the real reason for the dismissal was the existing membership of UCATT, or the refusal to join the [TGWU]. If the real reason for the dismissal was that [Mr Rath] was a member of UCATT, his claim will succeed; but if the real reason for dismissal was his refusal to join an independent trade union, namely, the TGWU, his claim will not succeed.’

But later there occurs this passage on which the board strongly rely (at 62):

‘It is common ground in this appeal tribunal that the purpose of section 58(1)(a) was to protect an employee against dismissal by an employer who objected to any union membership amongst his workforce. It was not directed towards inter-union disputes as to rivalries between two independent trade unions. In those circumstances, it does not seem to us over-artificial to analyse exactly what was the reason for dismissal so as to discover whether it was the existing membership of one union or the refusal to transfer to a different union.’ (Browne-Wilkinson J’s emphasis.)

Since this passage is based on a concession it is of limited authority. Since, furthermore, it was clear to the EAT on the facts that the reason for Mr Rath’s dismissal could not have been his existing membership of UCATT, the present point did not fall for decision. I think it plain that ss 23(1)(a) and 58(1)(a) are directed towards safeguarding the rights of employees and not (I respectfully agree) ‘towards inter-union disputes as to rivalries between two independent trade unions’, but that is not the real point at issue. I do not regard *Rath’s* case as persuasive authority on the present question, and if a choice between *Carlson’s* case and *Rath’s* case is called for I prefer the earlier decision (which does not appear to have been cited on the later occasion, understandably in the circumstances).

I shall not attempt to review all the arguments advanced by the board in favour of their construction and against the appellants’, but I should briefly say why I do not accept some of the more significant of their arguments.

(1) It was pointed out that the right to take part in union activities, first enacted in para (b) of s 53(1) of the 1975 Act and re-enacted in para (b) of s 23(1) of the 1978 Act, was in both Acts limited to what may be loosely called closed shop unions where there was a closed shop agreement in force. Why, ask the board, should there not be a similar limitation of ss 53(1)(a) and 23(1)(a) if the appellants’ construction were right? If I am right that sub-ss (1)(a) and (1)(b) should prima facie bear the same meaning, the closed shop limitation of sub-s (1)(b) is in my view somewhat damaging to the board’s construction. But I do not think that the different treatment of the right to membership and the right to take part in activities poses any problem. Sections 53(1)(b) and 23(1)(b) are concerned, although they do not say so, with union activities on the employer’s premises. As Lord Denning MR trenchantly observed in *Crouch v Post Office* [1973] 3 All ER 225 at 230, [1973] 1 WLR 766 at 773, referring to the predecessor of this subsection:

‘The Industrial Court, as I understand, have held that a worker has no such right when he is on the premises of the employer. He only has that right, they say, when

he is at home or in some premises not occupied by his employer. All I would say is that, if that is the only right given by the section, it gives him nothing. It did not need a statute to tell a worker that, when off the employer's premises, he can take part in any activities that he likes.' a

It does not seem surprising that an employee's right to take part in trade union activities on his employer's premises should be excluded where the employer has made a closed shop agreement and the union in question is not one of the closed shop unions. But membership is different. It requires nothing of the employer except a lack of action to prevent, deter or penalise membership. Compulsion to join a closed shop union is the subject of a different code. I see no anomaly here. b

(2) The board drew attention to a number of instances in which reference had been made in this legislation to 'a particular trade union' and argued that where Parliament had intended a provision to have this meaning it said so expressly. There are three answers to this. c

(a) Parliament did not intend the subsection at issue to have this meaning. It intended it to cover the general as well as the particular.

(b) The first reference to 'a particular trade union' was in para 6(5) of Sch 1 to the 1974 Act. This provided that dismissal of an employee should be fair if he refused to become or remain a member of a closed shop union— d

'unless the employee genuinely objects on grounds of religious belief to being a member of any trade union whatsoever or on any reasonable grounds to being a member of a particular trade union, in which case the dismissal shall be regarded as unfair.'

The purpose of that reference is, I think, quite clear, but this language did not reappear in the 1978 Act, and (I think) neither the 1975 nor the 1978 Act contained any reference to a particular trade union. I do not therefore think that any contrast of statutory language can be based on the Act the court now has to construe. e

(c) The other references occur in amendments made by the 1982 Act. I do not think that these references are a reliable (even if they are an admissible) guide to construction of a provision enacted in 1975 and reproduced in a consolidating Act in 1978. f

(3) Particular reliance was placed by the board on amendments to s 23(1)(c) and corresponding amendments to s 58(1)(c). Since these amendments were made in 1982, I doubt their significance, for reasons just given. But I do not think they give the board much help anyway. As enacted in 1975 and re-enacted in 1978 ss 53(1)(c) and 23(1)(c) gave an employee the right not to have action short of dismissal taken against him for the purpose of 'compelling him to be or become a member of a trade union which is not independent'. There was a conscience exemption, but subject to that an employer could take action short of dismissal to compel an employee to become a member of an independent trade union. Thus the employee was not to be compelled to join a non-independent (ie employer-dominated) union, a right which was no doubt beneficial to him but was also of obvious benefit to the independent unions. The 1980 Act deleted the words 'which is not independent'. This apparently innocuous amendment altered the whole thrust of the provision. The employee gained a potentially much more important right, ie not to be compelled to join any trade union at all, whether independent or not. The provision was no longer beneficial, and may even have become unwelcome, to the independent unions. The 1982 Act deleted 'a trade union' from s 23(1)(c) and substituted 'any trade union or of a particular trade union or of one of a number of particular trade unions'. Whether this amendment altered the effect of that provision I rather doubt. It is, however, noteworthy that a corresponding amendment was made to s 58(1)(c). This last amendment would have had the effect of reversing the decision in *Rath's case* [1982] ICR 60, and enabling him to succeed, on the assumption that the reason for his dismissal was his refusal to join the TGWU. It seems to me at least possible that, a need to amend g
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s 58(1)(c) having been detected, a corresponding amendment was made to 23(1)(c), but one cannot of course be sure.

- a (4) The board contended that the appellants' construction gave rise to an anomaly. Under the 1974 and 1978 Acts an employee in a closed shop could (subject to the conscience clause) be fairly dismissed if he refused to become or remain a member of the closed shop union. Under the 1975 and 1978 Acts the employee's rights under ss 53(1)(b) and (c) and 23(1)(b) and (c) were similarly limited in a closed shop. It was, said the board, b anomalous if an employee's rights were as the appellants contended under ss 53(1)(a) and 23(1)(a) and remained unaffected by the closed shop; if, as the board argued, the right under ss 53(1) and 23(1) was a general one only, there was no anomaly since an employer who had made a closed shop agreement could not in any general way be hostile to trade unions. This is an elaboration of the first argument already considered but again there is in my judgment no anomaly. The rule underlying these provisions is, as I have suggested, c that the employer should not intervene to prevent, deter or penalise trade union membership or activity. That rule requires some modification where there is a closed shop, but no modification of these subsections (ss 53(1) and 23(1)) is called for. If the union which an employee wants to join or remain a member of is a closed shop union, there is of course no problem. If it is not, but membership of that union can be combined with membership of a closed shop union, there is again no problem: it is a matter for the employee and the unions concerned. If membership cannot be combined, the employee d may be at risk if he does not join the closed shop union, but that is a matter for him and perhaps for the two unions. There are well-known procedures for resolving inter-union disputes of this kind. I do not think it surprising if, even in this situation, Parliament thought it undesirable for the employer to intervene to prevent, deter or penalise e membership of the non-closed shop union. Dismissal for such a purpose would not be automatically fair either.

For all these reasons I would allow the appellants' appeal and dismiss the board's cross-appeal.

Appeal allowed. Cross-appeal dismissed. Leave to appeal to the House of Lords refused.

- f Solicitors: *Seifert Sedley Williams* (for the appellants); *C T Peach* (for the board).

Carolyn Toulmin Barrister.

Practice Note

QUEEN'S BENCH DIVISION
LORD LANE CJ
14 OCTOBER 1987

Practice – Admiralty and Commercial Court Registry – Administrative arrangements – Court file – Issue of process – Filing of documents – Interlocutory applications – Orders, decrees and judgments – Judgment by default – Applications to masters – Listing – Setting down for trial – RSC Ord 35, r 10 – RSC (Amendment) 1987.

LORD LANE CJ issued the following direction at the sitting of the court with the concurrence of the Admiralty Judge (Sheen J) and the judge in charge of the commercial list (Hirst J).

1. RSC (Amendment) 1987, SI 1987/1423, the relevant provisions of which come into force on 2 November 1987, provide for the creation of an Admiralty and Commercial Court Registry. This direction gives details of the new administrative arrangements.

2. *Administrative structure*

The new registry will combine the Admiralty Registry and the Commercial Court Listing Office and, in addition, will take over all work on Commercial Court cases previously carried out in the Central Office. While all process will need to show whether the case is proceeding in the Admiralty Court or the Commercial Court, there will be a continuous run of numbers for all originating process, one cause book and a common court file and filing system.

3. *The court file*

A court file will be maintained for each case. The documents relevant to a particular case will be kept on the file, including the originating process, acknowledgment of service, notices of change of solicitors, summonses, affidavits, pleadings and orders. The Admiralty Registry and, in some cases, the judges may make their notes of any interlocutory matter on the file. The file will normally be kept in the registry, but it will be sent to a judge or the registrar when required by him. It will be available in court on the trial of any action or interlocutory application.

4. *Issue of process*

All originating process in the Admiralty Court and Commercial Court, that is writs, originating summonses and originating motions, will be issued in the registry. Fees will continue to be paid to the Supreme Court Accounts Office.

5. *Filing of documents*

Documents in Commercial Court proceedings will not be accepted for filing in room 81 after 30 October 1987. All affidavits filed in room 81 up to and including 30 October 1987 will be retained there.

On the first interlocutory application made in any Commercial Court case on or after 2 November 1987 a full set of such pleadings as have been served must be lodged in the registry together with all affidavits in the proceedings previously filed in room 81. These will be retained on the court file. Exhibits to affidavits will normally be returned to the parties.

6. *Interlocutory applications in Commercial Court proceedings*

There will be no change in the current procedure. Parties will continue to draw any

order from the judge's indorsement. The order should be presented to the registry for issue and entry.

7. Interlocutory applications in Admiralty proceedings

Orders will be drawn by the parties and should be presented to the registry for checking against the registrar's or judge's note and for issue and entry.

8. Orders, decrees and judgments in Admiralty and commercial proceedings

A certificate under RSC 35, r 10 will be issued by the court in appropriate cases and entered on the file.

9. Judgment by default in commercial actions

All applications for judgment by default should be presented to the registry with the appropriate supporting documents. It is not necessary to produce a certificate of non-acknowledgment of service.

10. Applications to masters in Commercial Court matters

Applications in Commercial Court matters which are at present dealt with by Queen's Bench masters, e.g. applications for charging orders, should be made in the registry and dealt with where possible by the Queen's Bench master disposing of Admiralty matters or as the Senior Master may direct.

11. Listing

Listing of Admiralty and commercial cases will be co-ordinated in the registry.

12. Setting down for trial

All Admiralty and Commercial Court matters will be set down in the registry.

N P Metcalfe Esq Barrister.

R v Gold

R v Schifreen

COURT OF APPEAL, CRIMINAL DIVISION

LORD LAKE CJ, LEONARD AND ROSE JJ

29, 30 JUNE, 20 JULY 1987

Criminal law – Forgery – False instrument – Hacking – Use of electronic impulses to gain unauthorised access to computer databank – Impulses briefly stored in system while checked by computer – Whether electronic impulses a ‘device’ – Whether hacking involving use of false ‘instrument’ – Whether hacking amounting to forgery – Forgery and Counterfeiting Act 1981, ss 1, 8(1).

The appellants gained entry to a computer databank by ‘hacking’, ie illegitimately and without payment keying in electronic impulses in the form of customer identification numbers and passwords to the ‘user segment’ of the databank where those impulses were checked and verified before admitting the appellants to the database. The appellants were charged with, and convicted of, contravening s 1^a of the Forgery and Counterfeiting Act 1981 by making a ‘false instrument’ with the intention of using it to induce the computer to treat it as genuine to the prejudice of the company operating the system by allowing the appellants unauthorised access to the database. The appellants appealed, contending that they had not made a ‘false instrument’ as defined by s 8(1)^b of the 1981 Act, since they had not made a ‘device on or in which information is recorded or stored by ... electronic or other means’.

Held – Although s 8(1) of the 1981 Act extended the protection of the law of forgery to electronic methods of creating false information or instructions which were recorded or stored for further use, the electronic impulses keyed in by the appellants in the course of hacking were not a ‘device’ of the type covered by s 8(1) and so could not found a charge of forgery. Furthermore, the user segment of the databank was not such a ‘device’ within the ambit of forgery and the information which was received from the appellants, held for a moment while automatic checking took place and then expunged was not ‘recorded and stored’ within s 8(1). Accordingly, ‘hacking’ did not involve the use of a false ‘instrument’ within s 8(1) and the appeals would therefore be allowed (see p 621 j, p 622 g to j and p 623 b, post).

Notes

For forgery and the meaning of ‘false instrument’, see Supplement to 11 Halsbury’s Laws (4th edn) paras 1326–1375.

For the Forgery and Counterfeiting Act 1981, ss 1, 8, see 12 Halsbury’s Statutes (4th edn) 820, 827.

Appeals

Stephen William Gold and Robert Jonathan Schifreen appealed against their convictions on 24 April 1986 in the Crown Court at Southwark before his Honour Judge Butler QC and a jury of forgery, in contravention of the Forgery and Counterfeiting Act 1981, for which Gold was fined £150 on each of four counts, with 14 days’ imprisonment in default and ordered to pay £1000 towards the prosecution’s costs, and Schifreen was fined £150 on each of six counts, with 14 days’ imprisonment in default and ordered to pay £1000 towards the prosecution’s costs. The facts are set out in the judgment of the court.

^a Section 1 is set out at p 620 d, post

^b Section 8(1), so far as material is set out at p 620 e, post

Colin Nicholls QC and Alistair Kelman (both assigned by the Registrar of Criminal Appeals) for the appellant Gold.
Stephen Mitchell QC and Andrew Hochhauser (both assigned by the Registrar of Criminal Appeals) for the appellant Schifreen.
Michael Kalisher QC and Austen Issard-Davies for the Crown.

Cur adv vult

20 July. The following judgment of the court was delivered.

LORD LANE CJ. On 24 April 1986 in the Crown Court at Southwark, these appellants were convicted of contravening the provisions of the Forgery and Counterfeiting Act 1981 (the Act). They were sentenced as follows: Gold, who was convicted on four counts, was fined £150 on each with 14 days' imprisonment on each in default, and ordered to pay £1,000 towards the prosecution costs; Schifreen, who was convicted on six counts, was fined £150 on each with the same term in default, and the same order was made with regard to costs. They now appeal against both conviction and sentence.

The case involved the unauthorised access gained into the British Telecom Prestel computer network between October 1974 and January 1985 by these appellants, who are what is known as computer 'hackers'. This is said to be the first occasion on which this kind of activity has been made the subject of charges under the Act.

The nine counts in the indictment were specimens. Save for the date and the particular computer involved, each count was similar, alleging, as it did, that the appellant in question 'made a false instrument, namely a device on or in which information is recorded or stored by electronic means with the intention of using it to induce the Prestel computer to accept it as genuine and by reason of so accepting it to do an act to the prejudice of British Telecommunications plc'.

There is little, if any, dispute about the factual background to the case. Some description of it is necessary in order to understand the way in which the appellants went about their activities.

Prestel is an information system which allows people who have the necessary micro-computers to call up a computer database and to receive information therefrom. Access to the Prestel computer is by way of the British Telecom telephone system. When the computer's number is dialled, the telephone system connects the dialler to the appropriate Prestel centre. In order legitimately to obtain information from the Prestel data base, it is necessary to register as a user by filling in an application form and paying a rental charge. Once that is done, the user is allocated an identity number consisting of ten numerals and also a password. The user has, as part of his equipment, a television screen and a key-board. After he has become connected to the particular Prestel computer which he has dialled, a picture appears on his television screen inviting him to 'log on'. He then types in his customer identification number (cin). That is verified by the computer. Next the user types out his password, which is also verified by the computer. If the computer has been able to match up the cin and the password with the user information which it has in its memory, the user is then admitted to those parts of the Prestel database which he has been authorised to use. He can then type out his request for information on his key-board.

In order to understand the nature of the charges, it is necessary to examine in a little more detail the procedure whereby the computer verifies the cin and the password. When the user telephones the computer, the call is answered by a device called a 'port'. A 'port' is analogous to a doorway into the system. There is one 'port' for each telephone line. The 'port' tells the computer that a new call has been made and that the user needs to be shown the logging frame. The logging frame is then shown to the user on his television screen. The user then types out his cin. This passes down the telephone line as a series of electronic impulses. There is a part of each computer which is reserved for

dealing with the input and output and the control of each 'port'. The cin is received in a particular area reserved for that 'port' alone. That area is called a 'user segment'. Each user segment has three areas: (1) the input buffer, (2) the control area and (3) the output buffer. The word 'buffer' in this context is used to describe an area in a computer which is used to receive information from, or to transmit information to, the outside world. When the user keys in his cin, that is received in the input buffer and is then immediately moved in the control area and retained there for the duration of the logging procedure. This may be a very brief time indeed.

In order to verify the customer's identity and the password, the user's details must be accessed from the database to determine whether he is a valid user or not. It is the function of the logging procedure to compare the cin with the information already contained in the user file. If there is no cin on the user file which matches that which has been typed in by the user, then the user is given up to three attempts to repeat his cin. The same procedure is then adopted with the password. If those two checks are completed successfully, the user is then allowed into the Prestel computer. After these operations are over, the areas in the user segment that were used for the cin and the password are cleared. Thereafter the input buffer is used to receive the instructions being keyed in by the user and the output buffer is used to show the information which has been requested on the user's terminal.

The relevant provisions in the Act are as follows:

1.—A person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice . . .

8.—(1) . . . in this Part of this Act "instrument" means . . . (d) any disc, tape, sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means . . .

9.—(1) An instrument is false for the purposes of this Part of this Act—(a) if it purports to have been made in the form in which it is made by a person who did not make it in that form; or (b) if it purports to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form . . .

(2) A person is to be treated for the purposes of this Part of this Act as making a false instrument if he alters an instrument so as to make it false in any respect (whether or not it is false in some other respect apart from that alteration).

10.—(1) Subject to subsection . . . (4) below, for the purposes of this Part of this Act an act or omission intended to be induced is to a person's prejudice if, and only if, it is one which, if it occurs . . . (c) will be the result of his having accepted a false instrument as genuine . . . in connection with his performance of any duty . . .

(3) In this Part of this Act references to inducing somebody to accept a false instrument as genuine . . . include references to inducing a machine to respond to the instrument . . . as if it were a genuine instrument . . .

(4) Where subsection (3) above applies, the act or omission intended to be induced by the machine responding to the instrument . . . shall be treated as an act or omission to a person's prejudice . . .

On any view this, if it was a forgery at all, was very unusual form of it. The appellants did not dispute that they had gained access to the relevant Prestel databank by means of a dishonest trick. Their object was not so much to gain any profit for themselves as to demonstrate their skill as 'hackers'. Although they no doubt appreciated that they were in a 'grey area of the law', as one of them said to the police, there is no evidence or likelihood that they suspected that they might be contravening the provisions of the Act.

At the root of the whole case is the question: what was the false instrument which the appellants had made? Or (to expand the question by importing the definition in s 8(1)),

a what was the device (ejusdem generis with disc, tape and sound-track) on or in which information was recorded or stored by electronic means?

Surprisingly, no firm answer to that question appeared until much of the trial was over. No particulars were requested. The first positive inquiry came from the judge, who asked prosecuting counsel during submissions at the close of the prosecution case: 'If I were to say to you, "What is the instrument?", what would you reply?' Counsel replied: 'The answer I would have to give would be, "The user segment".' That is an answer which does not exude great confidence.

b In his ruling on the submissions, the judge had this to say:

c '... the defendants here made a series of electrical impulses which arrive at, affect and operate on what is called a user segment. These impulses are ... recorded or stored, albeit for a limited period only. No doubt nothing can be touched, but that is always inherent in the recording process, and, quite apart from that, by s 9(2) an alteration to an instrument is sufficient and here there was, as I see it, an alteration to a user segment.'

d So there the judge is saying that the appellants made a false instrument by altering the user segment by means of the impulses which they keyed into the system. In his direction to the jury the judge put the matter in this way:

'If you are a member and you put in your own details, of course there is no problem, but, say the prosecution, if you input somebody else's number and password, you have made ... a false instrument. They liken it to making ... a false visiting card ...'

e Then a little later comes this passage:

f 'Now during the "log on" process these electronic impulses have to be held albeit for a very short time indeed in ... the input buffer which is in the user segment and checked for veracity ... by the computer with the information it is already holding ... No doubt it all takes a fraction of a second. So there is made by the caller, say the prosecution, an instrument. By this process, they say, there has been created a device on or in which information is stored by electronic means. Now it is argued on behalf of the defendants that such a construction is wholly artificial and unwarranted. Electronic impulses, they say, cannot be a device on or in which information is stored.'

g Our sympathies are with the judge, faced as he was with the formidable, if not almost impossible, task of putting before the jury fairly, accurately and intelligibly a concept which comes near to defying description. It is scarcely surprising if some confusion is detectable in the passages we have cited between the user segment itself and the electronic impulses which are put into it by the caller, legitimate or otherwise.

What we have to decide is whether the words of the Act are apt to cover what the appellants admittedly did.

h The first and all-important matter which the prosecution had to prove was that the appellants made a false instrument. As already indicated, there were two possible candidates for that role, the electronic impulses and the user segment. Counsel for the prosecution concedes that the judge, albeit understandably, did not make this aspect of the case altogether clear, but submits that since the facts were scarcely in dispute, no harm was done thereby.

j If the device was the electronic impulses then, say the appellants, that cannot found a charge of forgery. First, they are not of the same genus as disc, tape or sound track. Secondly, they are no more than electronic translations of the cin and password and are part of the process of transmission; they are the information which may be recorded or stored; they are not the device on which information is recorded or stored. With those submissions we agree. Counsel for the prosecution does not, as we understand it, dissent.

The other possibility is the user segment. Before us the prosecution based their case on this as being the device which was falsified. Their argument runs as follows. The user segment of the relevant Prestel computer receives the information keyed into it by the caller, and, having received it (ie the cin and password), it retains or stores that information on semi-conductor chips or magnetic cords for the moment of time which is required to verify it against the user files which the computer has in its memory. The falsity, goes the argument, is that specified in s 9(1)(a) or (b), in that the instrument purports to have been made in that form by someone who did not make it or authorise its making. Once the check is successfully completed, the user segment is cleared. For that brief moment during which the user segment records or stores the false information it becomes a false instrument or device. It was made by the appellants who keyed in the cin and password. Thus the first and vital ingredient in the offence is, on the prosecution's argument, established. The fact that the false instrument only exists for a moment is immaterial, submits counsel for the prosecution. It makes no difference whether its life is a second or ten years, it has come into existence and that is all that the Act requires. Although the simplicity of that submission is attractive, it requires closer examination before being accepted.

Counsel for the appellant Gold drew our attention to the Law Commission's Criminal Law Report on Forgery and Counterfeit Currency (Law Com no 55) in order to demonstrate the mischief which the Act sought to remedy, and in particular what the words in s 1, as interpreted in s 8, were intended to cure. The report, in para 22, points out that in the straightforward case of forgery, a document contains messages of two distinct kinds, firstly a message about the document itself (eg that it is a cheque) and, secondly, a message to be found in the words of the document that is to be accepted and acted on (eg that a banker is to 'pay £x'). It is only documents which contain both types of message that require protection by the law of forgery.

In para 24 the report turns to the desirability of extending this protection to electronic devices. No difficulty arose over computerised printing of eg false dividend warrants, which would have been forgery without any necessity of amendment to the law. Paragraph 24 states: 'The problem is related to the production of false recordings or information or instructions, whether on tape or other material which are stored for further use.' The report then goes on to suggest words to bring such material within the Act, and they are almost identical with the words now found in s 8. The mischief sought to be remedied was the possibility of forgery by electronic means rather than by the hand-held pen. The basic concept of forgery did not require alteration. It only required adapting to electronic methods of creating false information or instructions which are recorded or stored for further use.

In our judgment the user segment in the instant case does not carry the necessary two types of message to bring it within the ambit of forgery at all. Moreover, neither the report nor the Act, so it seems to us, seeks to deal with information that is held for a moment while automatic checking takes place and is then expunged. That process is not one to which the words 'recorded or stored' can properly be applied, suggesting as they do a degree of continuance.

There is a further difficulty. The prosecution had to prove that the appellants intended that someone should accept as genuine the false instrument which they had made. The suggestion here is that it was a machine (under s 10(3)) which the appellants intended to induce to respond to the false instrument. But the machine (ie the user segment) which was intended, so it was said, to be induced seems to be the very thing which was said to be the false instrument (ie the user segment) which was inducing the belief. If that is a correct analysis, the prosecution case is reduced to an absurdity.

We have accordingly come to the conclusion that the language of the Act was not intended to apply to the situation which was shown to exist in this case. The defence submissions at the close of the prosecution case should have succeeded.

It is a conclusion which we reach without regret. The Procrustean attempt to force

a these facts into the language of an Act not designed to fit them produced grave difficulties for both the judge and jury which we would not wish to see repeated.

The appellants' conduct amounted in essence, as already stated, to dishonestly gaining access to the relevant Prestel databank by a trick. That is not a criminal offence. If it is thought desirable to make it so, that is a matter for the legislature rather than the courts. We express no view on the matter.

b Our decision on this aspect of the case makes it unnecessary to determine whether the other issues raised by the appellants, in particular the submission that they should not be found guilty of forgery when there was no evidence that either of them had any inkling that what they were doing might amount to a contravention of the Act.

The appeals are allowed and the convictions quashed.

c Appeals allowed.

d 31 July. The Court of Appeal (Lord Lane CJ, Farquharson, Hutchinson JJ) refused leave to appeal to the House of Lords, but certified under s 33(2) of the Criminal Appeal Act 1968, that the following points of law of general public importance were involved in the decision: 1. Whether on a true construction of ss 1, 8, 9 and 10 of the Forgery and Counterfeiting Act 1981, a false instrument is made in the following circumstances: (a) a person keys into a part of a computer (the user segment) a customer identification number and password of another, without the authority of that other, (b) with the intention of causing the same computer to allow unauthorised access to its database and (c) the user segment, on receiving such information (in the form of electronic impulses), stores or records it for a very brief period whilst it checks it against similar information held in the user file of the database of the same computer. 2. Whether, in order to constitute a false instrument within the meaning of the 1981 Act, an instrument must contain (a) a message about the instrument itself and (b) a message to be found in the words of the instrument that is to be accepted and acted on. 3. Whether, in order for a person to be found guilty of forgery within the meaning of the 1981 Act, he must be proved to have been aware of the relevant facts which constitute the making of the false instrument. 4. Whether the offence is made out if the 'somebody' whom the appellants allegedly intended should accept the false instrument as genuine (in this case, under s 10(3), a machine) is the same machine as that which was said to be the false instrument, namely the user segment.

f Solicitors: Philip G Ashcroft (for the Crown).

N P Metcalfe Esq Barrister.

Weddell and another v J A Pearce & Major (a firm) and another

CHANCERY DIVISION

SCOTT J

16, 17, 18, 19, 20 FEBRUARY, 9 MARCH 1987

Chose in action – Assignment – Equitable assignment – Right of action – Bankruptcy – Assignment by plaintiffs' trustee in bankruptcy to plaintiffs of all claims and legal rights against defendants – Plaintiffs bringing action against defendants – Notice of assignment not given to defendants at date of issue of writ – Trustee in bankruptcy failing to obtain consent of Department of Trade and Industry to assignment – Whether plaintiffs having locus standi to bring action – Whether action a nullity – Bankruptcy Act 1914, s 56(4).

In May 1980 the two plaintiffs gave the first defendants, a firm of solicitors, instructions to advise whether a contract of sale was enforceable against them and advice on the matter was taken from counsel, the second defendant. The first defendants continued to act for the plaintiffs until September 1981. The plaintiffs were subsequently advised by other solicitors that the advice they had received from the defendants was negligent and that they had a right of action against the defendants. In 1984 the plaintiffs were declared bankrupt and a trustee in bankruptcy was appointed. By a deed of assignment dated 7 February 1986 the trustee in bankruptcy assigned to the plaintiffs 'all claims and legal rights of action which the trustee may have against [the defendants]'. The deed contained covenants by the plaintiffs to account to the trustee for the net proceeds of the intended action by the plaintiffs against the defendants to the extent necessary to discharge the plaintiffs' outstanding debts under the bankruptcies. In May 1986 the plaintiffs issued a writ against the defendants claiming damages for negligent advice. Notice of the assignment was not given to the defendants until 4 June, by which date the cause of action against the second defendant and some of the causes of action against the first defendants were time-barred. On the defendants' application, the registrar set aside the writ on the grounds that it was an abuse of process because the plaintiffs had no locus standi to bring the action. On appeal by the plaintiffs, the judge allowed the appeal and ordered that a preliminary issue be tried, namely whether the writ ought to be set aside on the grounds (i) that at the date of issue of the writ no notice had been given to the defendants of the assignment on 7 February 1986 of the right of action from the trustee to the plaintiffs, and (ii) that the permission of the Department of Trade and Industry had not been obtained for the assignment pursuant to s 56(4)^a of the Bankruptcy Act 1914. The defendants contended that the plaintiffs lacked locus standi to commence the action because (i) the effect of the adjudication in bankruptcy was to vest the plaintiffs' cause of action in their trustee in bankruptcy and the assignment of the cause of action back to the plaintiffs took effect as a legal assignment only when written notice was given on 4 June 1986, with the result that when the writ was issued the cause of action remained vested in the trustee and the plaintiffs' action when commenced was a nullity, which defect was not cured on 4 June 1986 when the plaintiffs became legal assignees of the cause of action, and (ii) the trustee in bankruptcy had no power to assign the cause of action to the plaintiffs without the requisite permission from the Department of Trade and Industry under s 56 of the 1914 Act.

Held – (1) A disposition of assets by a trustee in bankruptcy passed title to the donee whether or not the transaction was authorised under the provisions of the 1914 Act and whether or not the requisite permission under s 56 of the 1914 Act had been obtained. If the transaction was tainted by breach of trust on the part of the trustee, the transaction

^a Section 56(4) is set out at p 630 j, post

a might, under the general law, be liable to be set aside (except if the disposition was to a bona fide purchaser for value without notice) but where the only impropriety was the absence of permission under s 56, the transaction would not be liable to be set aside on that account alone and strangers to the bankruptcy could not raise the absence of permission as a defence. It followed that the failure of the trustee in bankruptcy to obtain permission from the Department of Trade and Industry for the assignment to the plaintiffs did not prevent the deed of assignment taking effect as an equitable assignment

b on execution and as a legal assignment on 4 June 1986 when notice was given (see p 632 f, p 633 e to h and p 638 j, post); dictum of Slessor LJ in *Clark v Smith* [1939] 4 All ER at 62–63 followed.

(2) An equitable assignee could sue another in his own right even though he could not recover damages or a perpetual injunction without joining as a party the assignor in whom legal title to the chose in action was vested. Furthermore, an action which was

c commenced by an equitable assignee without joining the assignor was not a nullity, although it could be liable to be stayed until the proper parties had been joined. On the facts, the plaintiffs' claim that immediately before the bankruptcy the defendants were liable to them in damages was an asset which vested in the trustee in bankruptcy and was assigned by him back to the plaintiffs on 7 February 1986 and the plaintiffs' entitlement

d as equitable assignees to bring an action to enforce their rights was no different from the entitlement of an equitable assignee to bring an action to recover a debt. It followed that the writ was not a nullity and, furthermore, the defect which would have prevented the plaintiffs obtaining judgment against the defendants was removed on 4 June 1986 when the assignment became a legal assignment (see p 630 d, p 634 e f, p 636 g, p 637 h j and p 638 b to e g h, post); *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1904–7] All ER Rep 345 and *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 applied; dicta of Roskill J in *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1964] 1 All ER at 235–236 not followed.

e

Notes

f For the power of the trustee in bankruptcy to assign a right of action, see 3 Halsbury's Laws (4th edn) para 526.

For the effect of an equitable assignment of a chose in action, see 6 *ibid* paras 69–71.

As from 29 December 1986 the Bankruptcy Act 1914, s 56, is replaced by the Insolvency Act 1986, s 314, Sch 5. For s 314 of and Sch 5 to the 1986 Act, see 4 Halsbury's Statutes (4th edn) (1987 reissue) 953, 1057.

g Cases referred to in judgment

- Atkinson's Will Trusts, *Re* (1852) 2 De GM & G 140, 42 ER 824.
- Barr's Trusts, *Re* (1858) 4 K & J 219, 70 ER 92.
- Beall, *Re*, *ex p* Official Receiver [1899] 1 QB 688.
- Bowden's (EM) Patents Syndicate Ltd v Herbert Smith & Co [1904] 2 Ch 86; *affd* [1904] 2 Ch 122, CA.
- h Brandt's (William) Sons & Co v Dunlop Rubber Co Ltd [1905] AC 454, [1904–7] All ER Rep 345, HL.
- Branson, *Re*, *ex p* The trustee [1914] 2 KB 701.
- Charlotte, *The* [1908] P 206, CA.
- Clark v Smith [1939] 4 All ER 59, [1940] 1 KB 126, CA.
- Cohen v Mitchell (1890) 25 QBD 262, CA.
- j Compania Colombiana de Seguros v Pacific Steam Navigation Co [1964] 1 All ER 216, [1965] 1 QB 101, [1964] 2 WLR 484.
- Dearle v Hall (1828) 3 Russ 1 [1824–34] All ER Rep 78, 38 ER 475.
- Debtor (No 26A of 1975), *Re a* [1984] 3 All ER 995, [1985] 1 WLR 6.
- Lee v Sangster (1857) 2 CBNS 1, 140 ER 310.
- Manchester Diocesan Council for Education v Commercial and General Investments Ltd [1969] 3 All ER 1593, [1970] 1 WLR 241.

Mercer v Vans Colina (1897) 67 LJQB 424.

National Provincial Bank Ltd v Ainsworth [1965] 2 All ER 472, [1965] AC 1175, [1965] 3 WLR 1, HL. a

Palmer v Locke (1881) 18 Ch D 381, CA.

Performing Right Society Ltd v London Theatre of Varieties Ltd [1922] 2 KB 433, CA; *affd* [1924] AC 1, HL.

Ramsey v Hartley [1977] 2 All ER 673, [1977] 1 WLR 686, CA.

Richards (Michael) Properties Ltd v Corp of Wardens of St Saviour's Parish, Southwark [1975] 3 All ER 416. b

Stone's Will, Re (1893) 37 SJ 354.

Stuart v Cockerell (1869) LR 8 Eq 607.

Appeal and preliminary issue

By writ issued on 2 May 1986 and a statement of claim dated 1 July 1986 the plaintiffs, Mr D B Weddell and Mrs F R Weddell, brought an action against a firm of solicitors, J A Pearce & Major (the first defendants), and Mr Robin Miller of counsel (the second defendant) alleging negligence in advising the plaintiffs that a contract of sale for the purchase of property at Tintagel, Cornwall, was enforceable against them. On 21 August 1986 the second defendant issued a summons under RSC Ord 18, r 19, seeking an order to set aside the writ and on 22 August 1986 the first defendant issued a similar summons, on the ground that the plaintiffs had no locus standi to bring the action. On 1 December 1986 Mr Registrar Trayhurn issued an order in the Plymouth District Registry setting aside the writ. The plaintiffs appealed. At the conclusion of argument on the appeal Scott J indicated that the appeal against the order setting aside the writ would be allowed and directed that the question whether the plaintiffs had locus standi to prosecute the action be decided as a preliminary issue prior to the further progress of the action. The preliminary issue is set out at p 628 *c d*, post. The case was heard in chambers but judgment was delivered in open court. The facts are set out in the judgment. c
d
e

John Matthew Bowyer for the plaintiffs.

Andrew Simmonds for the first defendants.

Edward Davidson for the second defendant. f

Cur adv vult

9 March. The following judgment was delivered.

SCOTT J. The matter before me began as an appeal by the plaintiffs against an order made by Mr Registrar Trayhurn in the Plymouth District Registry setting aside the writ as being frivolous or vexatious or an abuse of the process of the court. g

The plaintiffs are Mr and Mrs Weddell. There are two defendants. The first defendants are a firm of solicitors, Messrs J A Pearce & Major. The second defendant is Mr Robin Miller.

In May 1980 the plaintiffs gave the first defendants instructions to advise whether a contract of sale was enforceable against them. The advice of counsel, the second defendant, was taken. The second defendant was instructed on one occasion only. His opinion was dated 20 May 1980. The first defendants continued to act for the plaintiffs until 24 September 1981. Nothing thereafter was heard by either defendant about the matter until each received a letter dated 11 April 1986 from solicitors acting for the plaintiffs. Each letter made an allegation of negligence. As against the first defendants it was alleged that they had been negligent in advising the plaintiffs in May 1980 and subsequently in connection with the contract of sale. As against the second defendant it was alleged that the advice given by his opinion of 20 May 1980 was negligent. Although not yet time-barred, these were stale claims. h
j

On 2 May 1986 a writ was issued. It was served on the defendants on 6 May 1986 and

a was followed on 1 July 1986 by a statement of claim. The writ and statement of claim raised the allegations of negligence to which I have referred.

On 21 August 1986 the second defendant issued a summons under RSC Ord 18, r 19 seeking an order setting aside the writ. On 22 August 1986 the first defendants issued a like summons. The ground on which this relief was sought related to the locus standi of the plaintiffs to bring the action. The relevant facts are these.

b On 18 September 1984 Mr Weddell was adjudicated bankrupt. On 30 November 1984 Mrs Weddell was adjudicated bankrupt. Each of them had the same trustee in bankruptcy. By deed of assignment dated 7 February 1986 the trustee in bankruptcy assigned to the plaintiffs—

c 'all claims and legal rights of action which the Trustee may have against Messrs. Pearce & Major, Mr Robin Miller and all debts due therefrom for the benefit of the property and estate of each of the bankrupts and the bankrupts jointly . . .'

The deed contained covenants by the plaintiffs to account to the trustee for all or so much of the net proceeds of the intended action as might be necessary to discharge the outstanding debts and costs of the bankruptcies.

d Notice of this assignment had not been given to the defendants when the writ was issued on 2 May 1986. Notice thereof was eventually given to the defendants by a letter dated 4 June 1986 from the plaintiffs' solicitors. It is not in dispute that, at the date of this notice, the cause of action against the second defendant and some, at least, of the causes of action against the first defendants were time-barred.

e The defendants submit, firstly, that the effect of the adjudications was to vest the plaintiffs' causes of action in their trustee in bankruptcy; secondly, that the assignment of the causes of action by the trustee to the plaintiffs took effect as a legal assignment only when written notice thereof was, on 4 June 1986, given to the defendants (see s 136(1) of the Law of Property Act 1925); thirdly, that when the writ was issued the causes of action remained vested in the trustee, and, consequently, that the plaintiffs lacked locus standi to commence the action. It is contended that the action when commenced was a nullity and was not cured when, on 4 June 1986, the plaintiffs became legal assignees of the causes of action.

f The defendants have a further point. It is the fact that the trustee in bankruptcy entered into the transaction effected by the deed of assignment without having obtained permission, pursuant to s 56 of the Bankruptcy Act 1914, to do so. Since in neither bankruptcy is there a committee of inspection, the requisite permission, if permission was needed, was that of the Department of Trade and Industry (see s 20(10) of the Bankruptcy Act 1914). The defendants contend that in the absence of the requisite permission the trustee had no power to assign the causes of action to the plaintiffs, that the assignment was void and that, for that reason also, the plaintiffs lacked locus standi to commence the action.

g The registrar accepted the defendants' submissions and set aside the writ. The plaintiffs appealed. The appeal raised the preliminary question whether notice of appeal had been given before time for appeal expired and, if not, whether an extension of time should be granted. I dealt with this preliminary question in a judgment which I gave on Monday, 16 February 1987. I held that the notice of appeal was not out of time and that an extension of time was not necessary. I must now deal with the substance of the matter.

h Argument on the issues raised by the appeal began on Monday, 16 February and continued until Friday, 20 February. A number of difficult points of law were debated. On some there was no clear authority. On others there was conflicting authority. At the conclusion of argument I reserved my judgment. In the course of the hearing I formed the strong view, firstly, that the nature of the issues being debated made the matter inappropriate for a striking-out application under RSC Ord 18, r 19; but, secondly, that it was highly desirable that the locus standi of the plaintiffs to prosecute the action should be settled as a preliminary to the further progress of the action. I was, therefore, receptive

to an application made by counsel for the second defendant for leave to bring the issue of locus standi before the court as a preliminary issue in case I should be of opinion that the appeal should be allowed on procedural rather than substantive grounds. He drafted a preliminary issue and, on his undertaking to issue a pro-forma summons, I directed the trial of that issue as a preliminary issue and treated that issue as being before me. Counsel for the first defendants and counsel for the plaintiffs agreed with this procedure. a

At the conclusion of argument I indicated that the appeal against the order of the registrar would be allowed. I allow the appeal on the ground that the issues are wholly unsuitable to be dealt with on a striking-out application under RSC Ord 18, r 19. Without prejudice to my conclusions on the issues of law that have been argued before me, I regard the plaintiffs' action as neither scandalous, frivolous nor vexatious. Nor, unless and until the difficult issues relating to their locus standi are decided against the plaintiffs, is their action an abuse of process. b

The preliminary issue is in these terms: whether the writ in this action ought to be set aside on the grounds that (i) at the date of issue thereof no notice had been given to the defendants of the assignment dated 7 February 1986 and made between the trustee in bankruptcy of the plaintiffs of the one part and the plaintiffs of the other part, and (ii) the permission of the Department of Trade and Industry was not given for the said assignment pursuant to ss 56(4) and 20(10) of the Bankruptcy Act 1914. c

The first submission of counsel for the plaintiffs was that a legal chose in action vested in a bankrupt at the commencement of the bankruptcy did not vest in law in the trustee in bankruptcy until written notice of the bankruptcy had been given to the person or persons subject to the chose. Until that notice had been given, the trustee's title to the chose in action was, counsel for the plaintiffs submitted, an equitable title only. The legal title remained in the bankrupt who had, therefore, locus standi to maintain an action. This submission contradicts a number of provisions contained in the 1914 Act and is, in my view, wholly misconceived. d

Section 18(1) of the 1914 Act provides: e

'Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the court may allow, the court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee.' f

Section 48(5) of the 1914 Act provides: g

'Where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee.'

Section 53(3) provides:

'The property of the bankrupt shall pass from trustee to trustee, including under that term the official receiver when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever.' h

Counsel for the plaintiffs' submission is, in effect, that the plaintiffs' causes of action against the defendants were not duly assigned to the trustee and did not vest in him. Very clear and binding authority would be necessary in order to support a submission so at variance with the statutory provisions. There is none. j

Counsel for the plaintiffs referred me to a number of cases dealing with assignments of equitable choses in action. These cases establish that an equitable interest belonging to a bankrupt at the commencement of the bankruptcy vests in the bankrupt's trustee

a subject to the equitable rules as to priorities established by *Dearle v Hall* (1828) 3 Russ 1, [1824–34] All ER Rep 28 (see *Re Atkinson's Will Trusts* (1852) 2 De GM & G 140, 42 ER 824, *Re Barr's Trusts* (1858) 4 K & J 219, 70 ER 92, *Palmer v Locke* (1881) 18 Ch D 381, and *Re Stone's Will* (1893) 37 SJ 354). But in none of these cases was there any suggestion that anything less than the bankrupt's full and complete interest in the chose in action became vested in the trustee. The notice that the trustee had to give to perfect his title was necessary in order to prevent other equitable interests obtaining priority; it was not necessary in order to perfect his title vis-à-vis the bankrupt. This is expressly made clear by Chitty J in *Re Stone's Will*. The report of his judgment commences thus:

c 'CHITTY, J., said the question was one of general importance under the Bankruptcy Act, 1883. It was plain that the property vested in the trustee, but he had failed, without any fault of his own, to give notice to the trustees of the fund. Now where a person entitled to an equitable chose in action such as a share in a trust fund assigned it, the property passed, and on the assignment the equitable interest vested in the assignee, and the assignor had no interest left. But a rule had long prevailed in equity, not in favour of the assignor, but in favour of subsequent assignees, that the assignee must give notice to the holders of the fund, in order to perfect his title, not as against the assignor, but as against subsequent assignees.'

d These cases, in my judgment, are of no assistance to counsel for the plaintiffs.

Counsel for the plaintiffs referred me also to cases which establish that a trustee in bankruptcy can obtain no better title to a chose in action than was held by the bankrupt (see e.g. *Stuart v Cockerell* (1869) LR 8 Eq 607). These cases, too, do not assist him.

e And, finally, counsel for the plaintiffs referred me to two decisions of Wright J: *Mercer v Vans Colina* (1897) 67 LJQB 424 and *Re Beall, ex p Official Receiver* [1899] 1 QB 688. In each of these cases, the bankrupt, after the commencement of the bankruptcy, had acquired a legal chose in action and had purported to assign the chose for value to a third party. Wright J had to decide who had priority: the trustee in bankruptcy or the third party. He held that priority depended on whether the third party had perfected his title by notice to the debtor before the trustee had intervened to claim the fund. These decisions, submitted counsel for the plaintiffs, show that a trustee in bankruptcy has to give notice before a legal title to a chose in action can vest in him. The cases show nothing of the sort. The cases were concerned with after-acquired property and Wright J was applying the rule in *Cohen v Mitchell* (1890) 25 QBD 262, in which Lord Esher MR said (at 266):

g 'Of course all the property which belongs to the bankrupt at the time of the bankruptcy becomes at once the property of the trustee. But does all the property acquired by the bankrupt after his bankruptcy belong to the trustee absolutely, so that the bankrupt is divested of all interest and property in it, or does it remain the property of the bankrupt, so that at any rate he can deal with it until the trustee interferes?'

h He then stated this principle (at 267):

'... until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bonâ fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee.'

i Fry LJ said (at 268):

'The clause in the Bankruptcy Act which vests the property in the trustee for distribution amongst the creditors includes all such property as shall belong to or may be vested in the bankrupt at the commencement of the bankruptcy, and also which may be acquired by or devolve upon him before his discharge. If one merely

confined one's attention to the words of the section, the reader might suppose that both those kinds of property vested absolutely in the trustee—vested in him in precisely the same manner. But the inconvenience of such a conclusion has been apparent not only from the present statute, but from many statutes which have preceded it, which contain substantially the same language. It is obvious that there is no difficulty in divesting out of the bankrupt and vesting in the trustee the whole of the property which was in the bankrupt at the commencement of the bankruptcy; but, unless (to use the language of Lord Mansfield) the bankrupt is to be made the slave of the trustee, it is obvious that he may have dealings with his fellow-men, and, in the exercise of his industry, he may acquire rights and he may acquire property, and therefore there is the greatest difficulty in supposing that every right acquired and every piece of property devolving upon the bankrupt after his bankruptcy and before his discharge vests in the trustee, in the same manner in which the property at the commencement of the bankruptcy has vested in the trustee.

These passages make counsel for the plaintiffs' use of Wright J's two decisions wholly impermissible.

In my judgment, the plaintiffs' causes of action in negligence became vested in their trustee in bankruptcy and, in law, remained so vested until written notice of the assignment thereof back to the plaintiffs was given to the defendants on 4 June 1986.

Counsel for the plaintiffs' second submission was that under the deed of assignment of 7 February 1986 the plaintiffs became equitable assignees of the causes of action and thereby acquired a sufficient locus standi to issue the writ. This submission raises two points. First, it requires a view as to the effect on the assignment of the failure of the trustee in bankruptcy to obtain the permission of the Department of Trade and Industry. Counsel for the plaintiffs submitted that permission was not needed and, alternatively, that the absence of permission had no effect on the efficacy of the assignment. Second, there is the question as to the competency of an equitable assignee of a cause of action in damages to sue on the cause of action.

As to the first point, I should start with the relevant provisions of the 1914 Act.

Section 55 of the 1914 Act contains five subsections. Each specifies some transaction or act that the trustee may enter into or do. Subsection (1) permits the trustee to do the following:

'Sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt), by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels.'

I need not read the other four subsections.

Section 56 specifies transactions and acts that the trustee may enter into or do with the permission of the committee of inspection or (as the case may be) the Department of Trade and Industry. The section provides as follows:

'The trustee may, with the permission of the committee of inspection, do all or any of the following things:—

- (1) Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same;
- (2) Bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt . . .
- (4) Accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time subject to such stipulations as to security and otherwise as the committee think fit;

- (5) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts . . .
- (8) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person . . .

It has been submitted by counsel for both defendants that the powers of a trustee in bankruptcy to dispose of assets of the estate are, save for the power to disclaim onerous property conferred by s 54, to be found in one or other of these two sections. A disposition by a trustee of assets of the estate which could not be justified under one or other of the provisions of these sections would, they submitted, be ultra vires and void. They submitted that the transaction effected by the deed of assignment fell within s 56(4) and so required the permission of the Department of Trade and Industry. The permission of the Department of Trade and Industry was not obtained and consequently, they submitted, the transaction was ultra vires the trustee and the deed of assignment was void. If that is right, then plainly the plaintiffs had no locus standi to issue the writ.

All counsel agreed that the transaction between the plaintiffs and the trustee represented a sale of the causes of action to the plaintiffs and fell within sub-s (1) of s 55. An assignment of a cause of action in consideration of a covenant by the assignee to pay all or part of the net proceeds to the assignor would not generally be regarded as a transaction of sale, and, in the absence of authority, I would not myself so regard it. There is, however, Court of Appeal authority that a transaction of this character does represent a sale within s 55(1) (see *Ramsey v Hartley* [1977] 2 All ER 673, [1977] 1 WLR 686). That decision is binding on me and requires me to treat the transaction in the present case as a sale falling within s 55(1). I would otherwise, I confess, have regarded the transaction not as a sale within s 55(1) but as an 'arrangement' falling within s 56(8).

A sale under s 55(1) does not require anyone's permission. But counsel for the defendants point out that the consideration payable to the trustee under the deed of assignment must, if it becomes payable at all, be payable at a future time and that, accordingly, the transaction comes within s 56(4) and requires the permission of the Department of Trade and Industry. I agree. In a transaction of sale where the consideration is to be payable at a future time, s 55(1) and s 56(4) must, in my view, be read together, and, so read, require the requisite permission to be given to the transaction. I reject counsel for the plaintiffs' submission that permission was not needed in the present case.

In *Ramsey v Hartley* it was assumed that the trustee in bankruptcy had obtained the requisite permission to enter into the transaction (see Megaw LJ's judgment [1977] 2 All ER 673 at 681, [1977] 1 WLR 686 at 695). In the present case it is common ground that the trustee did not do so.

So what was the effect of the absence of the requisite permission?

Counsel for the plaintiffs submitted that the purpose of permission being required for the s 56 transactions was to protect the bankrupt's estate and that a failure to obtain the requisite permission did not provide a ground of defence to third parties dealing with the trustee. I readily accept his submission as to the purpose of s 56. It is supported by the cases he cited: *Lee v Sangster* (1857) 2 CBNS 1, 140 ER 310, *Re Branson, ex p The trustee* [1914] 2 KB 701, *Clarke v Smith* [1939] 4 All ER 59, [1940] 1 KB 126 and *Re a Debtor* (No 26A of 1975) [1984] 3 All ER 995, [1985] 1 WLR 6. But none of these cases, save perhaps *Clark v Smith* in an incidental respect, involved dispositions by the trustee of assets of the estate. In the first two cases the trustee in bankruptcy had commenced legal proceedings without the requisite permission. The omission did not, it was held, constitute a point which the defendant could take as a defence. In *Lee v Sangster* (1857) 2 CBNS 1 at 6, 140 ER 310 at 312 Williams J, delivering the judgment of the court, said:

'On consideration, however, we are satisfied that the statute intended to make the

obtaining of the requisite leave a matter only between the assignees and the court of bankruptcy, and not at all between the assignees and the other party to the suit.' a

In *Re Branson* [1914] 2 KB 701 at 704 Horridge J said:

'My ruling is that the obtaining of the consent of the committee of inspection to the taking of proceedings is merely a provision for the protection of the estate and is not one which the respondent or the defendant in any proceedings by the trustee is entitled to avail himself of in answer to those proceedings.' b

In *Clark v Smith* a trustee had, with the permission of the committee of inspection, carried on the business of the bankrupt and had been given by the defendant a guarantee indemnifying the estate against any loss thereby incurred. It was held that the case did not come within s 56(1) in that the business was being carried on as a speculative trading venture and not for the purpose of winding up the estate. But the contract of guarantee was none the less enforceable. The impropriety being committed by the trustee did not constitute a ground of defence available to the defendant. c

And in *Re a Debtor* (No 261 of 1975) a trustee, without the requisite permission, engaged solicitors to conduct legal proceedings. He was liable to the solicitors under the contract of retainer he had entered into.

These cases were not dealing with the question as to the effect of the disposition of assets made by a trustee in bankruptcy without permission, in circumstances that required permission. The cases do, however, establish that the lack of the requisite permission does not have the consequence that the action taken by the trustee is a nullity. In *Lee v Sangster* and in *Re Branson* the trustee had commenced proceedings without the requisite permission. The action was nevertheless held to be properly constituted. d

Counsel for both defendants have submitted that where the disposition of assets is concerned, a trustee in bankruptcy has only the powers given to him by the 1914 Act. If the trustee enters into some transaction purporting to dispose of assets and cannot find authority for the transaction in some enabling provision of the Act, the transaction is, they submitted, ultra vires and the disposition a nullity. e

In my judgment, these arguments confuse vires with propriety. If an asset of the estate is vested in the trustee then the trustee has, in my judgment, power, in the strict sense, to divest himself of it. Whether it is proper for him to divest himself of the asset is another matter. It may be that if a trustee in bankruptcy entered into a transaction that was outside his powers under the Act and in the course of so doing disposed of assets of the estate, the disposition could, in suitable circumstances, be set aside. But unless and until set aside it would, in my judgment, stand. Whether or not it would be voidable, it would not be void. f

Counsel for the first defendants sought to draw an analogy between s 56 and s 29(1) of the Charities Act 1960. Under the latter section the consent of the Charity Commissioners to sales of certain charity land is necessary. It is well settled that a sale made without the requisite consent is void (see e.g. *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241 and *Michael Richards Properties Ltd v Corp of Wardens of St Saviour's Parish, Southwark* [1975] 3 All ER 416). So, counsel for the first defendants argued, a s 56 transaction entered into without the requisite permission should be held to be void. g

I do not think, however, that the analogy is apt. Section 29(1) of the 1960 Act provides that 'no property . . . shall without an order of the court, or of the Commissioners . . . be sold . . .' This is the language of prohibition. It is very different from the language of ss 55 and 56 of the 1914 Act which state that 'the trustee may . . . do all or any of the following things . . .' This is enabling language, allowing the trustee to do with safety the things described in the sections. h

Section 56(1) authorises the trustee, with permission, to carry on the bankrupt's business with a view to winding it up. *Clark v Smith* [1939] 4 All ER 59, [1940] 1 KB 126 i

a was a case where the trustee was carrying on the business for a different purpose. The case did not fall within s 56(1). The trustee's actions were not authorised under any section of the 1914 Act. But it could not, in my view, sensibly have been argued that dispositions of assets made by the trustee in the course of carrying on this business were void. Indeed, Slessor LJ said ([1939] 4 All ER 59 at 62-63, [1940] 1 KB 126 at 136):

b '... as against the world, the carrying on of the business by the trustee can create legal relations between him and third parties, either as debtor or creditor, incurred in the carrying on of the business, notwithstanding that it is carried on otherwise than solely for the beneficial winding up of the estate.'

And later on he continued ([1940] 1 KB 126 at 136; cf [1939] 4 All ER 59 at 63):

c '... it cannot be said that this contract or the carrying-on of the business thereunder is illegal in the sense in which the learned judge has used the word. I do not think it can be said that it is void as being ultra vires, because the trustee is in my opinion competent to carry on the business and to create legal liabilities as between himself and third persons with whom he deals in carrying on the business, whether he does or does not do so for the purpose of the beneficial winding-up of the estate.'

d Test the point by reference to s 56(5). Suppose a trustee, with the requisite permission, mortgages part of the property of the bankrupt. What is the position of the mortgagee if the purpose of the trustee is to raise money for a purpose other than the payment of the bankrupt's debts? The arguments of both counsel for both defendants would have the mortgage be a nullity. In my judgment that cannot be so. What concern would it be of e the mortgagee what use the trustee proposed for the mortgage money?

f In my judgment a disposition of assets by a trustee in bankruptcy passes title to the donee whether or not the transaction is authorised under some provision of the Act and whether or not a permission made requisite by s 56 is absent. If the transaction were tainted by breach of trust on the part of the trustee, the transaction might, under the general law, be liable to be set aside except against a bona fide purchaser for value without notice. The position would be no different, in my view, from that in which any trustee had committed a breach of trust. But if the only impropriety were the absence of permission made requisite by s 56, the transaction would not, in my opinion, be liable on that account alone to be set aside. Strangers to the bankruptcy cannot raise as a defence the absence of permission; it must follow that they can deal safely with the trustee without concern as to whether permission has or has not been obtained.

g Accordingly, in my judgment, failure of the plaintiffs' trustee in bankruptcy to obtain the permission of the Department of Trade and Industry to his transaction with the plaintiffs did not prevent the deed of assignment taking effect on execution as an equitable assignment and on 4 June 1986 as a legal assignment. On this point the defendants, in my judgment, fail.

I now come to the second point.

h The deed of assignment was executed on 7 February 1986. Written notice thereof was not given to the defendants until 4 June 1986. In the intervening period, the causes of action remained at law vested in the trustee in bankruptcy. The causes of action were vested in the plaintiffs in equity but not in law. The writ was issued on 2 May 1986.

i So these questions arise. Does an equitable owner of a cause of action in damages have locus standi to sue on the cause of action as plaintiff, if he joins the legal owner of the cause of action as a defendant? If the answer is Yes, what is the status of such an action if the legal owner is not joined as a defendant? Is it a nullity? Is it effective to stop time running for the purposes of the statutes of limitation?

There are three cases to which I have been referred which bear on these questions. First, there is the very well-known case of *William Brandt's Sons & Co v Dunlop Rubber Co*

Ltd [1905] AC 454, [1904-7] All ER Rep 345. This case is usually cited as authority on the nature of a valid equitable assignment. It bears also, however, on the question with which I am concerned. The facts are important. Brandts were bankers and had advanced money to a client to enable the client to purchase goods. The client sold the goods to Dunlop and delivered them to Dunlop with an invoice requesting Dunlop to remit the purchase price to Brandts. On delivery of the goods to Dunlop, the client sent Brandts a written document authorising payment of the purchase price to Brandts. Brandts sent this document to Dunlop with a covering letter. On these facts it was held by the House of Lords, differing from the Court of Appeal, that there had been an equitable assignment to Brandts of the purchase price due from Dunlop. It was also held by the House of Lords that the covering letter and the enclosed document gave notice to Dunlop of the equitable assignment. In the event, however, Dunlop paid the purchase price to the client, not to Brandts. Shortly thereafter the client became insolvent, so Brandts sued Dunlop for the price. Brandts were equitable assignees. But the client, in whom legal title to the chose in action remained, was not joined as a party to the action. None the less Brandts' action succeeded. Lord Macnaghten (with whose judgment the Earl of Halsbury LC and Lord Lindley concurred) said ([1905] AC 454 at 462, [1904-7] All ER Rep 345 at 350):

'Strictly speaking, Kramrisch & Co. [the client], or their trustee in bankruptcy, should have been brought before the Court. But no action is now dismissed for want of parties, and the trustee in bankruptcy had really no interest in the matter. At your Lordships' bar the Dunlops disclaimed any wish to have him present, and in both Courts below they claimed to retain for their own use any balance that might remain after satisfying Brandts.'

Lord James said ([1905] AC 454 at 464, [1904-7] All ER Rep 345 at 351): 'The defect in the parties to the suit can be remedied.'

This case seems to me clear authority for the view that an equitable assignee of a chose in action has locus standi to sue on the chose in action; that, strictly, the person in whom the chose in action is in law vested ought to be a party, but that the absence of that person does not render the action a nullity.

The same conclusion can be derived from *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1922] 2 KB 433 (Court of Appeal), [1924] AC 1 (House of Lords). In this case the plaintiff was equitable assignee of the copyright in a certain song. The defendant, a music hall proprietor, permitted the song to be sung in its music hall. There was a clear infringement of copyright. The plaintiff sued for an injunction and damages. The owner at law of the copyright was not a party to the action. Branson J at first instance gave judgment for the plaintiff for an injunction and damages. The Court of Appeal, however, held that the plaintiff, the equitable owner of the copyright, could not obtain either damages or a perpetual injunction without adding the legal owner of the copyright as a party to the action. So the appeal was allowed and the judgment of Branson J set aside. But the action was not dismissed. Instead, the Court of Appeal gave the plaintiff leave to amend the writ and subsequent pleadings by adding the legal owner as co-plaintiff. It is clear, therefore, that the action was not a nullity. The House of Lords upheld the view taken of the matter by the Court of Appeal. Viscount Cave LC said ([1924] AC 1 at 14):

'That an equitable owner may commence proceedings alone, and may obtain interim protection in the form of an interlocutory injunction, is not in doubt; but it was always the rule of the Court of Chancery, and is, I think, the rule of the Supreme Court, that, in general, when a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action . . . If this were not so, a defendant after defeating the claim of an equitable claimant might have to resist like proceedings by the legal

a owner, or by persons claiming under him as assignees for value without notice of any prior equity, and proceedings might be indefinitely and oppressively multiplied.'

Viscount Finlay expressed the same view. He referred to *Brandt's case* [1905] AC 454, [1904-7] All ER Rep 345 and said ([1924] AC 1 at 19):

b 'Except under very special circumstances the ordinary rule should be observed, that the legal owner should be a party to the proceedings. There may possibly be cases in which a person who has made an equitable assignment might by a subsequent assignment have transferred the legal interest in the same work to a purchaser for value without notice, whose title would prevail over the merely equitable right, and such a possibility is one reason for the rule of making the legal owner a party. But whatever may be the balance of convenience, the established rules of practice should be adhered to, even in cases, of which I think the present is c one, when their observance in all probability will serve no useful purpose.'

And later he said (at 20):

d 'Some observations made by Lord Macnaghten in *William Brandt's Sons & Co. v. Dunlop Rubber Co.* ([1905] AC 454 at 462, [1904-7] All ER Rep 345 at 350) were, it was argued, inconsistent with the claim of the defendant in the present case to have the suit dismissed owing to the non-joinder of the owner of the legal estate. I do not think that these observations should be read as overruling the general rule of practice as to the necessity of joining the owner of the legal estate and the right of the defendant to have the suit dismissed if the plaintiff refuses or neglects to join him in any case not falling within the recognized exceptions to the rule.'

e On the same point, Lord Sumner said (at 30-31):

f 'It was indeed suggested by the appellants that the passage at the end of the opinion of Lord Macnaghten in *Brandt's Sons & Co. v. Dunlop Rubber Co.* ([1905] AC 454 at 462, [1904-7] All ER Rep 345 at 350) supported and indeed decided the point in issue in their favour, on the ground that the same objection was taken then as is taken by the respondents here, and that your Lordships' House refused to give effect to it. The question is whether it was really the same objection, for certainly the House did not give effect to it. The subject of the dispute was the right to be paid a debt which was due to the assignor till it was by him equitably assigned to the appellants. There was accordingly a possibility of the debtors being exposed to duplicate claims. Lord Macnaghten accepts the rule, for which the respondents now contend, that the assignor ought to be made a party in order that he might be bound, but points out that *Brandt's Case* was an exception to it. Plainly the House did not consider itself to be departing from established rules of practice, nor has the case ever been so regarded. It has, therefore, now to be shown that the present case is within the principle of the exception to which effect was then given. If the assignor, Kramrisch, was not made a party, he would not be bound; was it not possible that the debtors, the Dunlop Company, might be exposed to claims by him or his trustee in bankruptcy? Kramrisch, however, had already been settled with and the Dunlop Company held his receipt. It appears on reference to the arguments in the Courts below that this fact was relied on. Kramrisch was therefore bound already. The respondents admitted that what they wanted was not the presence but the absence of the assignor, and that they did not propose to pay the assignor but desired to pay nobody, and this mere non-joinder of parties was not allowed to relieve them. *Brandt's Case* is thus distinguishable, for the present case is otherwise.'

j

It seems, therefore, that an equitable assignee can sue in his own name. He cannot, however, recover damages or a perpetual injunction without joining as a party the

assignor in whom legal title to the chose in action is vested. The same would apply to recovery of a debt. The reason for this is, however, a pragmatic one. The debtor must not be at risk of suit by the legal owner of the chose. To put the point another way, the debtor must, if he is adjudged liable, be in a position to obtain a complete discharge from his liability by paying the plaintiff, the equitable assignee. In the special circumstances of *Brandt's* case, where, wrongly, the legal owner of the chose had already been paid, the problem did not arise. Dunlop had already obtained, by payment, a discharge from any liability to Kramrisch. In most cases, however, if the legal owner of the chose were not a party to the action, the defendant might, notwithstanding he had paid the successful plaintiff, the equitable assignee, nevertheless remain liable to the legal owner. The legal owner, after all, might dispute the validity of the equitable assignment, or might disclose a prior equitable interest in some third party. Reasons on these lines for requiring the legal owner of the chose to be a party were expressed by Viscount Cave LC, by Viscount Finlay and by Lord Sumner in the *Performing Right Society* case [1924] AC 1 at 14, 19, 31. :

In neither of the authorities to which I have referred was the action, begun by an equitable assignee without the assignor being joined as a party, treated as a nullity. In *Brandt's* case final judgment on the chose in action was obtained. In the *Performing Right Society* case an opportunity was given to the plaintiff to join the assignor. It is, I think, a common practice for an action commenced by an equitable assignee to be stayed pending joinder, either as co-plaintiff or as co-defendant, of the assignor. *E M Bowden's Patents Syndicate Ltd v Herbert Smith & Co* [1904] 2 Ch 86 (affirmed in the Court of Appeal [1904] 2 Ch 122) is an example where that was done. The practice is indorsed by the terms of RSC Ord 15, r 6(2)(b) which authorises the joinder of—

'any person . . . whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon . . .'

In *The Supreme Court Practice* 1985, vol 1, p 177, para 15/6/2 there is a note that—

'The addition of a co-plaintiff may be made where the original plaintiff's cause of action is defective, e.g. where the legal owner is required to be added (*The Charlotte* [1908] P 206). Thus the legal owner of a patent will be added in an action for infringement brought by the equitable owner (*Bowden's Syn. v. Smith & Co.* [1904] 2 Ch 86 at 122) so in the case of copyright (see *Performing Right Society v. London Theatre of Varieties* [1924] AC 1) . . .'

In my judgment, therefore, it is clearly established that an action commenced by an equitable assignee without joining the assignor is not a nullity. It may be liable to be stayed until the proper parties have been joined, but it is not a nullity.

Counsel for both defendants argued the contrary. The action commenced by the plaintiffs on 2 May 1986 was, they submitted, a nullity. They relied on the decision of Roskill J in *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1964] 1 All ER 216, [1965] 1 QB 101. The facts of this case were highly complex but the relevant question for present purposes was whether an action for damages, commenced by an insurance company in England on 7 January 1960, was time-barred. The cause of action had accrued on 12 December 1954. The insurance company was assignee of the cause of action. By reason of the Carriage of Goods by Sea Act 1924, Sch, art III, r 6, the cause of action was time-barred unless brought within one year after it had accrued. So the action brought in England in 1960 was, apparently, time-barred. An action had, however, been commenced in New York on 2 November 1955 by, in effect, although not in name, the insurance company. On 2 November 1955 the insurance company was equitable assignee only. Notice of the assignment was, for the purposes of s 136 of the Law of Property Act 1925, given on 5 November 1955. The New York action was dismissed on 16 May 1956, but it was argued that the effect of the New York action having been instituted within a

a year from 12 December 1954 was to stop time running. Roskill J rejected this argument and held the action in England to be time-barred. He so held on the ground that an action commenced in some other court could not prevent the English action from being time-barred. But he also made some remarks about the status of the New York action, and it is on these remarks that counsel for both defendants rely. Roskill J said ([1964] 1 All ER 216 at 235, [1965] 1 QB 101 at 127–128):

b ‘There remains the further question on this branch of the case, namely, whether, even if the insurance company could have otherwise relied on the New York suit to defeat the provisions of art. III, r. 6, they could, on the facts of this case, have relied on it, in as much as the notice of the assignment was only given after the New York suit had been begun. That the chronology of events is that notice was given after the suit had been begun, is undoubted. What is the effect? Had the New York suit been brought in England, it seems clear that it must have failed, all else apart, for want of notice satisfying the requirements of s 136 of the Law of Property Act, 1925. Counsel for the defendants says that this is a further fatal bar to reliance on the New York suit as satisfying art. III, r. 6. Counsel for the plaintiffs says that suit was brought by the right party, the insurance company, and the fact that there was a valid defence is irrelevant.’

d Roskill J noted that the proper law of the chose in action was English law (see [1964] 1 All ER 216 at 235, [1965] 1 QB 101 at 128), and said ([1964] 1 All ER 216 at 235–236, [1965] 1 QB 101 at 129):

‘The antecedent notice to the debtor before action brought is clearly required by the proper law of the debt, namely, English law.’

e Later he said ([1965] 1 QB 101 at 129; cf [1964] 1 All ER 216 at 236):

f ‘... only the assignor could sue at the time when the New York suit was brought and therefore, that suit was brought by the wrong party, if one applies English law either as the proper law of the chose in action or (by presumption) as the proper law of the assignment or of the *lex fori*. “Suit brought” must mean suit brought by the person properly entitled to bring it. On the facts as to notice which I have related, the insurance company had no right to bring that suit in New York at the time when it was brought. Only the telephone company could have brought it, and they did not do so.’

g These remarks were not necessary to the decision of the case but represent the considered opinion of the judge, expressed in a reserved judgment, on assumed facts which seem, for relevant purposes, very like the facts of the present case. Roskill J held, in effect, that the action commenced by the equitable assignee was a nullity. He so held, notwithstanding that three days after the action had been commenced, the assignment became, by reason of written notice thereof given to the debtor, a legal assignment. I find myself unable to accept that this can be right. *Brandt’s* case [1905] AC 454, [1904–7] h All ER Rep 345 and the *Performing Right Society* case [1924] AC 1 establish beyond any argument that an action commenced by an equitable assignee and to which the assignor is not a party is not a nullity. It will not be struck out until the plaintiff has had an opportunity to join as a party the assignor. It may be stayed until that has been done. Even this is not an invariable practice. In a case where the protection of the defendant debtor from claims by the legal owner of the chose in action can be seen to be unnecessary, j the equitable assignee can prosecute the action to final judgment without joining the assignor as a party (see *Brandt’s* case). All this I take to be established by the two House of Lords cases in question. These authorities were not cited to Roskill J and I do not think he could have decided the equitable assignee point as he did if they had been.

There is a final point made by counsel for both defendants on this part of the case that I must deal with. Whatever may be the *locus standi* of an equitable owner of a chose in

action in general to bring an action, the position of an equitable assignee of a cause of action in damages is, it was said, different. Indeed, counsel for the second defendant submitted that there was really no such thing as an equitable assignee of a cause of action in damages. A bare right to sue cannot be assigned, he submitted. A debt may be assigned, copyright may be assigned, but not a bare right to sue. I do not accept the contrast which this submission seeks to draw between a debt on the one hand and a cause of action in damages on the other hand. There is no such thing as a cause of action in vacuo. In the present case the plaintiffs allege that immediately before the bankruptcy the defendants were liable to them in damages. The right to unliquidated damages is an asset just as a debt is an asset. Subject to the law regarding maintenance and champerty, a right to unliquidated damages can, in law, be sold or assigned as readily as a debt. The bringing of an action is the means of enforcing the right to unliquidated damages. But the asset that vested in the trustee in bankruptcy and was assigned on 7 February 1986 to the plaintiffs was the right to damages. The plaintiffs' entitlement as equitable assignees to bring an action to enforce that right was, in my judgment, no different from the right of an equitable assignee of a debt to bring an action to recover the debt.

The writ in this action was issued by the plaintiffs, as equitable assignees, on 2 May 1986. The trustee in bankruptcy, the assignor, was not a party. This writ was not, in my judgment, a nullity. The state of affairs immediately after its issue was that if the defendants had applied for the action to be stayed pending the joinder of the trustee in bankruptcy, the assignor, the application would have succeeded. Also, if immediately after the issue of the writ the plaintiffs had sought the joinder of the trustee in bankruptcy, that application, too, would, in my view, have succeeded. The joinder would have been authorised by RSC Ord 15, r 6(2)(b)(i). That remained the position at least until 20 May 1986.

The significance of 20 May 1986 is that that it was the date on which, apparently, the cause of action against the second defendants became time-barred. It may also have been the date on which causes of action against the first defendants began to become time-barred. But the state of the action remained, in my judgment, the same after 20 May 1986 as it had been before. The joinder of the trustee in bankruptcy would have required paras (5)(a) and (6)(a) of Ord 15, r 6 to be complied with; but neither would, in my view, have presented any difficulty. It would have been 'necessary for the determination of the action that the new party should be added' (para (5)(a)) and the case would have fallen squarely within para (6)(a).

The position did, however, change on 4 June 1986. That was the date on which the plaintiffs' equitable assignment became, by reason of the written notice to the defendants, a legal assignment. As from that date, the defendants did not need to be protected against claims by the trustee in bankruptcy or anyone claiming through the trustee in bankruptcy. The trustee could have made no claims against them. A stay of the action pending the joinder of the legal owner of the chose in action was not thereafter necessary. The plaintiffs were the legal owners. The trustee in bankruptcy could not be joined as a party. Apart from the objection that his joinder would be pointless, the case could no longer be brought within para (6)(a). In my judgment, on 4 June 1986 the defect which would previously have prevented the plaintiffs obtaining judgment against the defendants was removed.

There are two other questions which arise from what I have decided.

First, since the permission of the Department of Trade and Industry to the assignment of the causes of action ought to have been but was not obtained (see s 56(4) of the 1914 Act) there remains a theoretical possibility that someone with locus standi to do so might apply to have the assignment set aside. Does that possibility render the plaintiffs' action in any way defective or require the joinder of the trustee in bankruptcy? For the reasons which I have already given, the absence of a requisite permission is not, in my judgment, ground by itself for a transaction to be set aside. Strangers to a bankruptcy are not concerned with whether or not permission has been given. But, of course, the plaintiffs

a are not strangers to the bankruptcy: they are the bankrupts. It may be thought to be arguable that, as against them, some creditor or other person with sufficient locus standi might be able, on the ground of lack of requisite permission, to have the assignment set aside. But even if that were a correct view, none the less, in my judgment, it would not assist the defendants. The right to have the assignment set aside for want of the requisite permission would be no more than a mere equity. It would not, in my judgment, prevent the plaintiffs from giving the defendants, on payment of any damages found to be due or agreed to be due, a complete discharge. If the action proceeds to judgment, whether in the plaintiffs' favour or the defendants' favour, the causes of action will be extinguished. As Lord Upjohn commented in *National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472 at 488, [1965] AC 1175 at 1238:

c '... mere "equity" naked and alone, is, in my opinion, incapable of binding successors in title even with notice; it is personal to the parties.'

This conclusion is entirely consistent with the authorities to which I have already referred, which establish that want of the requisite permission pursuant to s 56 does not constitute a point of which a stranger to the bankruptcy can take advantage. The defendants are plainly strangers to the bankruptcy.

d Finally, there is the question whether, for the purposes of the Limitation Act 1972, time was interrupted by the issue of the writ on 2 May 1986 or continued running until the plaintiffs' assignment became a legal assignment on 4 June 1986. If the latter answer were correct, it might be necessary to dismiss the second defendant from the action on the footing that, as against him, the action would be bound to fail. This is a point on which there is apparently no authority save for the judgment of Roskill J in *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1964] 1 All ER 216, [1965] 1 QB 101 to which I have referred and which, for the reasons I have given, I do not feel able to accept. As a matter of principle, however, I conclude that time was interrupted by the issue of the writ. The plaintiffs are suing on the cause of action in negligence. They had locus standi as equitable assignees to do so. They were not suing on some different cause of action from that which in law remained vested in their assignor. There was and is only one cause of action, namely a cause of action to the benefit of which the plaintiffs were, on 2 May 1986, in equity entitled and are now in law entitled, and in respect of which they were entitled to issue a writ and obtain, if the circumstances warranted it, an immediate interlocutory injunction. In my judgment, therefore, time stopped running on 2 May 1986.

f Accordingly, on the preliminary issue I propose to answer No to both questions.

g *Preliminary issue answered accordingly. Leave to appeal granted.*

Solicitors: Lovell Son & Pitfield, agents for Pethybridges & Best, Torrington (for the plaintiffs); Bond Pearce, Plymouth (for the first defendant); Hewitt Woollacott & Chown (for the second defendant).

Jacqueline Metcalfe Barrister.

Practice Direction

(Bankruptcy 2/87)

CHANCERY DIVISION

Bankruptcy – Petition – Creditor's petition – Debt claimed – Only debt claimed may be included in petition.

Paragraph 3 of Practice Direction (Bankruptcy 3/86) ([1987] 1 All ER 602, [1987] 1 WLR 81) should be amended by deleting the words 'except that interest or other charges' to the end of the paragraph.

Paragraph 3 will now read:

'3. Where the petition is based on a statutory demand, only the debt claimed in the demand may be included in the petition.'

30 September 1987

JOHN BRADBURN
Chief Bankruptcy Registrar.

Practice Direction

FAMILY DIVISION

Ward of court – Practice – Proceedings in private – Disclosure of evidence – Disclosure to persons not parties – Disclosure without prior leave may be contempt of court.

The President and judges of the Family Division wish to remind practitioners of the need in wardship cases proceeding in private to obtain leave to disclose evidential documents to persons who are not parties, e.g. psychiatrists, psychologists and medical experts or any other person. Disclosure without prior leave may be a contempt of court, and this is none the less the case where the purpose of the disclosure is only to obtain advice from the expert concerned whether relevant expert evidence would be forthcoming or would be helpful to the court.

Issued with the concurrence of the Lord Chancellor.

15 October 1987

B P TICKLE
Senior Registrar.

Surrey County Council v Lewis

a

HOUSE OF LORDS

LORD BRIDGE OF HARWICH, LORD HAILSHAM OF ST MARYLEBONE, LORD ROSKILL, LORD ACKNER
AND LORD OLIVER OF AYLMEYTON

13, 14, 15 JULY, 15 OCTOBER 1987

b

Redundancy – Entitlement to redundancy payment – Qualifying period of employment – Concurrent but separate contracts of employment – Number of hours worked each week – Employee employed under concurrent but separate contracts to teach three part-time courses – Employee not working more than six hours per week under any one contract – Aggregate of hours worked under all three contracts exceeding eight hours per week – Whether employee permitted to aggregate hours worked under separate contracts – Whether employee qualifying to claim redundancy payment – Employment Protection (Consolidation) Act 1978, Sch 13, paras 4, 6.

c

d

Unfair dismissal – Entitlement to compensation – Qualifying period of employment – Concurrent but separate contracts of employment – Number of hours worked each week – Employee employed under concurrent but separate contracts to teach three part-time courses – Employee not working more than six hours per week under any one contract – Aggregate of hours worked under all three contracts exceeding eight hours per week – Whether employee permitted to aggregate hours worked under separate contracts – Whether employee qualifying to claim compensation for unfair dismissal – Employment Protection (Consolidation) Act 1978, Sch 13, paras 4, 6.

e

Employment – Continuity – Period of continuous employment – Temporary cessation of work – Calculation of hours worked per week by employee – Employment under series of concurrent but separate contracts with intervals between separate contracts – Whether employment which is not pursuant to contracts in same series relevant in determining whether interval between separate contracts merely 'temporary cessation of work' – Employment Protection (Consolidation) Act 1978, Sch 13, para 9(1)(b).

f

In 1969 the employee was employed by the employers, a local education authority, as a part-time teacher. In due course she taught three separate part-time courses at two colleges. Each course was regulated by a separate contract of employment which was confined to the duties to be performed for the particular course and each contract was for the duration of a college term. The contracts did not specify the number of hours to be worked, the hours actually worked being left to the individual college departments to arrange.

g

The employee never worked for more than six hours per week on any one course, but the aggregate of the hours worked under all three contracts exceeded eight hours per week. In June 1983 the employers informed the employee that they did not intend offering her part-time teaching contracts for the next term. The employee treated the employers' letter as a notice terminating her employment and claimed a redundancy payment or compensation for unfair dismissal on the basis that she qualified for such a

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payment under paras 4^a and 6^b of Sch 13 to the Employment Protection (Consolidation) Act 1978 because she had been employed for more than eight hours a week for more than five years and was therefore deemed to have worked the requisite number of hours per week to qualify for a redundancy or unfair dismissal payment. The industrial tribunal held that, taking into account the whole of the employee's work for the employers, she had normally worked more than eight hours per week and therefore qualified for a

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redundancy or unfair dismissal payment. The tribunal further held that for the purposes of para 9(1)(b)^c of Sch 13 the periods between the separate contracts for each did not break the continuity of employment. The Employment Appeal Tribunal allowed an appeal by

a Paragraph 4 is set out at p 647 j, post

b Paragraph 6 is set out at p 647 j to p 648 c, post

c Paragraph 9(1) is set out at p 648 c d, post

the employers, holding that when calculating the weekly hours worked by the employee each of her series of contracts was to be considered separately and accordingly the employee did not qualify to make a claim. The employee appealed to the Court of Appeal, which allowed her appeal and restored the industrial tribunal's decision. The employers appealed to the House of Lords. a

Held – Where an employee was employed by the same employer under concurrent but separate contracts of employment for part-time work the total hours worked could not be aggregated for the purpose of qualifying under paras 4 and 6 of Sch 13 to the 1978 Act for a redundancy payment or compensation for unfair dismissal. Accordingly, since the employee had not worked eight hours per week under any one contract her claim failed. The employers' appeal would therefore be allowed (see p 643 a, p 644 g to p 645 d, p 650 f to h, p 651 b c f to h and p 653 b f, post). b

Per curiam. Where an employee is employed under a series of concurrent but separate contracts of employment with intervals between the separate contracts, employment which is not pursuant to contracts in the same series is irrelevant in determining whether the intervals constitute merely a 'temporary cessation of work' within para 9(1)(b) of Sch 13 to the 1978 Act (see p 643 a, p 645 c d, p 652 g h and p 653 a f, post); *Ford v Warwickshire CC* [1983] 1 All ER 753 considered. c

Notes

For continuous employment and continuity of employment for the purposes of unfair dismissal or redundancy, see 16 Halsbury's Laws (4th edn) para 605, and for cases on the subject, see 20 Digest (Reissue) 354–360, 313 1–3150.

For the Employment Protection (Consolidation) Act 1978, Sch 13, paras 4, 6, 9, see 16 Halsbury's Statutes (4th edn) 580, 581. d

Cases referred to in opinions

Fitzgerald v Hall Russell & Co Ltd [1969] 3 All ER 1140, [1970] AC 984, [1969] 3 WLR 868, HL.

Ford v Warwickshire CC [1983] 1 All ER 753, [1983] 2 AC 71, [1983] 2 WLR 399, HL.

O'Kelly v Trusthouse Forte plc [1983] 3 All ER 456, [1984] QB 90, [1983] 3 WLR 605, CA. e

Appeal

Surrey County Council (the employers) appealed with leave of the Appeal Committee of the House of Lords given on 24 November 1986 against the decision of the Court of Appeal (Watkins, Purchas and Glidewell LJ) ([1987] ICR 232) on 31 July 1986 allowing an appeal by Elizabeth Lewis (the employee) from the decision of the Employment Appeal Tribunal (Waite J, Mr J P M Bell and Ms P Smith) ([1986] ICR 404) on 19 September 1985 which reversed the decision of an industrial tribunal (chairman Mr A M F Webb) sitting at Brighton on 8 February 1984 that the employee had a sufficient period of continuous employment to entitle her to lodge a complaint of unfair dismissal of redundancy. The facts are set out in the opinion of Lord Hailsham. f

Eldred Tabachnik QC and *Christopher Jeans* for the employers.
Stephen Sedley QC and *Laura Cox* for the employee. g

Their Lordships took time for consideration. h

15 October. The following opinions were delivered. i

LORD BRIDGE OF HARWICH. My Lords, I have had the advantage of reading in draft the speeches to be delivered by my noble and learned friends Lord Hailsham and

Lord Ackner. I agree with them both and for the reasons they give I would allow the appeal.

LORD HAILSHAM OF ST MARYLEBONE: My Lords, by a series of statutes now consolidated in the Employment Protection (Consolidation) Act 1978, as subsequently amended, Parliament conferred two important new rights on employees against their employers which arise independently of any rights or obligations contained in their contracts of employment. The first is a right not to be unfairly dismissed and if unfairly dismissed to receive an award either of reinstatement or compensation (see ss 54 and 67 to 69). The second gives a right to an employee to receive redundancy payments in case of dismissal on the grounds of redundancy (see s 81). By s 55 of the 1978 Act dismissal includes termination without renewal of a fixed-term contract of employment. Both rights are enforceable by originating application through the industrial tribunal network with appeal (on a question of law only) to the Employment Appeal Tribunal and thence to the Court of Appeal with a further appeal by leave to your Lordships' House. The present proceedings have run the whole course.

Like most such rights which have marked the move from contract to status characterising so much modern social legislation, these rights arise independently of the rights and obligations arising under the terms of the relevant contract of employment, and, by s 140, may not be excluded or abridged by anything in the contract which is inconsistent with their exercise.

In order to qualify for either right the employee must be able to show a period of 'continuous employment' of one year (see s 64 as amended) in the case of the right not to be unfairly dismissed and of two years in the case of the right to receive redundancy payments. Subject to a presumption in favour of continuity (see s 151 and Sch 13, para 1(3)) the qualifying periods of one year and two years (measured as calendar years or months) are computed week by week of weeks that 'count' in accordance with the somewhat elaborate provisions of Sch 13 to the Act (see s 151 and Sch 13). In order to show that he has qualified, and subject to the presumption of continuity referred to above, the employee must establish (a) that the employment is 'of a kind counting towards a period of continuous employment' and (b) that the periods, consecutive or otherwise but calculated week by week, are to be treated as 'forming a single period of continuous employment' (see s 151 and Sch 13, para 4). Only those weeks 'during the whole or part of which the employee's relations with the employer are governed by a contract of employment which normally involves employment for 16 hours or more' (eight hours in the case where the period of continuous employment has subsisted for five years) 'count' for the purpose of computing the period of continuous employment (see Sch 13, paras 4, 6). Subject to special provisions applying, inter alia, to absence from work on account of a 'temporary cessation of work' (see Sch 13, para 9(1)(b)) a break of a single whole week in the weeks which 'count' in estimating the period of continuous employment may deprive the employee of his rights under ss 54 and 84 (see s 64(1)).

In the present appeal the employee (the respondent) was employed by the employers (the appellants) more or less continuously (as to which see later) from January 1969 to June 1983, a period of about 14 years, when her last employment (a fixed term) terminated in circumstances which amount to 'dismissal' for the purposes of s 55. In fact it was a contractual period for a fixed term which was not renewed as the result of a change of policy on the part of the employers. By her originating application in September 1983 the employee claimed both compensation under ss 54 and 64 in respect of alleged unfair dismissal and redundancy payments under s 84. She was, however, immediately met by a preliminary objection on the part of her employers (respondents to the application but appellants in this appeal) that she could not establish the relevant qualifying periods respectively of one and two years of continuous employment. Since the relevant facts are not in dispute there is no room here for the presumption of

continuity. The question is one of the legal implication of admitted facts, and this preliminary objection on the part of the employers constitutes the sole matter of debate in this appeal. The employee won before the industrial tribunal, lost before the Employment Appeal Tribunal, won before the Court of Appeal, and the matter now falls to be determined by your Lordships. In passing, the process which began in 1983 and is still current in 1987 may seem a somewhat lengthy one in the light of the fact that the system designed by Parliament for the decision of such matters was intended to be speedy, inexpensive, informal and lacking in complexity.

The employee is a teacher of photography. Throughout her periods of engagement she was employed by the employers on a series of fixed-term and part-time contracts at one or more of their educational establishments, situated respectively at Guildford, Farnham and Epsom and latterly only at Epsom and Farnham. At the relevant time the contracts were by the term, or by the course at the relevant institution and department, and in consequence were intermitted amongst other interruptions by the usual vacations. Nothing would turn on these periods of intermission if the employee were entitled to add each terminal fixed-term contract to its predecessors or successors for the purposes of the calculation: see *Ford v Warwickshire CC* [1983] 1 All ER 753, [1983] 2 AC 71. But each was a separate contract. None of the 'contracts' (if that be the right description for some fairly imprecise documents) was in any way colourable, improper or designed in any way to defeat the purposes of the 1978 Act properly construed; either by finding of the industrial tribunal (which is unchallengeable) or by concession or admission by or on behalf of the employee (which after hearing argument on the point I believe to have been binding, as was the ultimate view formed by the Court of Appeal) the concurrent contracts were separate from and independent of one another, and though in practice operated so that the obligations under one did not conflict with the obligations under any other in time or place, did not form part of a single composite whole. Had this not been the case and had there been supporting evidence to enable one to conclude that, although expressed in different documents, there was in existence a single implied contract of service or a composite contract contained in the several documents, I might very well have taken a contrary view to that which I am now constrained to express.

The employee's difficulty resides in the fact that she can only establish the requisite periods of continuous employment whether for deciding that 'the whole or part of the employee's relations with the employer is governed by a contract of employment which normally involves employment for sixteen hours or more weekly' (see Sch 13, para 4) or for the purpose of considering whether 'the periods' (consecutive or otherwise) are to be treated as forming a single period of continuous employment if she is permitted to add both the hours and periods of work actually done under one engagement respectively to the hours and periods of work actually performed under one or more of the others. In my opinion neither computation will avail the employee if it is once established that the engagements are quite separate and distinct from one another, and do not, in one way or another, form a part of a single composite whole, entitling the employee to add one to the other for both purposes. I give full weight to the provisions of s 6 of the Interpretation Act 1978 in which, unless the contrary intention is implied, the singular embraces the plural and vice versa in the language of a statute. But, in my view, once it is established that the 'contracts' involved were distinct and separate arrangements and did not form part of a single composite relationship, I do not believe that the Interpretation Act can avail the employee. The whole structure of the Employment Protection (Consolidation) Act 1978 read with Sch 13 is built on the supposition that to create the qualifying period there must be a single relationship contained in a single contractual complex, whether oral, in writing or implied, and whether or not contained in a single document or a number of documents, and there is no room therefore for importing into para 4 of Sch 13 any such phrase as would give the meaning 'a contract or contracts of employment which normally, whether singly or collectively involve employment for sixteen hours'. In

a my view the whole structure of the Act precludes this interpretation and accordingly neither the Interpretation Act 1978 nor the ambivalence, in English, of the indefinite article, to which I referred in the argument before your Lordships, is available to the employee. It must follow that the appeal must be allowed and the judgment of the Employment Appeal Tribunal restored.

b I feel bound to add that I arrive at this conclusion after considerable hesitation and not a little regret. After 14 years of what in the ordinary course might have been regarded as continuous service the employee's contracts were allowed to lapse without imputed fault on her part and she is entitled to nothing either by her contracts or by virtue of the statute. The best that can be said is that, without the statute, the legal result would have been the same.

c Since preparing the above I have had the advantage of reading in draft the speech about to be delivered by my noble and learned friend Lord Ackner. Although I have approached the matter from a slightly different angle, I am happy to say that I agree with his more detailed analysis of the facts and chain of reasoning, which I believe to be wholly compatible with my own conclusions.

d **LORD ROSKILL.** My Lords, I have had the advantage of reading in draft the speeches delivered by my noble and learned friends Lord Hailsham and Lord Ackner. I agree that the appeal should be allowed for the reasons which they have given.

e **LORD ACKNER.** My Lords, this appeal raises two points of construction of certain provisions of the Employment Protection (Consolidation) Act 1978 as amended. The questions are very narrow and arise from a decision on a preliminary issue on a set of facts, either as found by the industrial tribunal or admitted by the respondent, Mrs Lewis (the employee). These facts, to which I will make more detailed reference hereafter, seem to me, and I believe to your Lordships, somewhat surprising if not unreal. I much doubt whether they are likely to be repeated again in a substantially similar form.

The facts

f The employee was first employed by the appellants, Surrey County Council (the employers), in January 1969 to teach photography (which included graphics) on a part-time basis at the Guildford School of Art. For the first year or two, the contract was a yearly one covering the academic year but thereafter she was employed by a series of consecutive contracts each being for the duration of a term.

g In 1975 the Guildford School amalgamated with the Farnham College of Further Education to become the West Surrey College of Art and Design. Thereafter the employee worked at Farnham. In 1980 the 'foundation' element of the course, that is the introductory part, which takes place only in the spring term, was separated out and was no longer taught by her in the department of audio visual studies of the Farnham College but was taught in their foundation department. Thereafter she was provided with separate contracts for each of those two departments. In the autumn of 1981 the graphics part of her teaching was transferred to the Epsom College of Further Education and she was provided with further consecutive contracts for a term's duration for that part of her work.

j Thus, from the autumn 1981 onwards the employee's engagement at each department was regulated by three separate series of consecutive contracts. Each single contract was confined to the duties to be performed at the work place of the particular department involved. Each single contract was evidenced by a separate letter of engagement, introducing the new contract, to apply to each college term at the relevant department. It was a feature common to all the contracts that the weekly work requirement in terms of hours was not specified in the letter of agreement. All such letters spoke only of a global number of hours, the totality of which had to be worked during that particular

college term within the department in question. The allocation of those contractual hours to particular weeks was left for the individual department to arrange, and this, no doubt, it did according to the programme which met the needs of each of the departments. a

The particular points I would wish to stress as showing the very restricted nature of the facts of the employee's case are as follows. (1) It might well have been argued before the industrial tribunal and the Employment Appeal Tribunal, but it was not, that this division of the employee's activities between the two departments of the Farnham College (the audio visual department and the foundation department) and the one department in the Epsom College (the graphics department) and the issue of separate contracts in respect of each department, was occasioned solely by organisational or budgetary reasons. Accordingly, so it might have been argued, the reality of the relationship between the employee and the employers was that of an employee and employer under *a single series of consecutive contracts*, each single contract in the series embracing all the work to be performed by the employee under one contract at the employers' three different departments of further education in any one term. This argument could have been advanced without any attack on the bona fides of the employers. (2) It was, however, common ground at the hearing before the industrial tribunal and the Employment Appeal Tribunal, that the separate and distinct contracts which I have described, under which over the years the employee worked, were quite *genuine independent contracts*. In neither tribunal was it sought to contend that the numerous contracts which governed the employee's engagement represented a mere facade designed to deprive her of the protection rights to which she would have been entitled, had her whole engagement been incorporated in a single contract of employment. On 14 June 1983 the employee was informed by the clerk to the governors of the West Surrey College of Art and Design that the college did not intend to offer her a part-time teaching contract for the next term, adding 'we may be offering you contracts on a block basis for specific topics, but it is very unlikely that we shall be able to offer you regular, termly part-time contracts as in the past'. The employee treated that as a notice entitling her to make an application for compensation for unfair dismissal/redundancy and, accordingly, made the appropriate application to the industrial tribunal. The employers in their answer to this application made the following allegations. (i) The employee had been employed under a series of termly fixed-term contracts with different further education colleges in the county since 17 March 1969. (ii) The employment in respect of which her originating application had been submitted was at West Surrey College of Art and Design (WSCAD), Farnham under two separate contracts of employment in the summer of 1983, the latter of which ended on 14 June, and also at Epsom School of Art and Design in the spring term 1983 which ended on 25 February. It was assumed that the claim related only to the employment at WSCAD. (3) The employee was employed by WSCAD as a photography lecturer (grade A) in the Audio Visual Studies Department under a fixed-term contract during the summer term 1983 working normally six hours per week, usually one day per week, starting on 27 April and ending on 14 June. Separately, she worked in the foundation studies department as a casual photography lecturer (grade B) working normally for six hours per week between 20 April and 31 May. Neither employment was renewed when it ceased. (4) The employee had not therefore completed one year's continuous service of 16 hours or more per week necessary to establish a right to the remedies for unfair dismissal. Additionally, she was not employed under a contract of employment normally involving employment for eight or more hours per week which would similarly be required, if continuous service had lasted for five or more years. b
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The issue

The question in this appeal is whether at the date of termination of her employment the employee had been continuously employed by the employers for long enough to

- a qualify for the statutory right to receive a redundancy payment and/or to be protected against unfair dismissal. The answer to this question depends initially on whether the hours worked by the employee under these *distinct and separate concurrent contracts*, as they were so held to be, can be aggregated for the purpose of determining whether, in a given week, she was employed under a contract which normally involved the minimum hours specified in the 1978 Act. It was common ground that during the period of five years immediately prior to the termination of her employment fewer than eight hours
- b teaching per week were normally involved under her contracts taken *separately*, but more than eight hours work taken jointly.

If such aggregation is permissible the further question arises, namely whether an interval *between these separate contracts*, as opposed to the interval between the successor and predecessor contracts in the same series, breaks the continuity of employment.

c *The relevant statutory provisions*

Unfair dismissal is dealt with in Pt V of the 1978 Act. The basic provisions are contained in s 54, which provides:

(1) In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer . . .

- d 'Employee' is defined by s 153(1) as meaning 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. In the same section 'contract of employment' is defined as 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing'. Under s 55(2)(b) of the Act, an employee shall be treated as dismissed
- e where her contract of employment is for a fixed term which expires without being renewed by her employer. However, by s 64(1)(a) the right not to be unfairly dismissed is excluded unless at the time of dismissal the employee has been continuously employed for not less than one year and the employee may not claim a redundancy payment unless at that time she has been continuously employed for at least two years (see s 81(1) and (4)). The computation of periods of continuous employment is the subject matter of
- f s 151 which provides in sub-s (1) that references in any provision of the Act to a period of continuous employment are, except where provision is expressly made to the contrary, to a period computed in accordance with the provisions of the section and Sch 13.

- g Schedule 13 lies at the heart of the problem with which your Lordships are concerned. Paragraph 1(1) as amended by para 7(2) of Sch 2 to the Employment Act 1982 provides that a week which does not count under the provisions of paras 3 to 12 breaks the continuity of the period of employment, except as otherwise provided. The exceptions have no relevance to this case. Paragraph 1(3) provides that a person's employment during any period shall, unless the contrary is shown be presumed to have been continuous. Paragraph 3 deals with normal working weeks and provides that 'Any week in which the employee is employed for sixteen hours or more shall count in computing a period of employment'. Apart from this presumption of continuity, in order to decide
- h whether an employee has been continuously employed for the requisite periods, the vital paragraphs of the schedule are paras 4, 6 and 9 and it is convenient to set these out in full:

4. Any week during the whole part of which the employee's relations with the employer are governed by *a contract of employment which normally involves* employment for sixteen hours or more weekly shall count in computing a period of employment.

- j 6.—(1) An employee whose relations with his employer are governed, or have been from time to time governed, by *a contract of employment which normally involves* employment for eight hours or more, but less than sixteen hours, weekly shall nevertheless, if he satisfies the condition referred to in sub-paragraph (2), be treated for the purposes of this Schedule (apart from this paragraph) as if his contract

normally involved employment for sixteen hours or more weekly, and had at all times at which there was a contract during the period of employment of five years or more referred to in sub-paragraph (2) normally involved employment for sixteen hours or more weekly. a

(2) Sub-paragraph (1) shall apply if the employee, on the date by reference to which the length of any period of employment falls to be ascertained in accordance with the provisions of this Schedule, has been continuously employed within the meaning of sub-paragraph (3) for a period of five years or more. b

(3) In computing for the purposes of sub-paragraph (2) an employee's period of employment, the provisions of this Schedule (apart from this paragraph) shall apply but as if, in paragraphs 3 and 4, for the words "sixteen hours" wherever they occur, there were substituted the words "eight hours".

9.—(1) If in any week the employee is, for the whole or part of the week—(a) incapable of work in consequence of sickness or injury, or (b) absent from work on account of a *temporary cessation of work*, or (c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for all or any purposes, or (d) absent from work wholly or partly because of pregnancy or confinement, that week shall, notwithstanding that it does not fall under paragraph 3, 4 or 5, count as a period of employment. c

(2) Not more than twenty-six weeks shall count under paragraph (a) or, subject to paragraph 10, under paragraph (d) of sub-paragraph (1) between any periods falling under paragraph 3, 4 or 5. d

The matter for construction

1. The question whether the hours worked by the employee under her distinct and separate concurrent contracts can be aggregated for the purpose of determining whether, in a given week, she was employed under a contract which qualifies her to claim that she has been unfairly dismissed or to claim redundancy payments depends on the proper construction of the words 'a contract of employment which normally involves ...' in paras 4 and 6 of Sch 13. e

2. The question whether an interval between these separate contracts, as opposed to an interval between the successor and predecessor contract in the same series, breaks the continuity of employment depends on the proper interpretation of the words 'a temporary cessation of work' in para 9(1)(b) of Sch 13. f

The first question

The industrial tribunal approached the matter on the basis that the whole of the employee's work pattern, during her entire employment by the employers must be taken into account. Having considered the evidence that in some weeks in the last two years she had worked for less than eight hours they said: g

'There is no doubt but that, looking back at the [employee's] employment as a whole, she normally worked for more than eight hours a week and often for more than 16, and we find that that was her normal pattern of work ... the use of the word "normally" in Sch 13 allows for the possibility that an employee may not always work for the requisite number of hours, and we are satisfied that the weeks in which the [employee] fell short do not, when compared with much more numerous weeks in which she worked for more than eight hours, break the continuity of her employment ... all the [employee's] contracts of employment envisage the possibility of at least eight hours work during the weeks when the courses for which she was responsible were continuous ...' h

The Employment Appeal Tribunal concluded that the industrial tribunal fell into the error of simply calculating the hours worked per week and striking an average as opposed to the process of inferential analysis of the normal contractual working week. It was j

a common ground before your Lordships that to equate hours actually worked with the normal work requirement and merely striking an average of hours worked would be an error.

b Before the Employment Appeal Tribunal it was argued on behalf of the employee that industrial good sense and realism required para 4 to be applied in such a way that the weekly hours of work found by the industrial tribunal to be involved normally under one contract should be added to the equivalent hours found in relation to another
c concurrent contract. It was submitted that this aggregation was not only required by general considerations of fairness but was permitted by a proper interpretation of the legislation and by the terms of para 4 of Sch 13 in particular. It was submitted that Parliament must advisedly have made use of the indefinite article and deliberately avoided a reference to any specific contract of employment as being material for consideration. However, the Employment Appeal Tribunal in a carefully reasoned judgment given by Waite J was unable to accept this submission. Waite J said ([1986] ICR 404 at 413).

d 'The statutory code defining the requirements of continuity of employment, although it is undoubtedly complex and elaborate in detail, appears to us to be clear and straightforward in its general terms. It is designed to place a defined limit on the otherwise unqualified right given to any employee to claim that his dismissal
e has been unfair or to make the corresponding claim in redundancy. At the heart of that right lies the loss of employment under the particular contract of employment in relation to which the complaint of termination is made. The whole code is geared to a consideration of that particular contract. We can find no warrant for putting a gloss on the language used by Parliament which would justify any industrial tribunal in taking into account, when calculating the normal hours of work requirement for the purposes of paragraph 4 of Schedule 13 to the Act of 1978, hours worked or required to be worked under some other contract whether or not such other contract involves the same employer.'

f In the Court of Appeal, where counsel for the employee appeared in this appeal for the first time, his main argument was based on s 6 of the Interpretation Act 1978, which provides: 'In any Act, unless the contrary intention appears . . . (c) words in the singular include the plural.' He submitted that applying this to s 153 of the Act, 'employment means employment under a contract or contracts of employment' and the same phraseology can be read into paras 4 and 6 of Sch 13. Thus, the question is, so he submitted, was the employee an employee under contracts of employment which at any
g one time normally involved employment for eight hours or more? This submission raises two separate questions: (1) does it appear from the Act that there is an intention that s 6(c) of the Interpretation Act 1978 should not apply? and (2) even if s 6(c) of the Interpretation Act 1978 is to apply would that solve the employee's problem?

h The Court of Appeal was satisfied that the contrary intention, negating the provisions of s 6(c) of the Interpretation Act 1978 did not appear in the Act (see [1987] ICR 232). Glidewell LJ, in giving the leading judgment, recognised that in relation to some sections of the Act, the reference to an individual contract means employment under a *single* contract. He referred specifically to s 54(1) where the words are 'in every employment' and s 64 where the words are 'dismissal of an employee from any employment . . .' and he accepted that the use of the word 'any' indicated a contrary intention to the word being used in the plural. Moreover, he accepted that the phrase 'the period of
j employment' in para 1(1) of Sch 13 could most probably only be read in the singular. Nevertheless, he was of the view that the phraseology of paras 4 and 6 of Sch 13 did not disclose an intention that the phrase 'a contract of employment' should be read only in the singular and not in the plural. Purchas LJ in expressing his agreement with the conclusion of Glidewell LJ appeared to indicate that there is an area in which the

industrial tribunal has a discretion in deciding whether or not to aggregate hours worked under separate concurrent contracts for the purpose of satisfying the minimum hours requirement of Sch 13. He said (at 244). a

'I wish to emphasise that the circumstances in which an employee may have more than one contract with an employer will vary widely from case to case. In considering other contracts of employment in relation to the particular employment in respect of the termination of which relief is being sought under the Act for the purposes of paragraphs 4, 6 and 9 of Schedule 13, the industrial tribunal will have to decide whether or not any such collateral contract forms part of the relevant relationship for the purpose of the contract under consideration. There may well be cases, particularly in the case of vertical aggregation of employment for the purpose of paragraph 9, where separate and unconnected contracts of employment may have been made between the same employer and employee, which the industrial tribunal may consider to be irrelevant. Such considerations must depend upon the facts of each case and will be essentially matters falling within the province of the industrial tribunal. Bearing in mind the expertise enjoyed by the industrial tribunal and their access to the details of each contract of employment, decisions as to the relevance of, and, if relevant, the true effect of, other and collateral contracts between the same employee and employer can be safely left to that tribunal.'

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Purchas LJ gave no clue as to the principles on which this discretion should be exercised, and certainly no guidance is to be found in the Act. Indeed, counsel for the employee did not contend for such a discretion, accepting that whether 'a contract of employment' in paras 4 and 6 can be pluralised is a question of law which admits of a single answer in all situations. Of course, if there was here, contrary to what was decided in the industrial tribunal and accepted in the Employment Appeal Tribunal, a single contractual relationship, the contract being for the discharge of an identified professional task on a single set of terms and conditions, the work being distributed over one or more departments or locations, no problem would have arisen and no element of discretion would have entered into the decision. There would have been no need to aggregate, the totality of the hours having all been worked under one contract, or one series of single terms contracts. e
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I agree with the judgment of the Employment Appeal Tribunal that at the heart of the right to claim that a dismissal has been unfair or to make the corresponding claim in redundancy lies the loss of employment under the particular contract of employment in relation to which the complaint of termination is made. The relevant provisions all focus on that particular contract. In the case of unfair dismissal, dismissal occurs when the contract in respect of which complaint is made is terminated (see s 55). That complaint must be presented within three months of the termination of *that* contract (see s 67). Moreover, if the complaint succeeds, the applicant receives a basic award which reflects the hours worked under *the* contract in respect of which the complaint is made (see Sch 14). Schedule 13 lays down a detailed code to which reference has to be made in order to discover whether following the termination of a particular contract, the necessary qualifying period has been established, or to compute the length of such employment for the purposes of compensation. Accordingly, references to employment or contract of employment in Sch 13 are focused on the particular contract of employment in respect of which relief is claimed under the appropriate provision of the Act. g
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Counsel for the employers in his helpful submissions placed considerable emphasis in support of his argument on s 146(4), which subsection does not appear to have been considered by the Court of Appeal. It reads as follows: i

'Subject to subsections (5), (6) and (7), the following provisions of this Act (which confer rights which do not depend upon an employee having a qualified period of continuous employment) do not apply to employment under a contract which

normally involves employment for less than sixteen hours weekly, that is to say, sections 1, 4, 8, 27, 28 and 29.'

Section 1 imposes the obligation on the employer to give the employee written particulars of his terms of employment. Section 4 obliges the employer, where there is a change in the terms of employment, to provide a written statement within a limited time of the nature of the alteration. Section 8 deals with the right to itemised pay statements. Sections 27, 28 and 29 deal with provisions relating to time off work. Thus s 146(4) makes it clear that, subject to sub-ss (5), (6) and (7), where the employment normally involves less than 16 hours a week, the rights conferred by ss 1, 4, 8, 27, 28 and 29 do not apply. To allow aggregation of the hours of a number of concurrent short-term periodic contracts involving less than 16 hours but in the aggregate more than 16 hours thereby imposing the obligations contained in these sections on each and every such short term contract would be clearly contrary to the whole scheme and purpose of s 146(4).

Counsel for the employers was, in my judgment, wholly justified in pointing to the anomalous position which would arise if aggregation were to be permitted. Paragraph 4 of Sch 13 contemplates that a contract will only qualify if it is a contract for a normal working week of 16 hours (subject, of course, to para 6). If aggregation is allowed a contract which does not qualify, because it does not satisfy the minimum hour requirement, would nevertheless qualify if there is in existence a concurrent contract which also does not qualify, providing the hours which each normally involves, when aggregated, do qualify. Thus, an employee who is dismissed from a four hour per week contract (eg lecturing to an evening class) could complain of unfair dismissal by virtue of having a concurrent 12-hour week with the same employer (eg teaching in a school) even though he had not been dismissed from the 12-hour employment. Moreover, further complications arise if aggregation is permitted in cases where contracts of employment are not operating contemporaneously. Is one to look at each separately and add the result together? How far, if at all, are periods carried over, where the pattern of employment changes as in this case, in relation to the very limited periods of teaching on the foundation course. In my judgment, if Parliament had intended that hours worked under separate concurrent contracts were to be aggregated for the purposes of paras 4 and 6 of Sch 13 it would have provided guidance as to how this was to be done. The total absence of any reference to aggregation seems to me to be the clearest indication that aggregation is not permissible.

But, even if s 6(c) of the Interpretation Act 1978 was to permit 'pluralisation' with the result that para 4 would read '... by contracts of employment which normally involve employment for ...', this would clearly create an ambiguity. Does the minimum hours requirement relate to each such contract or to the contracts taken together? The only solution for avoiding this ambiguity would be to add the further words 'taken cumulatively'. For reasons I have given I can see no justification for that implication.

The second question

In the light of my decision on the first question, namely that there is no entitlement to aggregate the hours worked on separate and distinct contracts, the question whether there was *continuity* of employment over a sufficient period of time does not arise. However, in deference to the submissions addressed to your Lordships, I will shortly give my view on this aspect of the appeal. The scope and operation of the words 'a temporary cessation of work' in para 9(1)(b) of Sch 13 was considered by your Lordships' House in *Ford v Warwickshire CC* [1983] 1 All ER 753, [1983] 2 AC 71. Mrs Ford was also a teacher. She had been employed by the county council on a series of consecutive fixed-term contracts, each for an academic year, for a total of eight years. There was no question of her being employed under separate and concurrent contracts. In her case there was a break each summer between the end of one contract and the beginning of the next

contract. Your Lordships held that para 9(1)(b) of Sch 13 could apply to preserve the continuity of her employment. In his speech Lord Diplock said ([1983] 1 All ER 753 at 758, [1983] 2 AC 71 at 81):

'My Lords, since para 9 only applies to an interval of time between the coming to an end of one contract of employment and the beginning of a fresh contract of employment, the expression "absent from work", where it appears in para 9(1)(b), (c) and (d), must mean not only that the employee is not doing any actual work for his employer but that there is no contract of employment subsisting between him and his employer that would entitle the latter to require him to do any work. So in this context the phrase "the employee is absent from work on account of a temporary cessation of work" as descriptive of a period of time, as it would seem to me, must refer to the interval between (1) the date on which the employee would otherwise be continuing to work under an existing contract of employment is dismissed because for the time being his employer has no work for him to do, and (2) the date on which work for him to do having become again available he is re-engaged under a fresh contract of employment to do it . . .'

At a later stage in his speech Lord Diplock said ([1983] 1 All ER 753 at 759-760, [1983] 2 AC 71 at 83-84):

'In harmony with what this House held in *Fitzgerald's* case [*Fitzgerald v Hall Russell & Co Ltd* [1969] 3 All ER 1140, [1970] AC 984], para 9(1)(b), in cases of employment under a succession of fixed-term contracts of employment with intervals in between, requires one to look back from the date of the expiry of the fixed-term contract in respect of the non-renewal of which the employee's claim is made over the whole period during which the employee has been intermittently employed by the same employer, in order to see whether the interval between one fixed-term contract and the fixed-term contract that next preceded it was short in duration relative to the combined duration of those two fixed term contracts during which work had continued, for the whole scheme of the Act there appears to me to show that it is in the sense of "transient", i.e. lasting only for a relatively short time, that the word "temporary" is used in para 9(1)(b). So, the continuity of employment for the purposes of the Act in relation to unfair dismissal and redundancy payments is not broken unless and until, looking backwards from the date of the expiry of the fixed-term contract on which the employee's claim is based, there is to be found between one fixed-term contract and its immediate predecessor an interval that cannot be characterised as short relatively to the combined duration of the two fixed-term contracts.'

Thus, para 9 is dealing only with periods which are not to be treated as interrupting a continuous period of employment under a contract of employment, notwithstanding that during the period of interruption there is in law no subsisting contract of employment. This is to be contrasted with the situation where there is a subsisting contract of employment and which is catered for by paras 4 to 7 of the same Sch 13. As counsel for the employers rightly submits, there is thus a dovetailing between paras 4 to 7 on the one hand and para 9 on the other, and to 'aggregate' would disrupt this scheme. Moreover, to assess 'temporary cessation' by reference to contracts other than the successor and predecessor contracts in the same series would give rise to comparable anomalies. Moreover, following the decision in *Ford's* case, the continuity of a succession of fixed-term contracts of employment with intervals between them, which would satisfy the continuity test required by para 9(1)(b), would, however, fail if there was a concurrent contract for say a two-hour per week evening class continuing throughout the year, unless the series of fixed-term contracts are to be viewed in isolation. Further, as was pointed out during submissions, unless one series of contracts is considered in isolation from another, there would be anomalous consequences for the employer, since an

a interval which does not amount to a temporary cessation and which would therefore break continuity, would be disregarded simply because another series of contracts subsist during the interval. To my mind the whole thrust of the decision in *Ford's* case suggests that employment which is not pursuant to contracts in the same series is irrelevant in assessing whether an interval constitutes a 'temporary cessation'.

b I would therefore, with reluctance, allow this appeal. My reluctance is not to be ascribed to any hesitation to accept the validity of the interpretation which I have put on the relevant provisions of the Act, but to the consequences to the employee. As I have sought to underline in the course of expressing my views, this result follows from the finding, which your Lordships are obliged to accept, that she was employed under and pursuant to a series of separate and distinct concurrent contracts. The Employment Appeal Tribunal was well alive to the possibility that a case might occur in which, to quote the words of Waite J ([1986] ICR 404 at 409-410)—

c 'an unscrupulous employer, served by an employee in diverse capacities or in different workplaces, would be found deliberately to have subjected the employment relationship to a mosaic of separate contracts dealing individually with each function, or each workplace, for the purpose of depriving the employee of the protection rights to which he would have been entitled had his whole engagement been incorporated in a single employment contract.'

d The Employment Appeal Tribunal rightly took the view that the industrial tribunal could be safely trusted to penetrate the superficial disguise, to look to the substance of the arrangements and not to the form and to arrive (in pursuance of the fact-finding mission which is their exclusive function) at a conclusion that the purported multiple contracts were in reality one single contract. I would add that, if the facts fitted, it would also be open to an industrial tribunal to find that, even though there were separate contracts, there was also a unifying contract of employment collateral to the separate contracts, of the type which has been referred to as an 'umbrella contract' of employment (see *O'Kelly v Trusthouse Forte plc* [1983] 3 All ER 456 at 479, [1984] QB 90 at 124-125) under which the minimum hours requirements were satisfied.

f **LORD OLIVER OF AYMERTON.** My Lords, I have had the advantage of reading in draft the speeches delivered by my noble and learned friends Lord Hailsham and Lord Ackner. I agree that the appeal should be allowed for the reasons which they have given.

Appeal allowed.

g Solicitors: *Sharpe Pritchard & Co*, agents for *F A Stone*, Kingston upon Thames (for the employers); *Seifert Sedley Williams* (for the employee).

Mary Rose Plummer Barrister.

R v Crown Court at Leicester, ex parte Director of Public Prosecutions

QUEEN'S BENCH DIVISION

WATKINS LJ AND KENNEDY J

17 JUNE 1987

Criminal evidence – Special procedure material – Application for production of special procedure material – Notice of application – Parties to be served with notice of application – Whether parties to be served with notice including person charged with or suspected of offence – Police and Criminal Evidence Act 1984, s 9(1), Sch 1.

The police are entitled at any stage in the investigation of a criminal offence to apply to the court under s 9(1)^a of and Sch 1^b to the Police and Criminal Evidence Act 1984 for an order allowing them access to special procedure material. The only parties to such an application are the police and the person or institution in whose custody the special procedure material is thought to be, and the police are not required to give notice of the application to any person suspected of or charged with the offence or to serve a copy of the application on him (see p 656 e to h, post).

Notes

For police access to excluded material and special procedure material, see Supplement to 11 Halsbury's Laws (4th edn) para 125B.

For the Police and Criminal Evidence Act 1984, s 9, Sch 1, see 12 Halsbury's Statutes (4th edn) 957, 1029.

Application for judicial review

The Director of Public Prosecutions applied, with the leave of Webster J given on 17 February 1987, for judicial review of a decision of his Honour Judge Jowitt QC sitting in the Crown Court at Leicester on 22 December 1986 refusing to grant applications for orders for the production of special procedure material pursuant to s 9 of and Sch 1 to the Police and Criminal Evidence Act 1984 in relation to police investigations into the activities of Elvis Loyston Francis, who was suspected of living on the earnings of prostitution, contrary to s 30 of the Sexual Offences Act 1956. The judge refused the applications on the ground that notice of the application was required to be served on Francis as the person under investigation. The relief sought by the applicant was for a declaration (i) whether an accused person in criminal proceedings, related to an application for the production of special procedure material under s 9 of and Sch 1 to the 1984 Act, was or should be a party to that application and (ii) whether para 7 of Sch 1 therefore required that such an accused person should be served with notice of the application before an order could be made. The facts are set out in the judgment of Watkins LJ.

Alison Hampton for the applicant.

The respondent did not appear.

WATKINS LJ. The Crown Prosecution Service, through the Chief Crown Prosecutor in Leicester, moves with leave to cause this court to judicially review a decision of his Honour Judge Jowitt QC, made on 22 December 1986 in the Crown Court at Leicester.

^a Section 9(1) is set out at p 655 c d, post

^b Schedule 1, so far as material, is set out at p 655 d to f, post

a At that time the police in Leicestershire was making investigations into the suspected criminal activities of a man called Elvis Loyston Francis. It was suspected that he was living on the earnings of prostitution, contrary to s 30 of the Sexual Offences Act 1956. In order to help their investigations into their suspicions, the police required a sight of accounts which they thought were held in the name of Francis at branches of Barclays Bank, the National Westminster Bank, the Halifax Building Society and the Citibank Savings Trust.

b In order to make those institutions divulge confidential information, it was necessary for the police to obtain an order of the court to cause them to allow the police access to the accounts of Francis they held. The special provisions provided by the Police and Criminal Evidence Act 1984 were therefore invoked and an application was made by the Crown Prosecutor on behalf of the police for an order allowing a constable to obtain access to what is called 'special procedure material' under s 9 of the 1984 Act.

c Section 9(1) states:

'A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 below and in accordance with that Schedule.'

d So far as is relevant, the provisions of Sch 1 are these:

'1. If on an application made by a constable a circuit judge is satisfied that one or other of the sets of access conditions is fulfilled, he may make an order under paragraph 4 below.'

e Paragraphs 2 and 3 set out the sets of conditions which require to be fulfilled. Paragraph 4 states:

'An order under this paragraph is an order that the person who appears to the circuit judge to be in possession of the material to which the application relates shall—(a) produce it to a constable for him to take away; or (b) give a constable access to it, not later than the end of the period of seven days from the date of the order or the end of such longer period as the order may specify.'

f I turn finally to para 7, which states:

'An application for an order under paragraph 4 above shall be made *inter partes*.'

g No issue arises in this application as to access conditions. The issue is as to who is being referred to in para 7 as a necessary party to an application made under s 9 and Sch 1. It was the view of the judge that a necessary party for the purposes of an application of this kind was the person either charged with or suspected of the crime being investigated. Accordingly on 22 December 1986 he ruled that he was not competent to entertain the application made by the Crown Prosecutor unless notice of the application had been served on the person whose activities were being investigated, namely Francis.

h That ruling caused some consternation, for both the Crown Prosecutor and the police were of the view that the only parties being referred to in para 7 of Sch 1 were on the one hand the police and on the other the person or institution in whose custody the special procedure material was thought to be held. Nevertheless, in order to make progress with the investigation, the Crown Prosecutor served, on behalf of the police, Francis and his solicitor, or one of them, with notice of the application.

j Soon thereafter the application was again placed before the judge who, having been satisfied about service on the parties, made the order which the police sought. We are told that the investigation was eventually completed and Francis convicted.

The concern of the police and the Crown Prosecutor remains of course, because they feel that if an application of a similar kind is made to the same judge he will adhere to the view which he expressed on 22 December 1986 in interpreting para 7, and further that his view might be followed by other judges.

The vice which will, it is said, arise out of such a decision is expressed in para 10 of the affidavit of the Branch Crown Prosecutor:

'... In the present case, it was possible to rely upon the integrity of the financial institutions referred to above. However, if a Notice of Application for the production of Special Procedure Material must be served upon a suspected or accused person in related criminal proceedings, there may be circumstances in which the Special Procedure Material to which access is required, may be held by persons or corporate bodies who might be subjected to threats from, or susceptible to the influence of, those accused or suspected persons. The Special Procedure Material might therefore be destroyed or disposed of before an order could be made. Moreover an accused or suspected person, once served with a notice of an application under Schedule 1 of the Act, might have had the opportunity to cause the Special Procedure Material to be unlawfully removed, disposed of, or destroyed, before an order under the schedule can be made.'

I agree that those are consequences which might easily follow from service on a suspected person of an intention by the police to seek an order under s 9 of and Sch 1 to the 1984 Act. It is desirable, in my view, that such consequences as that should be avoided. It seems almost inconceivable that Parliament in enacting this part of the Act could have contemplated that a suspected person should be made aware of this essential part of the activities of the police in making their investigation into criminal activity.

However, one has to look at the provisions already mentioned of the Act and the schedule, so as to gather from them, standing by themselves, who is being referred to as a party in para 7 of the schedule. It seems to me to be beyond doubt that, apart from the reasons which I have already stated, the only parties referred to in the 1984 Act and the schedule are the police who make the application and the person or institution in whose custody the special procedure material is thought to be. Be it noted that s 9(1) itself refers to a criminal investigation. It does not suggest that there is, even at the time of making the application, a suspected person, let alone a person who has in fact been charged with a criminal offence.

What is envisaged by s 9(1) in my view is that, when the police are making investigation into a crime, they may at any stage of those investigations, before they have identified anyone as a likely perpetrator of the crime being investigated, seek access to what is called special procedure material and invoke the assistance of the courts for an order for that purpose.

That construction I place on the wording of s 9(1) finds support, I think, in Sch 1 itself, which does not include any reference whatsoever to a suspected person or to a person who has been charged.

I have to say therefore that the judge was in error.

Accordingly I would make the declaration which is sought by the Crown Prosecutor on behalf of the police in Leicestershire giving effect to the construction I have placed on para 7.

KENNEDY J. I agree.

Declaration accordingly.

Solicitors: Crown Prosecution Service, Leicester.

Sophie Craven Barrister.

Butt v Butt

COURT OF APPEAL, CIVIL DIVISION

MUSTILL AND NOURSE LJJ

19 JUNE 1987

a

b

Injunction – Undertaking – Discharge – Undertaking in lieu of injunction – Defendant giving undertaking on hearing of interlocutory motion – Undertaking given until trial or further order – Defendant indicating that subsequently he might apply to discharge undertaking – Motion adjourned generally – Defendant subsequently applying to have undertaking discharged – Judge refusing to discharge undertaking – Whether undertaking binding until trial – Whether matter could be reopened before trial.

c

In the course of proceedings for a declaration that the defendant should hold on trust for the plaintiff half the net proceeds of the sale of a commercial property, the plaintiff applied for and was granted *ex parte* a Mareva injunction. At a subsequent hearing *inter partes* the defendant gave an undertaking in lieu of an injunction not to dispose of his former matrimonial home save at a fair market price nor to dispose of the net proceeds

d

of sale of the property 'until trial or further order', but he indicated to the court that he intended at a later date, if he acquired sufficient evidence, to apply to have the undertaking discharged on the grounds of material non-disclosure by the plaintiff at the *ex parte* hearing. The motion was then adjourned generally. The defendant subsequently applied to discharge the undertaking but the judge refused to discharge it on the ground that there had not been any significant change in circumstances since the defendant gave the

e

undertaking. The defendant appealed.

Held – Where an interlocutory motion was adjourned generally rather than merely stood over until trial it was, in terms, not dealt with or disposed of as an interlocutory matter, and therefore an application could be made for the matter to be reopened and dealt with in some other way before the trial if such a course was appropriate. Since it had been expressly contemplated that the defendant might apply to have the undertaking discharged if he was subsequently able to acquire sufficient evidence to justify such an application, and since the court should give effect to the expressly evinced intention of the parties once that had been established, the appeal would be allowed and the defendant's application to have his undertaking discharged would be remitted to the judge for determination on the merits (see p 659 *c* to *e h j* and p 660 *c d g j*, post).

g

Chanel Ltd v F W Woolworth & Co Ltd [1981] 1 All ER 745 distinguished.

Notes

For setting aside a consent order, see 26 Halsbury's Laws (4th edn) para 562, and for cases on the subject, see 37(3) Digest (Reissue) 13-16, 3024-3034.

h

Case referred to in judgments

Chanel Ltd v F W Woolworth & Co Ltd [1981] 1 All ER 745, [1981] 1 WLR 485, CA.

Case also cited

j

GCT (Management) Ltd v Laurie Marsh Group Ltd [1973] RPC 432.

Interlocutory appeal

The defendant, Alec Charles Prior Butt, appealed against the decision of his Honour Judge Micklem, sitting as a judge of the High Court on 14 November 1986 refusing to discharge him from undertakings given by him to the judge on 16 September in

connection with an action commenced by writ issued on 12 August 1986 by the plaintiff, Herbert Andrew Charles Butt. The facts are set out in the judgment of Nourse LJ.

Stephen Acton for the defendant.

Stephen Rees Davies for the plaintiff.

NOURSE LJ (giving the first judgment at the invitation of Mustill LJ). This is an appeal from a decision of his Honour Judge Micklem, sitting as a judge of the High Court in the Chancery Division, given on a preliminary point on 14 November 1986. The judge had before him an application by the defendant in the action to be discharged from undertakings given by him as part of an earlier order made by the judge on 16 September 1986.

The question which we have to decide is whether the circumstances of the present case are distinguishable from those which were considered by this court in *Chanel Ltd v F W Woolworth & Co Ltd* [1981] 1 All ER 745, [1981] 1 WLR 485.

The plaintiff and the defendant are first cousins. The action concerns a coal yard at Frog Lane, Coalpit Heath, near Bristol. The plaintiff claims a declaration that the defendant holds half the net proceeds of sale of that property on trust for him. He also seeks other and consequential relief.

The matter first came before the court on 18 August 1986 when the plaintiff applied *ex parte* to his Honour Judge FitzHugh QC for Mareva relief. The judge made an order restraining the defendant from disposing of the net proceeds of sale of his former matrimonial home until 8 September. On 4 September the defendant's solicitors wrote to the plaintiff's solicitors stating that the defendant did not accept that the plaintiff was entitled to the injunction, and that he intended to apply for it to be discharged. They added that they were not yet ready to make that application and that they would serve notice on the plaintiff's solicitors when they were. In the mean time they accepted that the order made on 18 August might continue, provided that the defendant continued to have liberty to apply to discharge it on 48 hours' prior notice.

When the matter came back before the court on 8 September, the defendant did not appear and was not represented. On that occasion Judge Micklem continued the Mareva relief in a somewhat different form until 16 September. On that day both the plaintiff and the defendant were represented by counsel. The order which was then made contains an undertaking by the defendant 'until trial or further order' not to do certain acts, one of which is not to sell his former matrimonial home save at a fair market price.

The order proceeds as follows:

- 'IT IS ORDERED THAT: (1) The motion be adjourned generally. (2) Costs reserved. (3) Liberty to apply on 48 hours written notice.'

On 16 September it was stated, and I quote from the judgment of the judge on 14 November:

'... that the undertaking which was accepted and embodied in the order was a matter of expediency and counsel for the defendant indicated that at a later date the defendant might apply to discharge the undertakings, and especially on the grounds of possible material non-disclosure when the plaintiff applied *ex parte*.'

In due course such an application was made, and it was that application which came before Judge Micklem on 14 November. The defendant was then met with the objection that he was not entitled to be discharged from his undertakings by reason of the decision of this court in the *Chanel* case.

As I have said, the judge dealt with that matter as a preliminary point, and he decided it in favour of the plaintiff. It was unnecessary in the circumstances for him to go on and consider the merits of the defendant's application, and he did not do so. The defendant

now appeals to this court and seeks an order that his application be remitted to the judge to be heard and determined on its merits.

In my judgment what this court decided in the *Chanel* case was that where, on an application for an interlocutory injunction, the respondent chooses not to seek an adjournment of the application, but instead accepts that it should be dealt with and disposed of then and there by offering undertakings until trial or further order, there must be good grounds before the respondent is able to apply to discharge or modify the undertakings. Good grounds can consist of a significant change in circumstances or a becoming aware of new facts which could not reasonably have been known or found out before the undertakings were given.

Counsel who appears here for the defendant, but did not appear below, submits that that decision can be distinguished in the present case on a number of grounds. The principal ground on which he relies is that here the motion was not, as it was in the *Chanel* case, stood over to the trial of the action, but was adjourned generally. Counsel submits that if a motion is stood over until the trial of the action, it is dealt with and disposed of as an interlocutory matter. On the other hand, if the motion is adjourned generally, it is not so dealt with and disposed of.

Counsel for the plaintiff submits that there is no practical distinction between standing a motion over until trial and adjourning it generally. He says that in each case the court assumes that the motion will not be restored except in what have been described as *Chanel* circumstances.

In my view the submission of counsel for the defendant is to be preferred. There has been some debate whether there is any distinction between an adjournment generally and an adjournment sine die. I do not think that there is, but in any event it seems to me that if a motion is adjourned it is, in terms, not dealt with and disposed of. The very expression contemplates that there may thereafter be an application for the status quo to be reopened and for the matter to be dealt with in some other way before trial. I doubt whether this important point was made in the court below.

Counsel for the defendant also relies on the fact that the order contains an express liberty to apply, albeit not an express liberty to apply to vary or discharge the order. In the *Chanel* case there was no such express provision in the order, although it was held that an undertaking 'until trial or further order' necessarily imports a liberty to apply in appropriate circumstances. It may be that if the order in the present case had been silent on the question of an adjournment, the express liberty to apply would not have added anything. But it seems to me that the express collocation of the two must, if anything, show that it was intended that there should be a liberty to apply to reopen the matter in certain circumstances not necessarily in *Chanel* circumstances. I do not myself regard this as a very significant point, but I do not think that it is one which can be against the defendant.

Finally, counsel for the defendant relies, although I think rather faintly, on the express provision in the order for costs to be reserved. I do not myself think that that is a point of any significance at all.

For these reasons I am of the opinion that, looking only at the terms of the order, the defendant's case on this appeal is made out. However, if there had been any doubt about the matter it would have been not only desirable but necessary for the court to pay attention to what was said before Judge Micklem on 16 September as recorded in the passage from his judgment which I have already read. That shows that it was expressly contemplated that the defendant might wish to apply to be discharged from his undertakings on the ground that there had been a material non-disclosure when the plaintiff first made his ex parte application to Judge FitzHugh. It seems to me that it would therefore in any event be quite wrong to prevent the defendant from making that application.

Counsel for the plaintiff has told us, and I certainly accept, that when he was before

Judge Micklem on 16 September, he expressly submitted that in order to succeed on such an application the defendant would need to show grounds on which the court would discharge an undertaking, by which he meant *Chanel* grounds. However, the significance of that submission does not appear to have got across to the defendant and his advisers who, if it had, would undoubtedly have sought to deal with the matter in some different way, for example by seeking an adjournment to a fixed date, perhaps with directions for evidence in the mean time. More important still is the fact it does not seem to have got across to the judge who, on 14 November, could not have expressed himself as he did, if he had known what had been in the mind of counsel for the plaintiff on 16 September.

For these reasons I would allow this appeal and remit the matter to the judge for him to hear and determine the defendant's application on its merits.

MUSTILL LJ. I agree and would add only one general observation. If there is an inter partes hearing on which an undertaking is given in lieu of an injunction, and if it is made plain and understood by all concerned in the hearing, that the undertaking is given in the contemplation that the defendant may subsequently wish to apply for the discharge of the undertaking when his evidence is in order, there would, in my judgment, be something wrong with the law if that common understanding were to be frustrated simply because the relief takes the form of an undertaking rather than an injunction.

I do not believe that *Chanel Ltd v F W Woolworth & Co Ltd* [1981] 1 All ER 745, [1981] 1 WLR 485 establishes any such proposition. Nor do I believe that it establishes that the defendant loses what would otherwise have been his rights, simply because the judge has not fixed the date on which evidence would be received in support of an application to have the undertaking discharged. It is to my mind plain from the judgment of Buckley LJ in the *Chanel Ltd* case that the defendant there had not in any way signalled an intention to return to the court before trial if the state of the evidence so permitted. It is not surprising that in such circumstances Buckley LJ described the defendant as having capitulated and that he read the form of order as meaning exactly what it said.

If any such intention had been intimated and clearly recorded by the judge at first instance (as it was here) it seems to me that the reasoning of Buckley LJ would necessarily have been entirely different (see *Chanel Ltd v F W Woolworth & Co Ltd* [1981] 1 All ER 745 at 751, [1981] 1 WLR 485 at 492).

In my judgment the situation in the present case is that the court should meet the justice of the matter by giving effect to the explicitly evinced intention of the parties once that intention has been established. I would be sorry to think that, in order to avoid the conclusion for which the plaintiff argues today, a defendant should be forced to accept an injunction rather than volunteer an undertaking, or should be forced to invite the judge to set a hearing date for the application to discharge the undertaking, even though he could not yet be sure whether his evidence would, in the event, prove to be sufficiently strong to justify the making of any such application.

Here the judge's record of what was said at the first hearing is consonant with the form of the order which was made. Both showed what had been intended to happen in the future. The defendant had signalled the possibility (not yet crystallised into a firm intention) of returning to court in order to have the injunction discharged. I believe it would be wrong in such circumstances to hold that the defendant's advisers had succeeded in shutting out their client from arguing that the plaintiff had failed to fulfil his obligations to the court at the ex parte stage of making a full disclosure of all the material facts. I therefore concur in the opinion that the appeal should be allowed.

Appeal allowed. Application remitted to judge.

Solicitors: *Osborne Clarke*, Bristol (for the defendant); *Scott & Co*, Stroud (for the plaintiff).

Frances Rustin Barrister.

R v Greater Manchester North District Coroner, ex parte Worch and another

COURT OF APPEAL, CIVIL DIVISION

SLADE, NICHOLLS LJ AND SIR JOHN MEGAW

21, 22, 31 JULY 1987

Coroner – Post-mortem examination – Post-mortem examination without inquest – Power of coroner to direct post-mortem examination without ordering inquest – Coroner suspecting that deceased dying either violent or unnatural death or sudden death of unknown cause – Whether coroner having jurisdiction to order post-mortem examination without inquest – Whether coroner only entitled to order post-mortem examination without inquest if his suspicion was solely of sudden death of unknown cause – Whether coroner required to order inquest if he also suspected violent or unnatural death – Coroners (Amendment) Act 1926, s 21(1)(3).

The deceased was found dead at the wheel of his car after it left the motorway for no apparent reason and crashed. The coroner, without ordering an inquest, directed that a post-mortem examination be carried out on the body of the deceased on the ground that there was reasonable cause to suspect that the deceased had died either a violent or an unnatural death or a sudden death of which the cause was unknown. By s 21(1)^a of the Coroners (Amendment) Act 1926 a coroner could, where there was reasonable cause to suspect that a person had died a sudden death of which the cause was unknown, dispense with an inquest if he was of the opinion that a post-mortem examination might prove an inquest to be unnecessary, but by s 21(3) he could not dispense with an inquest if there was reasonable cause to suspect that the deceased had died either a violent or an unnatural death. The post-mortem examination revealed that the deceased had been killed in the crash and had not died from natural causes, and accordingly the coroner refused to issue a burial order until an inquest had been held. The deceased was a member of a Jewish burial society whose tenets required burial before sunset on the day of death and forbade any tampering with the body. The widow and the president of the burial society sought, inter alia, a declaration that the coroner's decision to order a post-mortem examination was unlawful. The Divisional Court held that a coroner could only exercise his discretion under s 21(1) of the 1926 Act to order a post-mortem examination without ordering an inquest if he had reasonable cause to suspect nothing else but a sudden death the cause of which was unknown, and accordingly it granted the declaration sought. The coroner appealed.

Held – The jurisdiction which a coroner had under s 21(1) of the 1926 Act to order a post-mortem before deciding to hold an inquest encompassed the situations where he had reasonable cause to suspect that the relevant death was either (i) violent or unnatural or (ii) a sudden death of which the cause was unknown, ie was not known to be natural. Furthermore, if the result of the post-mortem then satisfied the coroner that the death had occurred by natural causes he had the power to dispense with an inquest unless the death had occurred in the circumstances specified in s 21(3). It followed that the coroner had had jurisdiction to order a post-mortem examination of the deceased before ordering an inquest although, in view of the result of the post-mortem examination, he was right subsequently to order an inquest. The coroner's appeal would accordingly be allowed (see p 667 j, p 668 d e j to p 669 a d g and p 670 f, post).

Decision of the Divisional Court of the Queen's Bench Division [1987] 2 All ER 536 reversed.

^a Section 21 is set out at p 665 d to h, post

Notes

For post-mortem examination without inquest, see 9 Halsbury's Law (4th edn) para 1065. a

For the Coroners (Amendment) Act 1926, s 21, see 11 Halsbury's Statutes (4th edn) 381.

Case referred to in judgment

National Assistance Board v Wilkinson [1952] 2 All ER 255, [1952] 2 QB 648, DC. b

Cases also cited

Ealing London BC v Race Relations Board [1972] 1 All ER 105, [1972] AC 342, HL.

R v Central Cleveland Coroner, ex p Dent (1986) 150 JP 251.

R v Hammersmith Coroner, ex p Peach [1980] 2 All ER 7, [1980] QB 211, CA. c

Appeal

The coroner for Greater Manchester North District, Mr J B C North, appealed against the decision of the Divisional Court of the Queen's Bench Division (Watkins LJ and Macpherson J) ([1987] 2 All ER 536, [1987] QB 627) on 14 January 1987 whereby the applicants, Sarah Sime Worch, the widow of the deceased Colin Worch, and Walter Brunner, the president of Chesed Shel Emess, a Jewish burial society, were granted a declaration that the decision of the coroner made on 4-5 August 1986 directing or requesting that a post-mortem examination be made on the body of the deceased was unlawful. The facts are set out in the judgment of the court. d

David Sullivan QC and *Giles Kavanagh* for the coroner.

Richard Gordon for the applicants. e

Cur adv vult

31 July. The following judgment of the court was delivered.

SLADE LJ. This is an appeal by the coroner for Greater Manchester North District from a judgment and order of the Divisional Court (Watkins LJ and Macpherson J) ([1987] 2 All ER 536, [1987] QB 627) given on 14 January 1987 whereby Mrs Sarah Sime Worch and Mr Walter Brunner, as applicants, were granted a declaration that the decision of the appellant coroner made on 4-5 August 1986 directing or requesting that a post-mortem examination be made on the body of Colin Worch deceased was unlawful. f

For present purposes the facts can be stated quite shortly. On 4 August 1986 the deceased was driving along a motorway. At about 7.30 pm he apparently, quite suddenly, lost control of his car. It left the motorway and crashed into some obstruction. Police who were called to the scene found him dead at the wheel. g

His widow, the first applicant Mrs Worch, was informed. She telephoned the second applicant, Mr Brunner. He is the president of an organisation known as Chesed Shel Emess, of which the deceased was a member. This organisation is responsible for looking after the body of a Jewish person from death up to and including burial. His evidence is that those who belong to this organisation acknowledge and believe that— h

'It is a sacred duty of the Jewish People to look after the body, prepare for burial and carry out the burial in accordance with the appropriate laws and customs. It is considered as such an important thing, that it takes precedence over almost all other Jewish laws and because of its importance and complexity special organisations referred to above, are established in all practising Jewish Communities . . . It is also obligatory to ensure that the burial takes place as quickly as possible and in any case before sunset, only in exceptional circumstances is it permitted for the body to be left overnight. It is very strictly forbidden to tamper with the body in any shape or form, thus a P.M. is absolutely forbidden in accordance with Jewish Law.' j

a At about 10 pm Mr Brunner informed the coroner of the accident and death by telephone. The coroner wished to hear further details from the police and at about 9.30 am the following morning (5 August) he spoke to the police officer concerned, who gave him brief details of the circumstances surrounding the death. From that conversation he learnt that the police were continuing their investigations, but it was thought that no other motor vehicle was involved.

b The coroner decided to hold a post-mortem. In para 2 of his first affidavit he made both a number of submissions of law and a number of statements of fact relating to this decision. In para 2(2) he said;

'I maintain that I exercised my discretion as to the holding of a post-mortem under Section 21(2) of the Coroners Act 1887 in a proper manner.'

c In para 2(4) he said: 'My discretion was exercised properly to assist myself to establish the cause of death.' In para 2(8) he described the reasons for his decision as follows:

d 'In the circumstance, I exercised my discretion and decided that a post mortem was necessary in order to determine whether the deceased had died as a result of injuries or had died from a natural cause so producing the injuries when the car crashed. The particular circumstances of the incident indicated that the deceased might have suffered some form of attack which produced the loss of control.'

In para 2 of a later, second affidavit he further explained his reasons as follows:

e 'The Police were continuing their investigations but it was thought at that stage that no other motor vehicle was involved. At this point, from the information given to me, I had reasonable cause to suspect that the deceased had died either a violent or unnatural death or a sudden death of which the cause was unknown. I formed the opinion that an inquest might be necessary. I then went through the reasoning process as set out at paragraph 2, subparagraph 8 of my earlier Affidavit. I then requested a pathologist to hold a post-mortem examination. I did feel that when I had the result of the post-mortem examination that it would be open to me to dispose of the matter without an inquest if the cause of death were shown to be natural. It was when I was informed that the medical cause of death was multiple injuries, that is unnatural, that I decided to open an inquest.'

f The coroner in his first affidavit stated, and there is no reason to doubt, that he was well aware of the burial requirements and funeral arrangements for the Jewish community. It has not been suggested that he has been careless of their concern over such matters.

g On 5 August a pathologist was instructed or requested to conduct a post-mortem and he did so at 3 pm that day. He reported that the medical cause of death was multiple injuries (so that the deceased had not died a natural death).

h At about 3 pm Mr Brunner arrived at the coroner's office, but the coroner was absent holding inquests and his office had not yet received the report of the post-mortem. A short time afterwards the coroner telephoned his office and learnt the effect of the pathologist's report. He ordered an inquest to take place on the following day. At about 3.30 pm, according to his evidence, Mr Brunner was informed by the coroner's secretary that the coroner had stated that an inquest would have to take place and that the burial order could only be issued after the opening of that inquest. In para 1(12) and (13) of his first affidavit the coroner explained the reasons why he considered that he should not issue an immediate burial order. These reasons are not material for the purpose of this appeal.

j Mr Brunner was upset by the information given to him by the coroner's secretary, coupled, as it was, with the statement that an inquest could not take place until the following morning, 6 August. He could not understand why in any event the body could not be released for burial at once, now that the post-mortem had taken place.

He again spoke to the coroner on the telephone about the urgency for a burial order. The coroner informed him that his deputy was now dealing with the matter and that he would have to contact the deputy to see whether the inquest could be held earlier. Mr Brunner attempted to contact the deputy, but was unable to do so. a

The inquest was opened at 12 noon on 6 August. The pathologist's report was handed to the deputy coroner. Formal evidence of identity of the deceased's body was given. Soon after that the burial order was issued on the same day, 6 August.

On 21 October 1986 Simon Brown J gave the applicants leave to move for judicial review of the decisions of the coroner (1) to direct or request that a post-mortem examination be made on the body of the deceased, (2) to withhold issuing an order authorising the burial until after the opening of the inquest. b

The Divisional Court, in its decision of 14 January 1987, refused relief under the second of these heads and there is no challenge to that part of its decision. However, it granted relief under the first head, in the terms of the declaration referred to at the beginning of this judgment. From this part of the order the coroner now appeals. c

Watkins LJ, in the course of his judgment, observed that the concern of the applicants was perfectly understandable, having regard to Jewish law and faith and custom and practice with regard to post-mortems and burial. The locus standi of the applicants to apply for judicial review has not been challenged on this appeal. However, as Watkins LJ also observed, a coroner is subject to the law laid down by Parliament and has to obey that law with scrupulous regard to all its provisions. d

We now turn to the relevant statute law. Section 3(1) of the Coroners Act 1887, as amended, provides for the holding of inquests as follows:

'Where a coroner is informed that the dead body of a person is lying within his jurisdiction, and there is reasonable cause to suspect that such person has died either a violent or an unnatural death, or has died a sudden death of which the cause is unknown, or that such person has died in prison, or in such place or under such circumstances as to require an inquest in pursuance of any Act, the coroner, whether the cause of death arose within his jurisdiction or not, shall, as soon as practicable, issue his warrant for summoning not less than seven nor more than eleven good and lawful men to appear before him at a specified time and place, there to inquire as jurors touching the death of such person as aforesaid.' e
f

Counsel for the coroner pointed out that the wording of s 3(1) imposes an obligation on a coroner *as soon as practicable* to set in motion arrangements for the holding of an inquest where there is reasonable cause to suspect that the relevant death (A) was violent or unnatural, or (B) was a sudden death of which the cause is unknown, or (C) occurred in prison, or (D) occurred in such place or under such circumstances as to require an inquest in pursuance of any Act. For the sake of brevity and convenience, we will hereafter refer to these four cases respectively as 'case A', 'case B', 'case C' and 'case D'. g

The operation of s 3(1) does not depend on a coroner's belief. It depends on the presence or absence of reasonable cause for suspicion. In view of the contents of the coroner's affidavit quoted above, it must be common ground that, if the subsection had stood alone, it would have imposed an obligation on him in the present case as soon as practicable to set in motion arrangements for the holding of an inquest, since there was reasonable cause to suspect that the death fell within case A or case B. h

Section 21 of the 1887 Act, as amended, confers certain powers on a coroner to summon medical witnesses and to direct a post-mortem examination. So far as material, it provides: j

'(1) Where it appears to the coroner that the deceased was attended at his death or during his last illness by any legally qualified medical practitioner, the coroner may summon such practitioner as a witness; but if it appears to the coroner that the

a deceased person was not attended at his death or during his last illness by any legally qualified medical practitioner, the coroner may summon any legally qualified medical practitioner who is at the time in actual practice in or near the place where the death happened, and any such medical witness as is summoned in pursuance of this section, may be asked to give evidence as to how, in his opinion, the deceased came to his death.

b (2) The coroner may, either in his summons for the attendance of such medical witness or at any time between the issuing of that summons and the end of the inquest, direct such medical witness to make a post-mortem examination of the body of the deceased . . .

However, the power of a coroner to direct a post-mortem under s 21(1) and (2) is not exercisable unless (i) the inquest has already been ordered and (ii) the doctor in question is already summoned as a witness.

c With the clear purpose of effecting an economy of time and effort, the Coroners (Amendment) Act 1926 gave coroners a new power to hold a post-mortem examination before an inquest (s 21). Section 13 also conferred on them a power to hold an inquest without a jury in certain specified cases, reflecting a similar power which had been conferred by s 7 of the Juries Act 1918.

d On this appeal we are principally concerned with the construction and effect of s 21 of the 1926 Act. In its original form, the section read as follows:

e '(1) Where a coroner is informed that the dead body of a person is lying within his jurisdiction and there is reasonable cause to suspect that the person has died a sudden death of which the cause is unknown, if the coroner is of opinion that a post-mortem examination may prove an inquest to be unnecessary he may direct any legally qualified medical practitioner whom, if an inquest were held, he would be entitled under section twenty-one of the Coroners Act, 1887, to summon as a medical witness or may request any other legally qualified medical practitioner, to make a post-mortem examination of the body of the deceased and to report the result thereof to him in writing, and for the purposes of the examination the coroner and any person directed or requested by him to make the examination shall have the like powers, authorities and immunities as if the examination were a post-mortem examination directed by the coroner at an inquest upon the body of the deceased.

f (2) If as a result of such a post-mortem examination as aforesaid the coroner is satisfied that an inquest is unnecessary, he shall send to the registrar of deaths whose duty it is by law to register the death a certificate under his hand stating the cause of death as disclosed by the report, and the registrar shall make an entry in the register or margin thereof accordingly in the form and manner prescribed under the Registration Acts.

g (3) Nothing in this section shall be construed as authorising the coroner to dispense with an inquest in any case where there is reasonable cause to suspect that the deceased has died either a violent or an unnatural death, or has died in prison, or in such place or in such circumstances as to necessitate the holding of an inquest in accordance with the requirements of any Act other than the Coroners Act, 1887.'

h It is common ground that s 21(1) of the 1926 Act empowers a coroner to order a post-mortem, even before deciding to hold an inquest, when the facts known to him give him reasonable cause to suspect that the case falls within case B and case B alone.

i The two principal issues which arise on this appeal are the following. (1) Does s 21(1) of the 1926 Act empower a coroner to order a post-mortem, before deciding to hold an inquest, when the facts known to him give him reasonable cause to suspect that the death falls *either* within case A *or* within case B? (2) If the answer to this question is in the affirmative, should the applicants still be granted relief by way of judicial review, having

regard to the coroner's manifestly inapposite reference to s 21(2) of the 1887 Act in para 2(2) of his first affidavit? a

The first issue

Counsel for the applicants submitted to the Divisional Court, as he has to us, that the answer to the first issue is in the negative. Watkins LJ summarised his submissions as follows ([1987] 2 All ER 536 at 541-542, [1987] QB 627 at 636-637):

'He says that there is no jurisdiction to order a post-mortem for the purpose of deciding whether, with or without a jury, an inquest is necessary, except where a coroner, on being informed that there is a dead body within his jurisdiction, has at that time reasonable cause to suspect nothing else but sudden death, the cause of which is unknown. He says that this coroner could not have made a valid order under s 21 [of the 1926 Act] unless the only thing in his mind was such a suspicion. If he had in his mind any other suspicion, and in particular a suspicion that death was due to violence, he could do no other than to revert to the provisions of s 3 of the 1887 Act which would have obliged him to hold an inquest.'

Watkins LJ continued:

'I feel bound to say that my mind for some while wavered whether this submission was validly made, having regard to s 21(1) and (3) of the 1926 Act. Counsel for the coroner contended that these two subsections can properly exist together. Thus, if a coroner is of the mind, in the peculiar circumstances of this case, that there could be two suspicions of a different kind as to the cause of death, he could go to the provisions of sub-s (1) and use the power there contained to order a post-mortem, the result of which might very likely result in the avoidance of an inquest. He says that Parliament was, by the enactment of s 21, bent on reducing the need for and therefore the number of inquests, and that it would be to defeat the intention of Parliament to come to a conclusion in accordance with the submission of counsel for the applicants.'

However, the Divisional Court rejected the arguments submitted on behalf of the coroner as to the construction of s 21 of the 1926 Act. Watkins LJ put the matter succinctly thus: f

'I disagree. It seems to me that Parliament intended, by the saving provisions in sub-s (3), when there is a reasonable suspicion that death has come about as a result of violence, that there should inevitably be an inquest in accordance with s 3 of the 1887 Act. I do not see how it could be said that Parliament intended otherwise. If it had, I apprehend that the word "only" would have appeared somewhere in sub-s (1). It does not find a place there. So much for the primary submission made on behalf of the applicants. That, of course, is sufficient for them to obtain the declaration which they seek with regard to the post-mortem. There was no power in this coroner, in the circumstances and in view of the law and his state of mind at the relevant time, to order a post-mortem on the body of the deceased.'

Macpherson J, in the course of his concurring judgment, said ([1987] 2 All ER 536 at 543, [1987] QB 627 at 638-639):

'For a time I too was attracted by the argument that s 21(1) of the 1926 Act gave the coroner power to order a post-mortem where there were two competing reasonable suspicions in his mind, namely that the deceased died a violent death as a result of the accident or that he died by natural causes at the wheel. But in the end, I am persuaded that s 21(1) is limited to cases where there is only a reasonable suspicion that a person has died a sudden death of which the cause is unknown, both because of the wording of s 21(1) and because of the operation and wording of sub-s (3). It is, in my judgment, right that where violent death is at the outset a reasonable

possibility, then an inquiry by inquest, in the present case without a jury, is required to take place so that the matter can be publicly explored and resolved.'

In his argument in support of the decision of the Divisional Court, counsel for the applicants did not feel able to adopt the point made by Watkins LJ by reference to the absence of the word 'only' in s 21(1) of the 1926 Act. (We will briefly revert to this point later in this judgment.) However, enlarging on the other reasoning of the Divisional Court, he submitted that its decision was correct, broadly for the following reasons.

In his submission, the plain meaning of s 21(1) of the 1926 Act is that the coroner has no power to order a post-mortem once there is reasonable cause to suspect that the death falls within any of the four cases referred to above, other than case B (death of which the cause is unknown). Thus, it is said, if there is reasonable cause to suspect that the death falls either within case A (violent or unnatural death) or within case B, the power is not exercisable. Counsel for the applicants submitted that this conclusion is supported not only by the clear words of s 21(1) of the 1926 Act, but also by s 3(1) of the 1887 Act. He pointed out that s 3(1) begins with more or less the very same words as s 21(1), namely:

'Where a coroner is informed that the dead body of a person is lying within his jurisdiction and there is reasonable cause to suspect that [such] [the] person has died ...'

Counsel for the applicants submitted that both subsections are directed to the same particular point of time. He submitted that the only inference to be drawn from the omission of any reference in s 21(1) to cases A, C and D (all of which are referred to in s 3(1)) is that the power to order a post-mortem conferred by s 21(1) is never to be exercisable in case A or case C or case D.

Furthermore, he contended, this conclusion is supported by the wording of s 21(3) of the 1926 Act. This subsection, in his submission, is directed to the same point of time as s 21(1); in contrast with s 21(1) it makes express reference to cases A, C and D and makes it clear that the coroner's powers under s 21(1) are not to be exercisable in any of those three cases.

Counsel for the applicants submitted that his construction of s 21(1) accords with the thinking behind the legislation, which is that there should be a public inquiry by inquest in any case where there is reasonable cause to suspect that the death falls within case A or case C or case D. He relied on the observations of Macpherson J to this effect. He pointed out that before 1926 there was no question of dispensing with an inquest in any such case. He reminded us of the principle of construction that 'a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion': see *National Assistance Board v Wilkinson* [1952] 2 All ER 255 at 260, [1952] 2 QB 648 at 661 per Devlin J.

Nevertheless, there can be no doubt that s 21(1) of the 1926 Act was intended to confer an entirely new power on coroners to order a post-mortem before an inquest, provided that the three conditions specified in the subsection are satisfied, namely: (1) the coroner 'is informed that the dead body of a person is lying within his jurisdiction'; (2) 'there is reasonable cause to suspect that the person has died a sudden death of which the cause is unknown'; and (3) 'the coroner is of opinion that a post-mortem examination may prove an inquest to be unnecessary ...'. As to the second of these conditions, the phrase 'a sudden death of which the cause is unknown' must clearly bear the same meaning as that which it bears in s 3(1) of the 1887 Act. In the context of s 3(1), case B must, in our judgment, be intended to cover, and does cover, any case of a sudden death where the cause of death is not known to be natural. We did not understand counsel for the applicants to dispute this proposition.

We can see no reason why, in the context of s 21(1), the phrase 'a sudden death of which the cause is unknown' should not be similarly construed as meaning 'a sudden death of which the cause is not known to be natural'.

If this meaning is attributed to the phrase in the second of the three conditions specified in s 21(1), then, in our judgment, good and consistent sense can be made of all the subsequent provisions of the section. As to the third of the conditions, the only circumstances ex hypothesi in which the coroner may be of opinion that 'a post-mortem examination may prove an inquest to be unnecessary' are if the case is not a case C or case D, and he thinks the post-mortem may prove that the deceased died of natural causes, so that the possibility of it being a case A may, perhaps, also be eliminated by the post-mortem.

The original s 21(2) of the 1926 Act is no longer law, since it has been replaced by s 23(3) of the Births and Deaths Registration Act 1953. Nevertheless, the original subsection is admissible in construing the section as a whole and, in our judgment, throws light on its construction. It demonstrates that the section as a whole contemplates a two-stage process.

First, the coroner has to consider whether the three conditions specified in s 21(1) are satisfied. If, but only if, he is so satisfied, he is under no *immediate* obligation to arrange an inquest 'as soon as practicable' (as he would otherwise have to do under s 3(1) of the 1887 Act), but may instead order a post-mortem. However, s 21(1) itself confers no power whatever to dispense with an inquest.

The second stage of the process arises when the result of the post-mortem is known. If, but only if, the case is not a case C or case D, and the post-mortem shows that the death was due to natural causes, the coroner may be satisfied that an inquest is unnecessary. If that is so, he can accordingly dispense with an inquest. However, s 21(3) is there as a reminder so as to make it clear that, after the result of the post-mortem is known, the coroner will still be obliged to order an inquest if the case is a case A or case C or case D (as he properly did in the present case when he learnt from the post-mortem that the death had been caused by multiple injuries).

We cannot accept the submission of counsel for the applicants that sub-ss (1) and (3) of s 21 are intended to operate at the same point of time. Any such contention disregards the original s 21(2) of the 1926 Act, which is, in our judgment, of some significance. Section 21(2) expressly or by necessary implication demonstrates that the section contemplates three things. First, the coroner is to have the power in certain circumstances to dispense with an inquest. Second, however, this power is to be exercisable (if at all) only after the post-mortem examination has been held and its result satisfies the coroner that an inquest is unnecessary (by satisfying him that the death has occurred by natural causes). Third, on dispensing with an inquest, he is to send to the registrar of deaths the appropriate certificate. The legislature, in our judgment, thought it right to add s 21(3) as a reminder and warning so as to make it clear that, after the post-mortem has been held, the dispensing power must not be exercised if the case remains a case A or case C or case D; in such circumstances the obligation to hold an inquest imposed by s 3(1) of the 1887 Act will still apply.

The construction of s 21 set out above in all essentials accords with that presented to us by counsel for the coroner. Counsel for the applicants asserts that this construction will produce a result contrary to the public interest, since it would enable a coroner to dispense with an inquest even in a case where there had initially been reasonable cause to suspect that the relevant death had been a violent or unnatural one. This thinking is reflected in the last sentence of the passage from the judgment of Macpherson J quoted above.

With all respect, we cannot agree. The obvious purpose of s 21, as we have already pointed out, was to effect an economy of time and effort by eliminating the need for an inquest in certain cases where the legislature thought an inquest would be unnecessary. The section, as so construed above, will never enable a coroner to dispense with an inquest so long as there remains a reasonable cause to suspect that the death was violent or unnatural; and, indeed, s 21(3) makes this clear. However, we can see no reason why the legislature should have thought it inappropriate to give a coroner the power to direct a post-mortem in a case where he considers that its result may eliminate the need to hold

a an inquest (by eliminating as a matter of evidence the possibility that the death was violent or unnatural), provided only that it is not a case C or case D.

Perhaps we should also emphasise that s 21 will never enable a coroner to dispense with an inquest where it is known, or there is reasonable cause to suspect, that the death occurred in prison. There was some debate before us whether, in a case where there is doubt whether the death occurred in prison or, on the other hand, in transit to or from prison, the section would empower a coroner to order a post-mortem in advance of an inquest for the purpose of possibly rendering an inquest unnecessary. We are inclined to think that the answer to this question is in the negative, bearing in mind that s 21(1) makes no reference to a death of which the place, as distinct from the cause, is unknown. However, it is not necessary to decide this particular point, and an additional reason for expressing no concluded view on it is that there appears to be some question whether the words 'in prison' in this context may bear the extended meaning of 'in prison custody': see *Thurston's Coronership* (3rd edn, 1985) para 15.04.

c Finally, in the context of the first issue, we should refer to the absence of the word 'only' from s 26(1). So far as this point has any significance, in our judgment, it supports the construction of the subsection of counsel for the coroner, since it could be said that, if the power thereby conferred were intended to be exercisable exclusively in a case B situation, one might have expected the word 'only' to be there, to effect the limitation on the power.

d For the reasons which we have given, we answer the first issue in the affirmative. We have felt some hesitation before reaching this conclusion because it differs both from that reached by the Divisional Court and from the apparent views of the editors of two well-known text books (see *Jervis on Coroners* (10th edn, 1986) para 7.9 and *Thurston's Coronership* (3rd edn, 1985) para 11.11). However, the two textbooks cite no authority on the question and we infer that the Divisional Court did not have the benefit of such full argument as we have done. In particular, we understand that the version of s 21 of the 1926 Act presented to that court did not include s 21(2), which, though now repealed, throws light on the relationship between s 21(1) and (3). Watkins LJ described the relevant question as being 'whether the effect of sub-s (3) is to render impotent the provisions of sub-s (1)'. If s 21(2) had been drawn to his attention, we venture to think that Watkins LJ might well have concluded that sub-s (3) relates to a different point of time from that to which sub-s (1) relates.

The second issue

g It follows from our conclusion on the first issue that on 5 August 1986 the coroner had the power to order a post-mortem under s 21(1) of the 1926 Act before ordering an inquest, because all the three conditions of that subsection were satisfied.

However, counsel for the applicants has submitted that, even if we were to take this view, we should still grant relief by way of judicial review of the coroner's decision to order a post-mortem because of the reference to s 21(2) of the 1887 Act in para 2 of the coroner's first affidavit.

h In circumstances very different from the present (because he accepted the applicants' argument on the first issue) Watkins LJ regarded this point as a further reason for granting the declaration sought in regard to the post-mortem, saying as follows ([1987] 2 All ER 536 at 542, [1987] QB 627 at 637):

j 'A further point which has been taken is that the coroner did not apply his mind to s 21 of the 1926 Act. There is some force in that. As I have already stated, in the first of his affidavits the coroner claims to have acted within the provisions of s 21, not of the 1926 Act but of the 1887 Act. That betrays a misunderstanding of the combined effect of these two Acts. Whether some error has crept into the first affidavit and the number '1887' appear there instead of, as might have been intended, '1926', I cannot tell. But in the absence of that error, there must have been

some confusion in the mind of the coroner as to the law which he had to apply in pursuance of his duties with regard to the post-mortem and inquest. That is an additional reason why I would say that the declaration here sought in respect of the order for there to be a post-mortem should go.' a

Macpherson J added nothing of his own on this point.

Though it seems a fair inference that the coroner's two affidavits were drafted for him by his legal advisers, there is no evidence before us as to the manner in which the reference to s 21(2) of the 1887 Act came to be included in para 2(2) of the first affidavit. We refused an application on the part of the coroner to adduce further evidence on this point. b

Counsel for the applicants, as we understood him, accepted that, provided the coroner had the power under s 21(1) of the 1926 Act to order a post-mortem at the time when he did and, in making such an order, properly directed his mind to the relevant factors specified in s 21(1), the exercise of his discretion in making an order of this nature would not be open to challenge by way of judicial review merely because he thought the relevant statutory power was conferred on him by s 21(2) of the 1887 Act or because, by an oversight, an erroneous reference to the last-mentioned subsection crept into his first affidavit. However, he submitted that the very fact of this erroneous reference by itself indicated that the coroner, in ordering a post-mortem, did not have, or may well not have had, the relevant factors in mind. c

We do not accept this submission. It seems to us that the passages from the coroner's affidavits quoted above, coupled with the rest of his evidence, show that he had the three conditions specified in s 21(1) of the 1926 Act very well in mind. Assuming that the circumstances were such as to render the power conferred by that subsection exercisable (as we have held), we are not persuaded that his reference to s 21(2) of the 1887 Act shows that, in exercising his discretion to order a post-mortem, he misdirected himself as to any essential matters. d

Even apart from this point, however, we do not think that, on any footing, this would be an appropriate case for this court, in the exercise of its discretion, to grant the applicants any relief by way of judicial review on the second subsidiary issue if (as we have held) they fail on the first issue, which is the only issue of principle raised on this appeal. e

For these reasons, we allow this appeal. We set aside the order of the Divisional Court and dismiss the application for judicial review. f

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Sharpe Pritchard & Co*, agents for *David Shipp*, Rochdale (for the coroner); *Price Bieber & Co*, agents for *Arran Wacks & Co*, Manchester (for the applicants). g

Mary Rose Plummer Barrister.

R v Waltham Forest London Borough Council, ex parte Baxter and others

COURT OF APPEAL, CIVIL DIVISION

SIR JOHN DONALDSON MR, STOCKER AND RUSSELL LJ*

15, 24 SEPTEMBER 1987

Local government – Meeting – Voting – Duty of councillor when voting – Resolution to fix general rate – Councillor voting in accordance with party ‘whip’ – Whether councillor entitled to take party policy into account when voting – Whether voting in accordance with party whip amounting to fetter on councillor’s discretion – Whether council resolution valid.

A local authority resolved by vote at a council meeting to fix the general rate for the borough at a level which represented an increase over that for the previous year of 56.6% in the non-domestic rate and 62% in the domestic rate. The majority group on the council belonged to a particular political party and operated a ‘whip’ system under their party’s standing orders which required members to refrain from opposing or voting against decisions of the group except in certain specified circumstances. At a meeting of the majority group prior to the council meeting some six or seven councillors voted against the proposed rate increase because they thought it was too high but at the council meeting they all voted for the increase. The applicants, who were members of a ratepayers’ group opposed to the rate increase, applied for a judicial review of the council’s resolution on the ground that certain councillors who had voted in favour of the resolution had taken into account an irrelevant factor, namely the party whip, and had fettered their discretion by obeying the whip. The Divisional Court dismissed the application and the applicants appealed.

Held – Although when voting to set a rate a local authority councillor was entitled to give weight to the views of colleagues in the same party and to the party whip a councillor was under a duty to make up his own mind on how to vote on a particular issue and could not abdicate that personal responsibility to the extent of voting blindly in support of party policy. On the evidence, however, it was clear that the councillors who initially opposed the majority view had nevertheless retained an unfettered discretion in the council chamber and their decision to vote in line with the majority group was the exercise of a free choice. It followed that the resolution could not be impugned and the appeal would therefore be dismissed (see p 673 j to p 674 a, p 675 e g j, p 676 e to j and p 677 d to g j to p 678 a, post).

Notes

For the abuse of discretion, see 1 Halsbury’s Laws (4th edn) paras 60–61.

Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Bromley London BC v Greater London Council [1982] 1 All ER 129, [1983] 1 AC 768, [1982] 2 WLR 62, CA and HL.

Cases also cited

O’Reilly v Mackman [1982] 3 All ER 1124, [1983] 2 AC 237, HL.

R v Amber Valley DC, ex p Jackson [1984] 3 All ER 501.

R v Cheltenham Comrs (1841) 1 QB 467, [1835–42] All ER Rep 301, 113 ER 1211.

R v Hendon RDC, ex p Chorley [1933] 2 KB 696, [1933] All ER Rep 20, DC.

Appeal

The applicants, Martin John Baxter, Barbara Irene Martin, Maureen Helena Williams and John Gordon Hughes (suing on their own behalf and on behalf of the Waltham Forest Ratepayers' Action Group), appealed against the decision of the Divisional Court of the Queen's Bench Division (Glidewell LJ and Schiemann J) dated 29 July 1987 refusing to grant judicial review of a resolution of Waltham Forest London Borough Council dated 10 March 1987 whereby it resolved that the general rate for 1987-88 be levied for domestic hereditaments at the rate of 302.5p in the pound, and for mixed hereditaments in respect of which the proportion of rateable value of the hereditament attributable to the part used for the purposes of a private dwelling was (a) greater than one-half at 311.8p in the pound, (b) greater than one-quarter but not greater than one-half at 316.4p in the pound, (c) greater than one-eighth but not greater than one-quarter at 318.7p in the pound, and all other hereditaments at 321p in the pound. The facts are set out in the judgment of Sir John Donaldson MR.

James Wadsworth QC and Anthony de Freitas for the applicants.
Eldred Tabachnik QC and Patrick Elias for the local authority.

Cur adv vult

24 September. The following judgments were delivered.

SIR JOHN DONALDSON MR. On 10 March 1987 the Waltham Forest Borough Council resolved to levy a rate for the year 1987-88 in the sum of 302.5p in the pound for domestic hereditaments and 321p in the pound for non-domestic. In the case of the domestic rate this represented a 62% increase on that levy for 1986-87 and a 56.6% increase in the case of the non-domestic rate.

Not unnaturally many ratepayers objected to so steep an increase in their rates and the applicants sought judicial review of the resolution fixing those rates. In its judgment dismissing the application, the Queen's Bench Divisional Court (Glidewell LJ and Schiemann J) noted that counsel then appearing for the council did not argue that the application should be dismissed on the grounds that an alternative remedy was available for the applicants in the shape of an appeal to the Crown Court under s 7 of the General Rate Act 1967 and held that it would not therefore be right to refuse relief on this ground. No doubt because this was not thought by counsel to be a live issue, they did not refer the court to s 4 of the Local Government Finance Act 1982, which restricts the scope of s 7 to quashing a rate in relation to a particular hereditament and provides that the claim to have the whole rating resolution quashed shall be made by judicial review. No alternative remedy therefore existed.

The applicants were faced with the initial difficulty that, not knowing what had moved the majority of the council to pass the rate-making resolution, they could really only allege that their conduct was 'Wednesbury unreasonable' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). However, the council rightly responded with additional information, as a result of which four principal issues emerged, namely whether (a) the councillors fettered their discretion by regarding themselves as bound by the terms of their election manifesto to undertake expenditure which rendered such a rate inevitable, (b) six or seven councillors voted for the resolution, notwithstanding that in their view the proposed rates were unreasonably high (had they abstained or voted against the resolution, it would not have been passed, since the voting was 31 for the resolution and 26 against), (c) the passing of the resolution was 'irrational' or 'Wednesbury unreasonable'; (d) there was no genuine or adequate consultation with representatives of commerce and industry.

In a long and careful judgment delivered by Glidewell LJ all these complaints were examined and rejected. In the context of the allegation that six or seven councillors voted

a for the resolution contrary to their personal views, affidavit evidence was filed by four of them, namely Cllrs Slack, Mrs Smith, Miles and Brind, and the latter three were cross-examined on their affidavits. In addition, affidavits were filed by Cllr Gerrard, the leader of the majority group, who, I need hardly say, was not one of the councillors said to have supported the resolution contrary to his personal inclinations. The findings of the Divisional Court are accepted by the applicants, save in relation to issue (b) above, and it is to that issue that I now turn.

b The right and duty to make a rate is confined to the rating authority, which, in the case of boroughs, is the borough council (see the General Rate Act 1967, s 1). By s 99 of and para 39(1) of Sch 12 to the Local Government Act 1972 'all questions coming or arising before a local authority shall be decided by a majority of the members of the authority present and voting'.

c Taking these statutory provisions together, counsel for the applicants submits, rightly, that no one other than a member of the rating authority can determine whether or not to make a particular rate and that each member present at the meeting which considers the resolution to make a rate has a personal and individual duty to consider the issues involved and to reach his own decision whether to vote for or against the resolution or to abstain.

d Before the Divisional Court it was contended that some of the councillors voted for the resolution on instructions from a body known as the 'local government group', which is composed of representatives of the Labour Party of the three parliamentary constituencies which make up the London borough of Waltham Forest. Some of those representatives may, coincidentally, be councillors, but that is irrelevant for present purposes. Had this allegation been made good (and it is not now maintained), the councillors concerned would quite plainly have been in breach of their statutory duty, and the resolution would have been invalid, since it could not have been said to be the decision of the rating authority.

e The allegation maintained in this appeal is a variant of this complaint. As is common practice, the members of the Waltham Forest council who were members of the Labour Party and formed the majority group held private meetings at regular intervals at which they discussed forthcoming council business and determined what the policies of the group should be. Such a meeting took place in advance of the rate-making meeting of the council on 10 March. The extent (if any) to which the new rate should be higher than that which had been levied in respect of the year 1986-87 was the subject of considerable discussion in which differing views were expressed. In the end the group resolved to support the resolution which was put to, and passed by, the council. This decision by the majority group was not, however, unanimous. Cllrs Slack, Mrs Smith, Miles and Brind and two or three other councillors voted against it, yet all voted for the resolution in council.

f No one could complain if the councillors had re-examined the issues and changed their minds between the group meeting and the meeting of the council. Counsel for the applicants, however, submits that there was no change of mind. The reason why the councillors voted for the resolution was that they were subject to party discipline and to the political 'whip' system. The councillors voted as they did, not because they considered that the resolution should be passed, but because, in the light of the majority group's private vote, their discretion had been fettered and they had no option but to vote as they did. For my part I would accept that if this could be made out on the facts I should have no hesitation in holding that the councillors had been in breach of their duty to make up their own minds on the issue of what was an appropriate rate and would have been minded to quash the resolution. However, I do not consider that it is made out on the facts.

j Bearing in mind that it must always be open to a member of the council to change his mind at any time before the actual vote in council, the fact that he expressed a different view at an earlier time does not, of itself, give rise to any inference that his discretion was

fettered or that he voted contrary to his genuinely held views. It follows that this allegation cannot be made out other than in relation to the councillors whom I have named, because it is only in their cases that we have any evidence. However, before turning to that evidence, I should explain the whip system as it was applied by the majority group of the Waltham Forest council. a

This was explained by Cllr Gerrard in his evidence and is not challenged. The majority group had adopted the nationally approved 'Model Standing Orders for Labour Groups on local authorities'. Under these standing orders members were required to refrain from speaking or voting in opposition to the decisions of the Labour group unless it had been decided to leave the matter to a free vote. In practice on this council many committee decisions and some council decisions were left to a free vote, but it was not to be expected that so important a matter as the rate resolution would be so treated. Provision was made for members to abstain from voting in accordance with group policy where matters of conscience arose (standing order 7(c)), but this conscience clause appears to have been directed primarily at issues involving religion or temperance. b
c

The standing orders also made a distinction between the general run of council business and cases in which the council or its committees or sub-committees were acting in a 'quasijudicial capacity (eg, licensing of theatres and cinemas, etc), [when] each member shall form his or her own judgment according to the evidence'. This led counsel for the applicants to argue that the rules did not permit a member to form his or her own judgment in relation to other matters, even one of such fundamental importance as the rate resolution. I do not so read the rules. It is well settled that councillors can have general policies in relation to any matter, including the licensing of theatres and cinemas, and the distinction which I think being made is between a situation in which the council has to determine a factual matrix to which a policy may well be applied from one in which no determination of particular facts is necessary. It is not possible to have a policy as to the existence of facts and they have to be determined by each member on the evidence. d
e

I do not find these rules in any way objectionable. What would be objectionable would be a provision that a member had forthwith to resign his membership of the council if, in the absence of a conscience situation, he intended to vote contrary to group policy. This would fetter his discretion and make him a mere delegate of the majority of the group. But this is not the position. Standing orders make provision for the withdrawal of the policy whip if a member acts in breach of the standing orders, but there is nothing to prevent his continuing to be an independent member of the council and to vote as he sees fit. In practice in this council, failure to 'toe the party line' led in the first instance only to a reprimand, next to removal from chairmanship and only as a last resort to withdrawal of the whip. f
g

As Glidewell LJ pointed out, if we were to quash the council's decision on the grounds that the majority group operated a whipping system based on these standing orders and the existence of private policy making meetings, we should be casting doubt on the legality of the procedures adopted by political groups of local councillors throughout the country. We should also, by implication, be criticising the system operating in Parliament itself. In an appropriate case I should have no hesitation in doing so, but not only do I see no possible reason for adopting such a course, but my conclusion is reinforced by additional evidence which we admitted during the hearing of the appeal and which included part of the Widdicombe report on local government (see the Report of the Committee of Inquiry into the conduct of Local Authority Business (1986) (Cmnd 9797)). That report considered this system and concluded that it was not a matter for concern, provided that the formulation of decisions in party groups outside the formal local government system was not allowed to undermine the statutory safeguards (see para 6.62 of the report). h
j

Counsel for the applicants submitted that, in the light of the requirement for rates to be fixed by the council, the private determination of a group policy in this context did

a undermine statutory safeguards. I do not agree. So long as councillors are free to remain members despite the withdrawal of the whip and so long as they remember that whatever degree of importance they may attach to group unity and conformity with group policy, the ultimate decision is for them and them alone as individuals, I cannot see that there is any undermining of statutory safeguards.

So how stands the evidence in relation to the individual councillors?

b *Cllr Slack*

In the group meeting he was the principal opponent of the policy eventually adopted by the majority group and campaigned forcefully for his point of view. In his affidavit, on which he was not cross-examined, he said:

c 'Despite my opposition to the extent of the rate increase, I felt that I ought not to carry my disagreement with the group decision into the council chamber and that I should vote for the rate increase proposed. This I did. I felt that I ought to defer to the wishes of the majority and support the rise. If I had decided to vote against the group policy in council, I would personally have felt obliged to resign from the Labour Group and thereby deprive myself of the opportunity to continue to try and influence my colleagues. 'I would like to stress that my opposition to the rate increase was not based on any belief that the rate proposed was unlawful. If that had been the case, I would not have voted for it in any circumstances.'

d Subsequently he decided that he had made a mistake. He then resigned from the majority group and voted for a resolution calling for a reconsideration of the rate. There are no grounds for impugning Cllr Slack's vote or his conduct. It was a wholly tenable view that he would serve the citizens of Waltham Forest better by voting in accordance with the wishes of the majority of the Labour group and continuing to oppose their policy on expenditure from within. The decision was clearly a difficult one from his point of view, as is shown by his subsequent conduct, but it was his personal decision honestly arrived at.

e *Cllr Mrs Smith*

f She had been a member of the Labour Party for 52 years and set great store by party unity. While in this instance she disagreed with the policy as determined by the group, she took the view that she should accept that policy, it having been determined by democratic decision. However, nothing in her evidence suggests that she did not consider herself free to vote against the resolution. It was simply the case that in her view it would have been wrong to do so in this instance and, it may be, in any situation which she could foresee. Given that a consideration of her colleagues' views was without doubt a legitimate factor in reaching her decision, the only complaint is the very great weight which she gave to those views. This was a matter for her and cannot be used as a basis for impugning her vote.

g *Cllr Miles*

h His attitude was substantially the same as that of Cllr Mrs Smith. He thought that he would be wrong to join the Labour group, knowing of its standing orders, and then simply ignore them and vote against party policy. His view, right or wrong, was that if he or his opponents were to act otherwise, it would detract from effective and strong local government and that a chaotic situation would result. This may not be a universally held view, but it is certainly tenable. What matters is that he exercised a free choice whether to support party policy or to vote as he would have voted if there had been no such policy.

i *Cllr Brind*

This is the one councillor whose attitude gave me some anxiety. In his affidavit he said:

'I did not want to carry my disagreement with the group decision into the council chamber. I was not deterred from voting as I believed right by the whip system. Of course I was aware of the existence of the whip, but what led me to vote as I did was my view that the right course was to support the proposal which I knew commended itself to the majority of my colleagues in the Labour Group.'

Thus far no problem. However, in cross-examination he said:

'One either votes with the majority or one resigns from the council [and] I regard my vote as being committed to the Labour group so long as I wish to remain a councillor.'

These latter answers might suggest that Cllr Brind regarded himself as a mere voting delegate of the majority group as a whole and, if that were the case, he would be failing in his duty and his vote might well have been impugned. Whether that would have led the court to quash the resolution or whether, in the exercise of its discretion, and bearing in mind that his vote was not decisive, we would have refused to do so, I need not stop to inquire because his evidence has to be looked at as a whole and, so looked at, I do not think that this was his attitude.

What Cllr Brind was saying was that he was a new member who ought therefore to have particular regard to the views of other more experienced members of the group, that party unity was of great importance in the run up to a general election, that in general his party's policies were very much in the public interest, even if in this particular respect he thought they were mistaken, and that, in all the circumstances, whilst recognising that he had a choice, he thought that he ought to support the resolution. Had he exercised that choice differently, he would have felt obliged in honour to resign from the council, since he would not have been acting as those who elected him must have expected him to act.

Again, while views may differ on whether his decision was the right one, it was his decision and no one else's and I can see no basis on which his vote can be impugned.

My view, based on the affidavits and the transcript of the oral evidence, coincides with that of the Divisional Court. However, if I had inclined to a different view, I should have hesitated long before doing so. I say this because there is no difference of view between the Divisional Court and this court on what is the duty of an individual councillor. It is to make up his own mind on how to vote, giving such weight as he thinks appropriate to the views of other councillors and to the policy of the group of which he is a member. It is only if he abdicates his personal responsibility that questions can arise as to the validity of his vote. The distinction between giving great weight to the views of colleagues and to party policy, on the one hand, and voting blindly in support of party policy may on occasion be a fine one, but it is nevertheless very real. In deciding on which side of the line a particular councillor's conduct falls, a court which has heard him giving evidence and seen the way in which he gave it, with all the subtle nuances of hesitation and facial expression which are a part of the way in which we communicate with one another, is in a far better position to divine the truth than an appellate court whose only raw materials are the written word.

I would dismiss the appeal.

STOCKER LJ. I agree. The ground of appeal argued before this court is that raised by issue (b) cited by Sir John Donaldson MR, that 'six or seven councillors voted for the resolution, notwithstanding that in their view the proposed rates were unreasonably high' and that, had they voted in accordance with their own views, the resolution would not have been passed.

Without further refinement or modification, such a formulation of a councillor's duty in discharge of the fiduciary relationship between himself and the ratepayers of the borough is in my view expressed in terms so wide as to prevent the modern system of local government from being carried out at all. It places too simplistic an interpretation

a on the words 'in accordance with their own views'. If it is, in truth, the duty of every councillor to vote only in accordance with his own intellectual appraisal of and on a given issue, then party organisation can have no part to play in local government. Some might think such a situation to conform more closely to democratic principles than the existing party system, but it would no doubt create many practical difficulties in the organisation of local government. Moreover, this formulation of a councillor's duty, on an issue where fiduciary duty to the ratepayers arises, would render a resolution invalid if supported by
b a councillor who has subordinated his own view to those of the majority of his fellow councillors in the council chamber in order to achieve unanimity.

I agree, and the contrary has not been argued on behalf of the respondents, that it would be a breach of a councillor's fiduciary duty to the ratepayers, and accordingly render a resolution liable to be quashed by the court, were he to fetter his own discretion as to how to cast his vote by any predetermined acceptance, to the exclusion of all other considerations, of a decision made by a political party, or caucus of that party, as, for
c example, to vote against his own assessment of the merits solely because such a vote was required in order to conform with views expressed in a party manifesto issued prior to his election as a councillor (see *Bromley London BC v Greater London Council* [1982] 1 All ER 129, [1983] 1 AC 768), or if he regarded himself as mandated by the fact of his election to vote in accordance with a predetermined political policy or as a mere delegate for those
d electors by whose votes he was elected. Such situations did not arise in the case of any of the councillors whose views and conduct were cited to the court from their affidavits or cross-examination, as Sir John Donaldson MR has, in his analysis of their evidence, pointed out. I can see no reason why a councillor should not vote in favour of a resolution contrary to his own intellectual assessment of its merits, taken in isolation, in order to secure unanimity of vote, provided he retains an unfettered discretion in the council
e chamber. There is nothing, in my view, morally or legally culpable in voting in support of a majority which has considered, and rejected, his arguments providing he considers all the available options and considers that the maintenance of such unanimity is of greater value to the ratepayers than insistence on his own view. This is not invalidated by the fact that certain sanctions which could be imposed on a failure to accept the party whip might follow as a consequence.

f I therefore agree with the decision of the Divisional Court on this aspect of the matters considered by it and with the judgment and reasoning of Sir John Donaldson MR. I agree that the evidence of these councillors who opposed the resolution at the party caucus meeting, but, nevertheless, voted in its favour in the council chamber, supports the conclusion that they had not, in any way, fettered their freedom to vote as they saw fit. I agree with the analysis and conclusions of Sir John Donaldson MR in each of the
g individual cases considered by him.

I agree that this appeal should be dismissed for the reasons given by Sir John Donaldson MR.

RUSSELL LJ. In my judgment the result of this appeal depends entirely on the assessment of the evidence of the four councillors, namely Mrs Smith, Mr Slack, Mr Miles
h and Mr Brind, whose testimony was before the Divisional Court either on affidavit or both on affidavit and from the witness box.

Counsel for the applicants did not seek to argue that a councillor was not at liberty to vote although his or her vote did not accord with his or her purely personal inclinations. Party loyalty, party unanimity, party policy were all relevant considerations for the individual councillor. The vote becomes unlawful only when the councillor allows these
j considerations or any other outside influences so to dominate as to exclude other considerations which are required for a balanced judgment. If, by blindly toeing the party line, the councillor deprives himself of any real choice or the exercise of any real discretion, then his vote can be impugned and any resolution supported by his vote potentially flawed.

For the reasons given by Sir John Donaldson MR in his judgment, which I have had

the benefit of reading in draft, I can see nothing in the evidence of the councillors, when properly analysed, to suggest that any deprived himself or herself of a proper discretion or that the discretion was exercised in a way which would justify any consequential interference by the court with the rate-making process that took place on 10 March 1987.

I too would dismiss this appeal.

Appeals dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Richards Butler* (for the applicants); *P J North* (for the local authority).

Diana Procter . Barrister.

Day and another v Grant R v Crown Court at Manchester, ex parte Williams

COURT OF APPEAL, CIVIL DIVISION

SIR JOHN DONALDSON MR, KERR AND LLOYD LJJ

28 JANUARY 1985

Criminal law – Appeal – Criminal cause or matter – Order of Crown Court or High Court – Witness summons in criminal trial – Whether summons an order in a ‘criminal cause or matter’ – Whether appeal against summons lying to Court of Appeal – Criminal Procedure (Attendance of Witnesses) Act 1965, s 2(1) – Supreme Court Act 1981, s 18(1)(a).

A witness summons issued out of the Crown Court or the High Court under s 2(1)^a of the Criminal Procedure (Attendance of Witnesses) Act 1965 requiring the person to whom it is directed to attend and give evidence or produce documents at a criminal trial is an order made in a ‘criminal cause or matter’ within s 18(1)(a)^b of the Supreme Court Act 1981, and accordingly no appeal lies to the Court of Appeal against the making or variation of the summons (see p 681 j, p 682 b g h and p 683 c to e, post).

Dicta of Viscount Simon LC and Lord Wright in *Amand v Secretary of State for Home Affairs* [1942] 2 All ER at 385, 387–388 applied.

R v Southampton Justices, ex p Green [1975] 2 All ER 1073 distinguished.

Notes

For statutory restrictions on appeals to the Court of Appeal, see 37 Halsbury’s Laws (4th edn) para 681.

For the Criminal Procedure (Attendance of Witnesses) Act 1965, s 2, see 12 Halsbury’s Statutes (4th edn) 353.

For the Supreme Court Act 1981, s 18, see 11 *ibid* 774.

Cases referred to in judgments

Amand v Secretary of State for Home Affairs [1942] 2 All ER 381, [1943] AC 147, HL.

Clifford and O’Sullivan, Re [1921] 2 AC 570, HL.

^a Section 2(1) is set out at p 679 j, post

^b Section 18(1), so far as material, is set out at p 681 a, post

a R v Crown Court at Sheffield, ex p Brownlow [1980] 2 All ER 444, [1980] QB 530, [1980] 2 WLR 892, CA.

R v Governor of Brixton Prison, ex p Savarkat [1910] 2 KB 1056, [1908-10] All ER Rep 603, CA.

R v Secretary of State for the Home Dept, ex p Dannenberg [1984] 2 All ER 481, [1984] QB 766, [1984] 2 WLR 855, CA.

b R v Southampton Justices, ex p Green [1975] 2 All ER 1073, [1976] QB 11, [1975] 3 WLR 277, CA.

R v Stipendiary Magistrate at Lambeth, ex p McComb [1983] 1 All ER 321, [1983] QB 551, [1983] 2 WLR 259, CA.

Woodhall, Ex p (1888) 20 QBD 832, CA.

Appeals

Day and anor v Grant

d Alexander Grant, the defendant in criminal proceedings at the Central Criminal Court, appealed against that part of the order of Sir Neil Lawson sitting as a judge of the High Court in the Queen's Bench Division in chambers dated 20 December 1984 as directed, on the application of Reginald Day and the Department of Trade and Industry, that a witness summons issued on behalf of the defendant, be set aside in so far as it required the applicant Reginald Day to produce documents requested therein at the defendant's trial. The facts are set out in the judgment of Sir John Donaldson MR.

R v Crown Court at Manchester, ex p Williams

e Dennis Dicks appealed against the decision of the Divisional Court of the Queen's Bench Division (Robert Goff LJ and Glidewell J) ([1985] RTR 49) on 21 December 1984 granting the applicant, Dr Paul Williams, judicial review by way of an order of certiorari to quash a witness summons issued in the Crown Court at Manchester at the request of Mr Dicks requiring the applicant to give evidence at the hearing of an appeal by Mr Dicks to the Crown Court against his conviction by Manchester City Magistrates' Court of a driving offence. The facts are set out in the judgment of Sir John Donaldson MR.

f *Stuart Standish Stevens and Pamela Radcliffe* for Mr Grant.

John Mummery for Mr Day and the Department of Trade and Industry.

Christopher Limb for Mr Dicks.

H M Boggis-Rolfe for Dr Williams.

g **SIR JOHN DONALDSON MR.** These two appeals have been called on together because they have two factors in common. First, both relate, directly or indirectly, to summonses issued under s 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965; and, second, both raise an issue as to the jurisdiction of this court.

h I shall refer first to *R v Crown Court at Manchester, ex p Williams*. In that case the Crown Court at Manchester issued a witness summons, acting under the powers contained in s 2(1) of the 1965 Act, requiring Dr Williams to give evidence in an Intoximeter case. Dr Williams is, I think, a director or is associated with the Lion Intoximeter company.

Section 2(1) as amended provides:

i 'For the purpose of any criminal proceedings before the Crown Court a witness summons, that is to say, a summons requiring the person to whom it is directed to attend before the court and give evidence or produce any document or thing specified in the summons, may be issued out of the Crown Court or out of the High Court.'

The summons was issued at the request of Mr Dicks, who had been convicted before a magistrates' court and was appealing to the Crown Court.

Dr Williams might have been expected, if he objected to the summons, to have applied under s 2(2) of the same Act. That section provides:

'If any person in respect of whom a witness summons has been issued applies to the Crown Court or to the High Court, and satisfies the court that he cannot give any material evidence or, as the case may be, produce any document or thing likely to be material evidence, the court may direct that the summons shall be of no effect.'

In fact, what he did was to apply to the High Court for judicial review in the nature of *certiorari* to quash the witness summons.

I think from what we have been told in this court that all concerned with those proceedings recognised that they had, to put the matter charitably, acted with some degree of irregularity, because, where there is a statutory right of this nature, one would not have thought that it was open to the Divisional Court to make an order by way of judicial review. However, both parties consented and, I apprehend, must have encouraged the Divisional Court to rule on the matter, the reason being that the Divisional Court was seised of various other 'Intoximeter problems, which it was thought could conveniently be dealt with at the same time, and because Dr Williams was being besieged by witness summonses from all points of the compass, and it was thought that a more authoritative ruling would be given by the Divisional Court than by a single judge. For our purposes, I think we have to assume that the order of the Divisional Court was effective, and that order was that the witness summons be set aside. Mr Dicks now seeks to appeal to this court in order to have the summons restored.

In *Day v Grant* a witness summons was issued out of the Central Criminal Court exercising its power under s 2(1) of the 1965 Act requiring Mr Day to attend to give evidence and to produce documents at the trial of Mr Grant.

Mr Grant is charged with certain offences which might generally be described as company fraud offences. At an earlier stage Mr Day had been appointed by the Department of Trade and Industry (the second respondents) to conduct an inquiry into the activities of the company concerned, a company called Axair Ltd.

The department and Mr Day applied to the High Court to have this summons varied. It might perhaps have been more convenient if they had applied to the court which had issued it, but the statute gives them the alternative right.

The summons was heard by Sir Neil Lawson sitting as a judge of the High Court. He allowed the summons to stand in so far as it required Mr Day to attend and give evidence if required so to do, but he set it aside in so far as it required Mr Day to produce documents at the trial. The relevant document, we are told, was Mr Day's report to the Secretary of State following his inquiry. The reason why Sir Neil Lawson set it aside is clear from the papers, namely that there was a claim to public interest immunity.

Mr Grant now appeals to this court. Counsel on his behalf says that this report is essential to Mr Grant's defence in that, if Mr Day is called to give evidence on behalf of the defence, the prosecution, who have this report, will be in a position to cross-examine Mr Day, and counsel appearing in his defence will not have a similar advantage. Counsel for Mr Grant says that under the Attorney General's guidelines (see *Practice Note* [1982] 1 All ER 734), where a witness has given a proof of evidence to the prosecution and the prosecution does not intend to call that witness, it is customary for the prosecution to make the proof of evidence available to the defence. This report, he says, is to be regarded as analogous to a proof of evidence.

However that may be (and there may be distinctions between a proof of evidence and a general report) the answer here is the claim to public interest immunity and the fact that, in the light of that claim, prosecuting counsel does not feel able to make the document available.

We are not concerned with that unless we have jurisdiction to consider the appeal itself. So I turn to this preliminary point applying to both appeals, namely have we any jurisdiction?

The starting point must be s 18 of the Supreme Court Act 1981. Section 18(1) provides:

a 'No appeal shall lie to the Court of Appeal—(a) except as provided by the Administration of Justice Act 1960, from any judgment of the High Court in any criminal cause or matter . . .'

Counsel for Mr Grant also referred us to s 53(3) of the same Act, which provides:

b 'The civil division of the Court of Appeal shall exercise the whole of the jurisdiction of that court not exercisable by the criminal division.'

He argued that, if the criminal division has no jurisdiction, then this division has; and, if this division has no jurisdiction, then no division has. That may well be right.

c The meaning of this section in its earlier form, where it is contained in s 31 of the Supreme Court of Judicature (Consolidation) Act 1925, was authoritatively considered by the House of Lords in *Amand v Secretary of State for Home Affairs* [1942] 2 All ER 381, [1943] AC 147. I need only cite from the speeches of Lord Wright and Viscount Simon LC. If I might take first Lord Wright, he said ([1942] 2 All ER 381 at 387, [1943] AC 147 at 159–160):

d 'The words "cause or matter" are, in my opinion, apt to include any form of proceeding. The word "matter" does not refer to the subject-matter of the proceeding, but to the proceeding itself. It is introduced to exclude any limited definition of the word "cause." In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers. The cause or matter in question was the application to the court to exercise its powers under the Allied Forces Act, 1940, and the Allied Forces (Application of 23 Geo. V., c. 6) (No. 1) Order, 1940, and to deliver the appellant to the Netherlands military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of *habeas corpus* deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right.'

f Again, he said ([1942] 2 All ER 381 at 388, [1943] AC 147 at 162):

g 'The principle which I deduce from the authorities which I have cited and the other relevant authorities which I have considered is that, if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a criminal cause or matter. The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made of a cause or matter which is not criminal. The order may not involve punishment by the law of this country, but, if the effect of the order is to subject by means of the operation of English law the persons charged to the criminal jurisdiction of a foreign country, the order is, in the eyes of English law for the purposes being considered, an order in a criminal cause or matter, as is shown by *Ex p. Woodhall* ((1888) 20 QBD 832) and *R. v. Brixton Prison (Governor)*, *Ex p. Savarkar* ([1910] 2 KB 1056, [1908–10] All ER Rep 603).'

i So Lord Wright was saying that you look not to the particular order under appeal, but to the underlying proceedings in which that order was made, and those are the proceedings which have to be characterised as either criminal or non-criminal.

Viscount Simon LC said ([1942] 2 All ER 381 at 385, [1943] AC 147 at 156):

'It is the nature and character of the proceeding in which *habeas corpus* is sought which provides the test. If the matter is one the direct outcome of which may be

trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal. This is the true effect of the "two conditions" formulated by VISCOUNT CAVE in *Re Clifford and O'Sullivan* ([1921] 2 AC 570 at 580).^a

So Viscount Simon LC is saying precisely the same thing. Habeas corpus as such cannot be a criminal cause or matter: it is either neutral or civil. What Viscount Simon LC is saying is that you look to see what is the nature or character of the proceedings in which habeas corpus is sought, and that provides the test.^b

Applying *Amand's* case, it is quite clear that these witness summonses were issued or varied in criminal causes or matters. But this appeal has been argued on the basis that there are two decisions of this court which suggest that *Amand's* case has a narrower meaning. I think, on analysis, that there is probably only one case, namely *R v Southampton Justices, ex p Green* [1975] 2 All ER 1073, [1976] QB 11, but reference is also made to *R v Crown Court at Sheffield, ex p Brownlow* [1980] 2 All ER 444, [1980] QB 530.^c

In *Green's* case Mrs Green was complaining of an order by magistrates estreating her bail. The matter went to the Divisional Court for judicial review, and then came to this court, presided over by Lord Denning MR. Lord Denning MR, with the agreement of Browne LJ and Brightman J sitting with him, held that it was within the jurisdiction of this court, and he cited the passage from Viscount Simon LC which I have already cited, but unfortunately he did not cite the first sentence from that passage, namely: 'It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test.' He cited only the succeeding sentence:^d

'If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal.'^e

And he said that the outcome of the order to estreat bail could not be the punishment or conviction of Mrs Green, and therefore this court had jurisdiction (see [1975] 2 All ER 1073 at 1076, [1976] QB 11 at 15).

Both I and May LJ, with whom I was sitting, in *R v Stipendiary Magistrate at Lambeth, ex p McComb* [1983] 1 All ER 321 at 329, 332, [1983] QB 551 at 563-564, 567 expressed our personal view that *Green's* case involved a misinterpretation of *Amand's* case, but both of us of course recognised that we were bound by *Green's* case unless we could distinguish it. We did not think that we could distinguish it in *McComb's* case for reasons to which I shall return in a moment. Equally, I do not consider that sitting on this occasion I could do other than follow *Green's* case if it is indistinguishable; but, in my judgment, it quite plainly is distinguishable. Of *Green's* case it can be said that the proceedings in relation to Mrs Green were collateral to the criminal cause or matter. In this case the summonses were both issued by the court which was itself charged with the criminal cause or matter and in that matter. If there is to be a distinction, that must be it; and, in my judgment, it is a valid distinction, assuming that *Green's* case validly interprets *Amand's* case.^f

Brownlow's case was slightly different. It was concerned with jury vetting, and the court held that it had no jurisdiction because of s 10 of the Courts Act 1971. It was only Lord Denning MR who expressed a firm view on the jurisdiction of this court in terms of s 18 of the 1981 Act (then s 31(1) of the Supreme Court of Judicature (Consolidation) Act 1925). Shaw LJ, who was sitting with him, said that the matter had not been fully argued, and Brandon LJ treated the remarks of Lord Denning MR as being unnecessary for the decision of the case (see [1980] 2 All ER 444 at 450, 454, 456, [1980] QB 530 at 537, 543, 546).^g

That leaves *McComb's* case, to which I have already referred. There proceedings were brought which, at the time when they came to the Court of Appeal, involved only a claim to a declaration as to the duties of the Director of Public Prosecutions in relation to^h

a a criminal cause or matter. That is quite clearly rather further removed from the criminal cause or matter than was the situation in *Green's* case, although, as I say, both I and May LJ expressed the view that but for *Green's* case we would have held that that arose from a criminal cause or matter and that accordingly we had no jurisdiction.

The latest case in this line of cases is *R v Secretary of State for the Home Dept, ex p Dannenberg* [1984] 2 All ER 481, [1984] QB 766, in which this court on appeal from the Divisional Court was concerned with the propriety of a recommendation for deportation.

b This court seems to have held that the recommendation was made in a criminal cause or matter and that there could be no appeal against the refusal of the Divisional Court to quash it. However, this court itself quashed the recommendation on the basis that it was invalid, having been made without referral. This appears to be a further refinement.

For my part, I cannot think of a case in which the order appealed from arises more clearly in a criminal cause or matter than this, and I would decline jurisdiction. It is right

c to say that the distinction which is made in *Green's* case [1975] 2 All ER 1073, [1976] QB 11 from the general line that this court has no jurisdiction in a criminal cause or matter has caused a great deal of difficulty, and, if a convenient opportunity occurred for their Lordships' House to consider *Amand's* case [1942] 2 All ER 381, [1943] AC 147 and the subsequent cases and either reaffirm or vary or clarify *Amand's* case, I cannot help

d thinking that it would be an exercise which would be applauded both by the judiciary and perhaps even more so by practitioners. But, for the reasons I have given, I would decline jurisdiction in these appeals.

KERR LJ. I agree.

e **LLOYD LJ.** I also agree.

Appeals dismissed. Leave to appeal to the House of Lords refused in Day v Grant.

Solicitors: *Mendoza Janes* (for Mr Grant); *Treasury Solicitor*; *J S Siergant & Co*, Chorley (for Mr Dicks); *Walters Fladgate*, agents for *Phillips & Buck*, Cardiff (for Dr Williams).

Frances Rustin Barrister.

Carr and others v Atkins

COURT OF APPEAL, CIVIL DIVISION

SIR JOHN DONALDSON MR, STEPHEN BROWN AND CROOM-JOHNSON LJ

13 MAY 1987

Criminal law – Appeal – Criminal cause or matter – Order of Crown Court – Order for production of special procedure material – Whether order for production of special procedure material an order in a ‘criminal cause or matter’ – Whether appeal against order lying to Court of Appeal – Supreme Court Act 1981, s 18(1)(a) – Police and Criminal Evidence Act 1984, Sch 1, para 4.

An order made by a circuit judge under para 4^a of Sch 1 to the Police and Criminal Evidence Act 1984 to produce or give access to special procedure material is an order made in a ‘criminal cause or matter’ within s 18(1)(a)^b of the Supreme Court Act 1981, because notwithstanding that criminal proceedings may not at that stage have been instituted the order is made in the context of a criminal investigation. Accordingly, the Court of Appeal has no jurisdiction to hear an appeal against the making of an order made under para 4 (see p 687 *c* to *d* and p 689 *d e g*, post).

Smalley v Crown Court at Warwick [1985] 1 All ER 769 considered.

Notes

For statutory restrictions on appeals to the Court of Appeal, see 37 Halsbury’s Laws (4th edn) para 681.

For the Supreme Court Act 1981, s 18, see 11 Halsbury’s Statutes (4th edn) 774.

For the Police and Criminal Evidence Act 1984, Sch 1, para 4, see 12 *ibid* 1029.

Cases referred to in judgments

Amand v Secretary of State for Home Affairs [1942] 2 All ER 381, [1943] AC 147, HL.

Clifford and O’Sullivan, Re [1921] 2 AC 570, HL.

Day v Grant, R v Crown Court at Manchester, ex p Williams (1985) [1987] 3 All ER 678, [1987] 3 WLR 537, CA.

R v Crown Court at Bristol, ex p Bristol Press and Picture Agency Ltd [1987] Crim LR 329, DC.

R v Crown Court at Sheffield, ex p Brownlow [1980] 2 All ER 44, [1980] QB 530, [1980] 2 WLR 892, CA.

R v Governor of Brixton Prison, ex p Savarkar [1910] 2 KB 1056, [1908–10] All ER Rep 603, CA.

R v Secretary of State for the Home Dept, ex p Dannenberg [1984] 2 All ER 481, [1984] QB 766, [1984] 2 WLR 766, CA.

R v Southampton Justices, ex p Green [1975] 2 All ER 1073, [1976] QB 11, [1975] 3 WLR 277, CA.

R v Stipendiary Magistrate at Lambeth, ex p McComb [1983] 1 All ER 321, [1983] QB 551, [1983] 2 WLR 259, CA.

Smalley v Crown Court at Warwick [1985] 1 All ER 769, [1985] AC 622, [1985] 2 WLR 538, HL.

Woodhall, Ex p (1888) 20 QBD 832, CA.

Cases also cited

Bonolumi v Secretary of State for the Home Dept [1985] 1 All ER 797, [1985] QB 675, CA.

IRC v Rossminster Ltd [1980] 1 All ER 80, [1980] AC 952, CA and HL.

^a Paragraph 4, so far as material, is set out at p 686 *h j*, post

^b Section 18(1), so far as material, is set out at p 685 *h*, post

Application

- a** Errol Ellis Carr, Memzie Kiffin, Victor Adegbesan and Lea Jack applied to the Court of Appeal to appeal against the decision of the Divisional Court of the Queen's Bench Division (Glidewell LJ and McCullough J) on 27 February 1987 refusing their application for judicial review of orders made on 3 July 1986 under Sch 1 to the Police and Criminal Evidence Act 1984 by his Honour Judge Machin QC sitting in the Central Criminal Court on the application of the respondent, Det Chief Inspector Atkins, requiring the
- b** applicants to produce certain specified documents to a constable within a stated period. The facts are set out in the judgment of Sir John Donaldson MR.

Geoffrey Shaw for the applicants.

Nicholas Coleman for the respondent was not called on.

- c** **SIR JOHN DONALDSON MR.** On 3 July 1986 his Honour Judge Machin QC, sitting as a circuit judge at the Central Criminal Court, made orders under Sch 1 to the Police and Criminal Evidence Act 1984 on the application of Det Chief Inspector Atkins of the company fraud department at New Scotland Yard requiring the four applicants to produce documents to a constable within 7 days or within 28 days of their proposed application for judicial review. The particular documents were specified in a written
- d** information laid before the judge by the detective chief inspector, each applicant was given advance notice of the documents which were required to be produced; and those documents related to the accounts of the Broadwater Farm Youth Association.

- On 27 February 1987 a Divisional Court consisting of Glidewell LJ and McCullough J heard applications for judicial review designed to quash those orders of Judge Machin. The Divisional Court dismissed the applications for judicial review on their merits, and
- e** went on to determine as a matter of law that the original production orders made by the circuit judge had been made in a criminal cause or matter, thereby indicating that so far as they were concerned any appeal must be to the House of Lords. It was not asked at that moment to certify that a matter of public importance was involved nor was it asked to give leave to appeal. If it had been asked, it might well have given a certificate but it might not have given leave to appeal as the general practice is to leave it to their
- f** Lordships' House to decide which appeals they will hear. It adjourned any further consideration in order to enable the applicants, if they were so minded, to explore the possibility of appealing to the Civil Division of the Court of Appeal. We have been dealing with such an application that we hear such an appeal as a preliminary point limited to the question of whether we have jurisdiction to do so.

- g** Under s 16 of the Supreme Court Act 1981 appeals lie to this court from the Divisional Court of the Queen's Bench Division unless excluded by other provisions. The only potential exclusion so far as this case is concerned is contained in s 18(1)(a) of the 1981 Act, which reads:

- 'No appeal shall lie to the Court of Appeal—(a) except as provided by the Administration of Justice Act 1960 [which relates to contempt], from any judgment
- h** of the High Court in any criminal cause or matter . . .'

So we have to decide whether any appeal to this court from the order of the Divisional Court could properly be described as an appeal in a criminal cause or matter.

- Counsel for the applicants, in an extremely helpful skeleton argument, has been good enough to draw to our attention the fact that the phrase 'criminal cause or matter' arises not only in the context of s 18 of the 1981 Act but also under RSC Ord 53, r 3(4), which provides that applications for leave to apply for judicial review, if refused in the first instance, can be renewed to a Divisional Court if the cause or matter is criminal, but otherwise to a single judge. Again under Ord 53, r 5(1), where leave has been granted, an application for judicial review is made to a Divisional Court, not to a single judge, if the cause or matter is criminal. Also, under s 5(1) of the Costs in Criminal Cases Act
- j**

1973, which has now been repealed and replaced by the Prosecution of Offences Act 1985, using rather different wording, a Divisional Court used to have power to order the payment out of central funds of the costs of any party to proceedings before the Divisional Court in a criminal cause or matter. a

It is quite clear that the legislature uses the phrase 'in [a] criminal cause or matter' as being a convenient description of matters which are not civil. It is very unfortunate that that phrase has given rise to a considerable conflict of judicial opinion as to its meaning, since if the legislature, by a simple form of words like this, is unable to divide the sheep from the goats, the criminal from the civil, great difficulties are created. But that is the position at the moment. b

Given that difficulty, I have to consider the current proceedings. One thing is quite clear. The nature of an order made or refused in judicial review proceedings must depend not on that order but on the order that is sought to be reviewed. What was being reviewed in this case was an order under the Police and Criminal Evidence Act 1984. That is an Act which has a long title, reading as follows: c

'An Act to make further provision in relation to the powers and duties of the police, persons in police detention, criminal evidence, police discipline and complaints against the police; to provide for arrangements for obtaining the views of the community on policing and for a rank of deputy chief constable; to amend the law relating to the Police Federations and Police Forces and Police Cadets in Scotland; and for connected purposes.' d

For our purposes, it is sufficient only to look at Sch 1 and Pt II of the Act. Part II, which is headed 'Powers of entry, search and seizure', deals in s 8 with the 'Power of justice of the peace to authorise entry and search of premises'. But that section contains what amounts to an exception in cases where the application relates to items described as 'excluded material' or 'special procedure material'. One finds what those latter materials are in s 14. They are materials of a specially sensitive nature either as being journalistic material or as being material which is subject in one way or another to an obligation of confidentiality. Applications to obtain access to excluded material or special procedure material are governed by s 9. That provides: e

'(1) A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 . . . f

(2) Any Act (including a local Act) passed before this Act under which a search of premises [and I stress these words] *for the purposes of a criminal investigation* could be authorised by the issue of a warrant to a constable shall cease to have effect so far as it relates to the authorisation of searches [as I have summarised above].' g

I then turn to Sch 1, which provides:

'1. If on an application made by a constable a circuit judge is satisfied that one or other of the sets of access conditions is fulfilled, he may make an order under paragraph 4 below.' h

Paragraph 4 provides:

'An order under this paragraph is an order that the person who appears to the circuit judge to be in possession of the material to which the application relates shall—(a) produce it to a constable for him to take away; or (b) give a constable access to it . . . ' i

The access conditions are complex, but for present purposes it is sufficient to say that there have to be reasonable grounds for believing that a serious arrestable offence has been committed and that the material is likely to be of substantial value, whether by

itself or together with other materials, to the investigation in connection with which the application is made.

I ought also to refer to para 15 of the schedule, which provides:

(1) If a person fails to comply with an order under paragraph 4 above, a circuit judge may deal with him as if he had committed a contempt of the Crown Court.

(2) Any enactment relating to contempt of the Crown Court shall have effect in relation to such a failure as if it were such a contempt.'

So disobedience of the circuit judge's order is being treated as if it were a contempt of the Crown Court, and of course the Crown Court is a court with a largely criminal jurisdiction.

It is to my mind clear beyond argument that the order which was made in this case was made in a criminal context, but it is right to note, as counsel for the applicants has stressed, that there are no proceedings in existence. In the limited time that has been available I have not been able to find out whether this Act could or would be used where criminal proceedings have been begun, but it does not really matter for his purposes. It is sufficient to note that no criminal proceedings have been begun here and, indeed, in most cases there is no doubt that orders would be sought under this Act where a decision had not yet been reached whether or not to prosecute. It is essentially a statutory provision in aid of a criminal investigation designed, if the evidence will stand it, to lead to a criminal prosecution. But, unless it is to be said that an order under the Act is either never or very rarely one which is by its nature a criminal cause or matter merely because of the stage at which the order is made, then the fact that there are no criminal proceedings does not, in my judgment, matter. That fact stems purely from the nature of the Act and the statutory provisions and does not affect the criminal character of the proceedings.

As I have said, countless problems have arisen as to what is meant by a 'criminal cause or matter'. I can shorten this judgment by saying that all the authorities are summarised, at any rate, up to that date, in my own judgment in *Day v Grant, R v Crown Court at Manchester, ex p Williams* (1985) [1987] 3 All ER 678, [1987] 3 WLR 537. That concerned two cases in which witness summonses had been issued out of the Central Criminal Court in one and out of the Crown Court at Manchester in the other. In one there was an application to a High Court judge asking him to vary the order. In the other there was an application to the Divisional Court to quash the order. [His Lordship then read from his judgment in *Day v Grant* [1987] 3 All ER 678 at 681-683, [1987] 3 WLR 537 at 539-592, and continued:]

Since then, and before the judgment of the Divisional Court which we are considering, another Divisional Court considered a case which was, I think, indistinguishable from the present under the 1984 Act, and it held that it constituted a criminal cause or matter (see *R v Crown Court at Bristol, ex p Bristol Press and Picture Agency Ltd* [1987] Crim LR 329). Glidewell LJ was following that decision when he reached his decision in the present case. I do not think that I need refer to that decision because we have to consider the matter de novo. Nevertheless, I should refer to the decision of the House of Lords in *Smalley v Crown Court at Warwick* [1985] 1 All ER 769, [1985] AC 622, which was subsequent to *Day v Grant*. In that case Mr Smalley had entered into a recognisance conditioned on his brother attending his (the brother's) trial at the Crown Court at Warwick. His brother failed to attend. The question then arose whether the recognisance of £100,000 which Mr Smalley had entered into should be estreated in whole or in part. It was held by the Crown Court judge that the whole amount of the recognisance should be estreated. Being dissatisfied, Mr Smalley applied to the High Court for that decision to be judicially reviewed and quashed. The Divisional Court held that it had no jurisdiction in the matter since the judge's order was one relating to a trial on indictment within the meaning of s 29(3) of the Supreme Court Act 1981. Section 29 provides:

(1) The High Court shall have jurisdiction to make orders of mandamus, prohibition and certiorari in those classes of cases in which it had power to do so immediately before the commencement of this Act. a

(2) Every such order shall be final, subject to any right of appeal therefrom.

(3) In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court . . . b

So what was being held by the Divisional Court was that it had no jurisdiction because this related to a trial on indictment.

Smalley's case went to the House of Lords, where the Divisional Court's decision was reversed. Lord Bridge, giving the leading opinion, held that a decision in a bail case relating to recognisances was not sufficiently closely connected with the trial on indictment to be caught by this exception to the jurisdiction of the Divisional Court. But more relevant for present purposes, he adverted to a plea that their Lordships' House should consider *R v Southampton Justices, ex p Green* [1975] 2 All ER 1073, [1976] QB 11, which is the fons et origo of much of the difficulty of what is meant by a 'criminal cause or matter'. Lord Bridge said ([1985] 1 All ER 769 at 772, [1985] AC 622 at 633): c

'In *R v Southampton Justices, ex p Green* the applicant was a surety for her husband's bail. On his failing to surrender as required, the wife's recognisance was ordered by justices to be estreated.' d

He dealt with the history of the case and then quoted from the judgment of Lord Denning MR where he said ([1975] 2 All ER 1073 at 1076, [1976] QB 11 at 15-16):

'A recognisance is in the nature of a bond. A failure to fulfil it gives rise to a civil debt. It is different from the ordinary kind of civil debt, because the enforcement is different. It is enforceable like a fine . . . But that method of enforcement does not alter the nature of the debt. It is simply a civil debt on a bond and as such it is not a criminal cause or matter.' e

Lord Bridge went on ([1985] 1 All ER 769 at 772-773, [1985] AC 622 at 634): f

'In the instant case Kerr LJ found it impossible to reconcile that decision with the conclusion which he nevertheless felt himself bound by *Brownlow's* case [*R v Crown Court at Sheffield, ex p Brownlow* [1980] 2 All ER 444, [1980] QB 530] to reach that the order estreating the appellant's recognisance was here made in "a matter relating to trial on indictment". Conscious that *Green's* case presents a formidable obstacle to his arguments for the respondents, counsel for the respondents invited us to overrule it. He drew our attention to the doubts expressed in *R v Lambeth Metropolitan Stipendiary Magistrate, ex p McComb* [1983] 1 All ER 321 at 329, 332, [1983] QB 551 at 563, 567 by Sir John Donaldson MR and May LJ whether *Green's* case had been rightly decided.' g

Then he said this, which is important ([1985] 1 All ER 769 at 773, [1985] AC 622 at 634): h

'In *Green's* case Lord Denning MR relied on a passage from the speech of Viscount Simon LC in *Amand v Secretary of State for Home Affairs* [1942] 2 All ER 381 at 385, [1943] AC 147 at 156 in support of his conclusion. Sir John Donaldson MR and May LJ in the passages referred to above, thought that the speeches of Viscount Simon LC and Lord Wright in *Amand's* case pointed the other way.' i

Then he dealt with *Amand's* case. He concluded by saying ([1985] 1 All ER 769 at 773, [1985] AC 622 at 634):

'I must frankly confess that I can find nothing in the speeches in that case which

a throws any light one way or the other on the totally different question whether an order estreating the recognisance of a surety for a defendant admitted to bail in criminal proceedings is covered by the same language. I do not find it necessary for present purposes to give a concluded answer to that question. It follows that I am not prepared to hold that *Green's* case was wrongly decided.'

b That produces a very interesting situation, because Lord Denning MR, with the concurrence of those who were sitting with him, was quite clearly founding himself on *Amand's* case. What Lord Bridge is saying, obiter, I grant, is that *Green's* case may well have been rightly decided but not on the basis of *Amand's* case. If that is right, then the position is as it appeared to the court in *Day v Grant* (1985) [1987] 3 All ER 678, [1987] 3 WLR 537, although it was at that stage precluded from saying so, namely that *Green's* case is really a decision that questions of the estreatment of bail are so collateral to a criminal trial that they do not themselves constitute a criminal cause or matter. So it does seem to me in that rather tangled situation that we are freed from the authority of *Green's* case. It may just be that we are nevertheless left with the slight difficulty that *McComb's* case, which concerns the Director of Public Prosecutions' conduct, might be thought to inhibit us in some way, but *McComb's* case was of course based on *Green's* case without the benefit of Lord Bridge's advice, and it was also based on *Brownlow's* case which was not wholly approved in *Smalley's* case. So, with all respect to the doctrine of stare decisis, I think that the time has come when we should look at this afresh. Looking at it afresh, I have no doubt whatsoever that an order or a refusal of an order under the 1984 Act and all subsequent proceedings relating to such an order or refusal are properly to be characterised as orders in a criminal cause or matter, and it would follow from that that we have no jurisdiction.

e Accordingly I would decline to hear the proposed appeal.

STEPHEN BROWN LJ. I agree. The whole foundation of an application under Sch 1 to the Police and Criminal Evidence Act 1984 is that it should be made for the purpose of a criminal investigation. As Sir John Donaldson MR has pointed out, para 15 of Sch 1 to the Act provides:

f '(1) If a person fails to comply with an order under [the schedule], a circuit judge may deal with him as if he had committed a contempt of the Crown Court . . .'

The criminal investigation is, in my judgment, the basis of the application in the instant case. This is undoubtedly, in my view, a criminal cause or matter, and to hold otherwise would render the administration of this Act well nigh impracticable.

g I would accordingly decline jurisdiction.

CROOM-JOHNSON LJ. I agree.

Jurisdiction declined. No order for costs. Leave to appeal to the House of Lords granted.

h Solicitors: Cowan Lipson & Rumney (for the applicants); Crown Prosecution Service (for the respondent).

Diana Procter Barrister.

R v Immigration Appeal Tribunal, ex parte Swaran Singh and others

COURT OF APPEAL, CIVIL DIVISION

DILLON, NICHOLLS LJ AND SIR FREDERICK LAWTON

22 MAY, 6 JULY 1987

Immigration – Leave to enter – Dependent parents – Other close relatives in their own country to turn to – Needs for which an elderly parent may turn to close relative – Whether needs of elderly parent restricted to provision of home or financial support – Whether parents' needs extending to any sort of need which may afflict elderly person – Statement of Changes in Immigration Rules (HC Paper (1982–83) no 169), para 52.

When considering whether an elderly parent of a person settled in the United Kingdom should be admitted to the United Kingdom under para 52^a of the Statement of Changes in Immigration Rules (HC Paper (1982–83) no 169) as a dependant of the person already settled in the United Kingdom because the parent is 'without other close relatives in their own country to turn to', the immigration authorities are required to administer para 52 humanely and to consider not just whether there are close relatives in his or her own country to whom the parent can turn for a home or financial support but whether there are close relatives there to whom the parent can turn for any sort of need, such as loneliness; isolation, chronic illness, accident or sudden emergency, which may afflict an elderly person (see p 691 *h* and p 692 *d g* to p 693 *b f g*, post).

R v Immigration Appeal Tribunal, ex p Bastiampillai [1983] 2 All ER 844 considered.

Jan v Secretary of State for the Home Dept (1982) 133 NLJ 744 disapproved.

Notes

For the rules governing admission of dependent parents, see 4 Halsbury's Laws (4th edn) para 995.

Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Jan v Secretary of State for the Home Dept (1982) 133 NLJ 744, Imm App Trib.

R v Immigration Appeal Tribunal, ex p Bastiampillai [1983] 2 All ER 844.

R v Immigration Appeal Tribunal, ex p Dadibhai (24 October 1983, unreported) QBD.

Appeal

By a notice of motion dated 29 November 1984 the applicants, Swaran Singh, Chint Kaur, Jaswant Singh and Havinder Singh, applied, with the leave of Hodgson J given on 16 November 1984, for judicial review of (1) a decision of an immigration adjudicator dated 12 April 1984 dismissing the applicants' appeals against the refusal by the entry certificate officer in New Delhi of entry clearance to enable them to join their sponsor in the United Kingdom, Mr Nirmal Singh, for settlement in the United Kingdom as his dependants, and (2) the decision of the Immigration Appeal Tribunal dated 19 July 1984 refusing the applicants leave to appeal from the adjudicator's decision. On 12 February 1986 Simon Brown J granted the application for judicial review and quashed the appeal tribunal's decision. The appeal tribunal appealed. The facts are set out in the judgment of Dillon LJ.

Nigel Fleming for the Immigration Appeal Tribunal.

Sibghat Kadri for the applicants.

Cur adv vult

^a Paragraph 52, so far as material, is set out at p 691 *e* to *g*, post

6 July. The following judgments were delivered.

a

DILLON LJ. The Immigration Appeal Tribunal appeals against a decision of Simon Brown J of 12 February 1986 whereby on an application for judicial review the judge, on the application of four applicants (the present respondents), quashed a refusal of the tribunal to grant the applicants leave to appeal against a determination of an adjudicator, who had dismissed an appeal of the applicants against a refusal by an entry certificate officer to grant the applicants leave to be admitted to the United Kingdom for settlement. The effect of the judge's decision was to leave it to the tribunal to proceed with hearing the applicants' appeal against the adjudicator's determination. In view of the pending appeal to this court against the judge's decision, however, that has not happened. The unfortunate result is that this case is now very stale: the entry certificate officer gave his decision on 9 June 1983 and the adjudicator gave his on 12 April 1984.

b

The two principal applicants, Swaran Singh and Chint Kaur, are the elderly parents, aged 67 and 63 respectively at the date of the entry certificate officer's decision, of their sponsor, Mr Nirmal Singh, who has been settled in the United Kingdom for many years, and has since about 1978 been supporting the applicants by remittances from England to India. The two other applicants, Jaswant Singh and Harvinder Singh, are younger sons of the principal applicants; at the time of the decision of the entry certificate officer they were schoolboys aged 16 and 15, who would have been entitled to enter the United Kingdom as dependants of the principal applicants if the principal applicants were entitled to enter.

d

It is common ground that the relevant immigration rule is para 52 of the Statement of Changes in Immigration Rules (HC Paper (1982-83) no 169). The relevant part of that rule is as follows:

e

'Widowed mothers, fathers who are widowers aged 65 or over and parents travelling together of whom at least one is aged 65 or over should be admitted for settlement only where the requirements of paragraphs 46 and 47 and the following conditions are met. They must be wholly or mainly dependent upon sons or daughters settled in the United Kingdom who have the means to maintain their parents and any other relatives who would be admissible as dependants of the parents and adequate accommodation for them. They must also be without other close relatives in their own country to turn to . . .'

f

That last sentence is the crucial sentence. The rule goes on:

g

'This provision should not be extended to people below 65 (other than widowed mothers) except where they are living alone in the most exceptional compassionate circumstances, including having a standard of living substantially below that of their own country, but may in such circumstances be extended to sons, daughters, sisters, brothers, uncles and aunts of whatever age who are mainly dependent upon relatives settled in the United Kingdom . . .'

h

So far as elderly parents are concerned, the object of para 52 is plainly humanitarian. Persons settled here, and who have the means to support them, are entitled to have their elderly parents come to live here, if the elderly parents are wholly or mainly dependent on the children settled here and if the elderly parents are 'without other close relatives in their own country to turn to'. Whatever it may be that the elderly parents are to turn to their other close relatives in their own country for, it must, in my judgment, be something that the other close relatives would, if turned to, be able and willing to provide. Otherwise the rule make no sense at all.

i

But what is it? In the judgment under appeal Simon Brown J took it as a principle now firmly settled and entrenched in this area of law that what the applicant has to turn to the other close relative for is the provision of a home or financial support, which that relative will be able and willing to provide. All that the phrase seeks to achieve, on that view, is that, even though the applicant is in fact wholly or mainly supported financially

by his child in this country, he cannot claim settlement here under the rule if he has another close relative in his own country who would be able and willing to provide him with a home and financial support if turned to. In other words, as counsel for the applicants put it in argument, the elderly parent's dependency on his child in this country must, if he is to be allowed to settle here, be a dependency of necessity, and not a dependency of choice, i.e. by choice as between dependency on the child in this country and dependency on some other close relative in the elderly parent's own country. a

This settled and entrenched principle is said to be derived from the decision of Glidewell J in *R v Immigration Appeal Tribunal, ex p Bastiampillai* [1983] 2 All ER 844 and the decision of Hodgson J in *R v Immigration Appeal Tribunal, ex p Dadibhai* (24 October 1983, unreported). On the facts of *Bastiampillai's* case, the only need that the elderly parents had was a need for a home and financial support. The case is unusual in that at the relevant time the elderly parents were staying rent free with a daughter and son-in-law in England, and had no means of financial support at all, except an exiguous pension from their own country. It was therefore natural that Glidewell J should consider whether there was anyone in the parents' own country to whom they could turn for a home or financial support, since that was their obvious need. But it does not follow that a general rule must be deduced from the facts of that case that the rule is only concerned with elderly parents having other close relatives to turn to for a home or financial support. Indeed, I doubt whether Glidewell J intended to lay down a universal rule. In my judgment, all the parents' circumstances should be taken into account including the financial or other support being received from the parents' child or children settled in the United Kingdom or from any other close relative. b
c
d

An alternative approach, cited by the adjudicator in his decision in the present case, was the approach of the Immigration Appeal Tribunal in *Jan v Secretary of State for the Home Dept* (1982) 133 NLJ 744. There it was stated: e

'In the opinion of the tribunal the expression "They must be without other close relatives in their own country to turn to" contemplates a situation where a person is isolated from his or her close relatives and is therefore unable to turn to them for those things for which a person can normally expect to turn to his family, such as companionship, affection, discussion of problems and courses of action, advice, physical help. This is not an exhaustive definition. Every case must be judged on its own facts and the question [to be] asked "Is the applicant deprived of the family support he or she might otherwise reasonably expect?"' f

There are several points about *Jan's* case. The first is that the decision on the facts, as they appear from the transcript of the decision, appears to be extremely harsh and, in my judgment, probably wrong. It would be most unsafe for the facts, as set out in the transcript, to be treated as typical of the sort of case in which entry for settlement should not be allowed. In the second place, while the factors listed, viz companionship, affection, discussion of problems etc, are relevant in the sense that an elderly parent who does not have even these available to him or her is indeed a person 'without other close relatives in his or her own country to turn to', they do not, in my judgment, go far enough. g
h

I read the phrase in para 52 'without other close relatives in his or her country to turn to' as importing 'to turn to in case of need', i.e. any sort of need which may afflict elderly parents living together, or a widowed mother or a father who is a widower aged 65 or over. What the need may be will depend on the facts of the particular case. But what has to be covered is not merely the need of loneliness and isolation, which the factors listed in *Jan's* case add up to, and which is indeed often a burden to such elderly people. There may also, as in *Bastiampillai's* case, be a need for a home and financial support. But there are many other circumstances in which elderly parents may need help and support from a child or other close relative. One obvious instance is the need for some close relative to turn to in the event of chronic illness. Another, more important in my personal view, is i

a the need for a close relative to turn to, and who will be able to and willing to cope, in the event of accident or sudden emergency to the elderly parent; it is difficult to imagine anything more worrying to a loving child settled here than the fear of an accident to a parent thousands of miles away with no one to cope. Another instance is the possibility of hostile and violent behaviour by neighbours towards the elderly parent who is not adequately protected.

b Indeed, much of the trouble in this jurisdiction is that the rule is one of broad humanity which in such instances as *Jan's* case has not been administered humanely.

c So far as the principal applicants in the present case are concerned, I take the view, on the evidence before this court, that the two younger applicants, mere schoolboys at the relevant time, were too young and immature to satisfy the requirements of the rule as close relatives to whom the principal applicants could turn in need. The adjudicator was also right, on the facts before us, in holding that the married daughters, two of whom

d satisfy the needs of the principal applicants.

The case turned against the applicants before the adjudicator because the principal applicant, Swaran Singh, has a brother, Joginder Singh, who lives in the same village, Sangatpur, as the applicants. Little was disclosed about Joginder Singh in the evidence before the adjudicator; from what we were told by counsel, his name seems to have

e cropped up in the argument at a late stage. We have had before us a subsequent affidavit as to Joginder Singh's circumstances, but I put that out of mind for present purposes. The adjudicator seems to have felt that a deception was being practised in relation to Joginder Singh, because Swaran Singh did not refer to Joginder Singh as living in Sangatpur; he stated instead in a family tree: 'Joginder Singh, husband of late Surjit Kaur, 1 daughter and 1 son, live at Kanpur.' The adjudicator has not given anything like enough weight

f to the fact that the second applicant, Swaran Singh's wife, Chint Kaur, did tell the entry certificate officer that Joginder Singh lived in Sangatpur. The adjudicator's decision is in this respect vulnerable on *Wednesbury* grounds (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223).

Accordingly, even though I do not accept the view of the law as stated by Simon Brown J, I would dismiss this appeal, and leave this case to be determined by the Immigration Appeal Tribunal, on appeal from the adjudicator, on whatever evidence may then be put before the appeal tribunal, and in the light of the views on the law expressed by this court.

NICHOLLS LJ. I agree.

g **SIR FREDERICK LAWTON.** I also agree.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Wm Bache & Son*, West Bromwich (for the applicants).

Wendy Shockett Barrister.

Arnold v Central Electricity Generating Board ^a

HOUSE OF LORDS

LORD BRIDGE OF HARWICH, LORD FRASER OF TULLYBELTON, LORD BRIGHTMAN, LORD ACKNER
AND LORD OLIVER OF AYLMEYTON

21, 22 JULY, 22 OCTOBER 1987

Limitation of action – Accrued defence – Effect of subsequent legislation – Deceased employed by defendant from 1938 to 1943 – Deceased diagnosed in 1981 as suffering from asbestos-related disease – Action commenced in 1984 alleging deceased contracted disease during employment with defendant – Defendant relying on time-bar accruing to it in 1944 – Whether subsequent legislation depriving defendant of accrued right to rely on time-bar. ^b

The plaintiff was the widow and administratrix of the deceased, who had been employed from 1938 to 1943 in a power station operated by a public authority whose liabilities had since devolved on the defendant. In 1981 the deceased was diagnosed as suffering from an asbestos-related disease, from which he died in 1982. In 1984 the plaintiff issued a writ against the defendant claiming damages for negligence and/or breach of statutory duty in failing to protect the deceased from the inhalation of asbestos dust while he was employed at the power station. By its defence the defendant pleaded that the claim had become time-barred in 1944 by virtue of s 21(1)^a of the Limitation Act 1939, which prescribed a limitation period of one year from the date when the action accrued in the case of actions for tort against public authorities. Section 21 was repealed by s 1 of the Law Reform (Limitation of Actions &c) Act 1954 but s 7(1)^b of that Act expressly preserved any accrued right to plead a time-bar as a defence. Although s 1(1) to (3) of the Limitation Act 1963 subsequently removed the time-bar defence in ordinary personal injuries actions if the plaintiff could show justifiable ignorance of his right to sue, s 1(4)(a)^c of that Act provided that (subject to an immaterial exception) any defence 'available by virtue of any enactment' was not excluded by s 1. By the Limitation Act 1975 (which inserted s 2A in the 1939 Act) the limitation period in 'any action for damages' in personal injuries claims ran from the date of accrual of the cause of action or, if later, the date of the plaintiff's knowledge. The question whether the subsequent legislation had retrospectively removed the time-bar imposed on the plaintiff's claim by s 21 of the 1939 Act was tried as a preliminary issue. The judge held that the time-bar had been removed but the Court of Appeal reversed his decision. The plaintiff appealed to the House of Lords. ^c

^d

^e

^f

Held – The defendant was entitled to rely on the time-bar which had accrued to its predecessor under s 21 of the 1939 Act because the 1954, 1963 and 1975 Acts were not intended to deprive it of an accrued right to rely on a time-bar but were instead intended to remedy defects in the law relating to limitation, and the time-bar contained in s 21 did not fall into that category. Furthermore, the 1963 and 1975 Acts were not to be interpreted retrospectively so as to impair any existing right which the defendant had under s 21 of the 1939 Act unless that result was unavoidable on the language used, which in the circumstances was not the case. Accordingly, the plaintiff's action was time-barred and her appeal would be dismissed (see p 701 *c* to *e* ^g *h* and p 703 *f* to p 704 *b* to *g*, post). ^g

^a Section 21(1), so far as material, provided: 'No action shall be brought against any person for any act done in pursuance, or execution, or intended execution . . . of any public duty or authority, or in respect of any neglect or default in the execution of any such . . . duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued . . .'. ^j

^b Section 7(1) is set out at p 697 *d* *e*, post

^c Section 1(4), so far as material, is set out at p 701 *f*, post

- Dictum of Lord Brightman in *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER at 836 applied.
- a* *Knipe v British Rlys Board* [1972] 1 All ER 673 overruled.

Notes

- For retrospective effect of statutes, see 44 Halsbury's Laws (4th edn) paras 921–926, and for cases on the subject, see 45 Digest (Reissue) 430–443, 4246–4387.
- b* For statutes of limitation generally, see 28 Halsbury's Laws (4th edn) paras 601–621, and for cases on the subject, see 32 Digest (Reissue) 468–469, 3599–3616.
- As from 1 May 1981 the Limitation Act 1980 consolidated the Limitation Acts 1939 to 1980. For the Limitation Act 1980, see 24 Halsbury's Statutes (4th edn) 629.
- The Law Reform (Limitation of Actions &c) Act 1954 was repealed by the Statute Law (Repeals) Act 1978, s 1(1), Sch 1, Pt I, and the Limitation Act 1963, s 1 was repealed by
- c* the Limitation Act 1975, s 4(5), Sch 2.

Cases referred to in opinions

- Cartledge v E Jopling & Sons Ltd* [1963] 1 All ER 341, [1963] AC 758, [1963] 2 WLR 210, HL; affg [1961] 3 All ER 482, [1962] 1 QB 189, [1961] 3 WLR 838, CA.
- d* *Knipe v British Rlys Board* [1972] 1 All ER 673, [1972] 1 QB 361, [1972] 2 WLR 127, CA.
- Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833, [1983] 1 AC 553, [1982] 3 WLR 1026, PC.

Interlocutory appeal

- The plaintiff, Emma May Arnold, suing as widow and administratrix of the estate of Albert Edward Arnold under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934, appealed with leave of the Appeal Committee of the House of Lords given on 10 December 1986 against the decision of the Court of Appeal (Sir John Donaldson MR, Ralph Gibson and Nicholls LJ) ([1987] 2 WLR 245) on 15 October 1986 allowing an appeal by the defendant, the Central Electricity Generating Board, against the judgment of Michael Ogden QC, sitting as a deputy judge of the High Court in the Queen's Bench Division ([1986] 3 WLR 171), on 23 January 1986 whereby,
- f* on the trial of a preliminary issue, he held that the plaintiff's action against the board claiming damages in consequence of the death of the deceased on 21 May 1982 as the result of acute bronchopneumonia and mesothelioma alleged to have been contracted by the deceased during the course of his employment between 11 April 1938 and 6 April 1943 by the board or its predecessor in title, the Birmingham Corporation, was not time-barred by s 1 of the Public Authorities Protection Act 1893 and s 21 of the Limitation Act 1939. The facts are set out in the opinion of Lord Bridge.
- g*

Michael Brent QC and John Foy for the widow.

Michael Wright QC and Anthony Nicholl for the board.

- h* Their Lordships took time for consideration.

22 October. The following opinions were delivered.

- LORD BRIDGE OF HARWICH.** My Lords, the appellant plaintiff is the widow of
- j* Albert Edward Arnold (the deceased). In an action commenced by writ dated 13 April 1984 she claims damages under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934 against the respondent defendant (the board). The deceased was employed by the Birmingham Corporation at Hams Hall power station between April 1938 and April 1943. It is common ground that any liabilities of the Birmingham Corporation arising from the operation of the power station have since

devolved on the board. The widow's statement of claim alleges that the deceased worked under conditions in which the Birmingham Corporation, negligently and in breach of statutory duty, failed to protect him from the inhalation of asbestos dust, as a result of which he contracted mesothelioma. This condition was first diagnosed in October 1981 and was the cause of the death of the deceased on 21 May 1982. a

The board's defence pleads, *inter alia*, by para 10:

'The plaintiff's claim is statute barred by virtue of the provisions of Section 1 of the Public Authorities Protection Act 1893 and Section 21 of the Limitation Act 1939, the deceased having brought no proceedings against the Birmingham Corporation in respect of the matters alleged in the Statement of Claim within months of the date on which his cause of action accrued.' b

The issue raised by this paragraph was ordered to be tried as a preliminary issue. It was tried and decided in favour of the widow by Michael Ogden QC sitting as a deputy judge of the High Court (see [1986] 3 WLR 171). That decision was reversed by the Court of Appeal (Sir John Donaldson MR, Ralph Gibson and Nicholls LJ) (see [1987] 2 WLR 245). The widow now appeals by leave of your Lordships' House. c

In 1943 the relevant statute in force was the Limitation Act 1939. This prescribed by s 2(1) a general period of limitation of six years for, *inter alia*, actions founded on tort. But s 21 prescribed a period of limitation of one year for actions against public authorities to which the Public Authorities Protection Act 1893 applied. The Birmingham Corporation was such an authority. It is to be assumed for the purpose of deciding the preliminary issue that the deceased contracted mesothelioma in the course of his employment by the Birmingham Corporation, *ie* at the latest by April 1943, and that a cause of action against the Birmingham Corporation in respect of that injury then accrued to him. Thus at the latest by April 1944 any cause of action which the deceased had against the Birmingham Corporation in respect of his mesothelioma was statute-barred. d

The current general law of limitation of actions is found in the Limitation Act 1980, a consolidating statute, which, by s 11(4), prescribes for personal injury actions a period of three years from '(a) the date on which the cause of action accrued; or (b) the date of knowledge (if later) of the person injured'. It is common ground that 'the date of knowledge' of the deceased within the meaning of that phrase in s 11(4) as defined by s 14 was not earlier than October 1981. If the deceased had a cause of action subsisting at the date of his death in May 1982, there is nothing in the 1980 Act which would bar the widow's claims in an action commenced in April 1984. e

Paragraph 9(1) of Sch 2 to the 1980 Act provides, so far as relevant: f

'Nothing in any provision of this Act shall—(a) enable any action to be brought which was barred . . . by the Limitation Act 1939 [before 1 August 1980] . . .'

Thus the critical question to be determined in this appeal is whether anything in the series of statutes dealing with limitation of actions leading up to the 1980 consolidation, each of which was passed to ameliorate aspects of the law believed to operate unjustly, has had the effect of removing retrospectively the bar to the widow's action which accrued to the Birmingham Corporation pursuant to s 21 of the 1939 Act. g

By s 16(1) of the Interpretation Act 1978 (re-enacting s 38(2) of the Interpretation Act 1889) the repeal of an enactment 'does not, unless the contrary intention appears . . . (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment . . .' In *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833, [1983] 1 AC 553 the Privy Council held that, on the expiry of a relevant period of limitation, a potential defendant to an action acquired an 'accrued right' within the meaning of an identical provision in the Malaysian Interpretation Act 1967 to rely on the time-bar as giving him immunity from liability, which was not affected by the h

a subsequent repeal of the relevant limitation provision unless the contrary intention appeared. Lord Brightman, delivering the judgment of the Board, went further when he said ([1982] 3 All ER 833 at 836, [1983] 1 AC 553 at 558):

b 'Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used.'

The Law Reform (Limitation of Actions &c) Act 1954, which came into force on 4 June 1954, repealed the Public Authorities Protection Act 1893 and s 21 of the 1939 Act. It amended (by s 2(1)) s 2(1) of the 1939 Act by the addition of the following proviso:

c 'Provided that, in the case of actions for damages for negligence, nuisance or breach of duty . . . where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years.'

Section 7(1) provided:

d 'The time for bringing proceedings in respect of a cause of action which arose before the passing of this Act shall, if it has not then already expired, expire at the time when it would have expired apart from the provisions of this Act or at the time when it would have expired if all the provisions of this Act had at all material times been in force, whichever is the later.'

e Thus, its effect in relation to actions for damages for personal injuries against public authorities was to apply the new limitation period of three years to causes of action which accrued within 12 months before 4 June 1954, but not to revive any cause of action which accrued more than 12 months before that date and which was already time-barred. Its effect in relation to actions for damages for personal injuries against other defendants was to leave causes of action which accrued between 4 June 1948 and 4 June 1954 subject f to the limitation period of six years pursuant to the unamended s 2(1) of the 1939 Act and to apply the limitation period of three years under the subsection as amended by the proviso only to causes of action accruing after 4 June 1954.

The injustice which rigid periods of limitations are capable of causing in certain classes of personal injury action was thrown into high relief by *Cartledge v E Jopling & Sons Ltd* [1963] 1 All ER 341, [1963] AC 758. A number of steel dressers had contracted g pneumoconiosis by inhaling noxious dust while working at the defendants' factory. As a result of changes at the factory, the plaintiffs could establish no breaches of duty by their employers making any material contribution to the causation of the injuries to their lungs after September 1950. They issued writs on 1 October 1956 commencing actions which were, in due course, consolidated. Thus, any relevant breach of duty responsible h for the initial onset of the disease had in each case occurred more than six years before the actions were brought. As the House felt obliged to hold, the plaintiffs' causes of action were statute-barred although they had accrued to the plaintiffs long before they could have known of their condition. As one would expect, all their Lordships deplored this result. It will be sufficient for present purposes to cite two passages from the speeches. Lord Reid said ([1963] 1 All ER 341 at 343, [1963] AC 758 at 771-772):

j 'It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer; and that further injury arising from the same act at a later date does not give rise to a further cause of action. It appears to me to be

unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and therefore before it is possible to raise any action. If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided.'

Lord Morris said ([1963] 1 All ER 341 at 346, [1963] AC 758 at 776):

'The evidence in the present case shows indisputably that there may be lung injury caused by the inhalation of fine particles of silica and that an injured person may, without any kind of fault on his part, be unaware of the fact that he has been caused injury. A result of this, in a case where there has been a breach of duty, is that a limitation period may bar a remedy before there is or could be knowledge of a cause of action. That seems to me to be highly unsatisfactory, and for that reason I share the regret expressed by others of your Lordships that this appeal must fail, and I join in the hope that consideration may be given to an amendment of the law.'

It was no doubt the *Cartledge* case, which was decided at first instance by Glyn-Jones J in 1959, which prompted the setting up in 1961 by the Lord Chancellor and the Secretary of State for Scotland of a distinguished committee under the chairmanship of Edmund Davies J with terms of reference—

'to consider and report whether any alteration is desirable in the law relating to limitation of actions in cases of personal injury where the injury or disease giving rise to the claim has not become apparent in sufficient time to enable proceedings to be begun within three years from the inception of such injury or disease.'

The Report of the Committee on Limitation of Actions in Cases of Personal Injury (Cmnd 1829) was presented in September 1962 after the decision of the *Cartledge* case [1961] 3 All ER 482, [1962] 1 QB 189 in the Court of Appeal but before the decision in the House of Lords. The report presents a thorough analysis of the problem, an examination of the pros and cons of various solutions and the committee's recommendations. It was this report which led to the enactment of the Limitation Act 1963. The determination of the present appeal turns primarily on the interpretation of that Act. It is, therefore, entirely legitimate to study the report to ascertain the mischief which the Act was intended to remedy. A substantial part of the able argument for the widow before your Lordships was based on this report and I was much impressed by it. But, on mature reflection, I do not believe the report lends any real assistance on the essential question of interpretation which relates to the degree of retroactivity which can be attributed to the 1963 Act. It is true that the report contains passages emphasising the long periods during which insidious diseases may lie dormant. But as against this I cannot overlook para 17 of the report, which emphasises the traditional and well-recognised grounds on which it has always been thought just and necessary to impose limitations for the protection of defendants on the time within which claims at law must be brought against them. The paragraph concludes as follows:

'We have, therefore, approached our task as one involving a duty to seek a balance between the interests of each litigating party and we appreciate that, whatever solution to the problem may eventually be accepted, there are bound to be hard cases.'

It is, I think, beyond question that the 1963 Act operated retrospectively, when the appropriate conditions were satisfied, to deprive a defendant of an accrued time-bar in

a respect of a claim for damages for personal injuries in which the cause of action had accrued since 4 June 1954 and which had, therefore, been subject to the three-year period of limitation introduced by the 1954 Act. This is the combined effect of the relevant provisions of ss 1, 6 and 15, which are as follows:

b **1.**—(1) Section 2(1) of the Limitation Act 1939 (which, in the case of certain actions, imposes a time-limit of three years for bringing the action) shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which—(a) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section, and (b) the requirements of subsection (3) of this section are fulfilled.

c (2) This section applies to any action for damages for negligence, nuisance or breach of duty . . . where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

d (3) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—(a) either was after the end of the three-year period relating to that cause of action or was not earlier than twelve months before the end of that period, and (b) in either case, was a date not earlier than twelve months before the date on which the action was brought . . .

e **6.**—(1) Subject to the following provisions of this section, the provisions of this Part of this Act . . . shall have effect in relation to causes of action which accrued before, as well as causes of action which accrue after, the passing of this Act, and shall have effect in relation to any cause of action which accrued before the passing of this Act notwithstanding that an action in respect thereof has been commenced and is pending at the passing of this Act . . .

f (3) For the purposes of this section an action shall not be taken to be pending at any time after a final order or judgment has been made or given therein, notwithstanding that an appeal is pending or that the time for appealing has not expired; and accordingly section 1 of this Act shall not have effect in relation to a cause of action in respect of which a final order or judgment has been made or given before the passing of this Act.

15. Except in so far as the context otherwise requires, any reference in this Act to an enactment shall be construed as a reference to that enactment as amended or extended by or under any other enactment.

g Hence it is the new three-year period of limitation introduced by the amended s 2(1) of the 1939 Act which is no longer to be available as a defence if the court has granted the appropriate leave and the conditions as to knowledge prescribed by s 1(3) are satisfied. The specific provisions relating to pending actions in s 6, distinguishing between actions awaiting trial and actions subject to appeal after final judgment, would be otiose unless the Act were intended, in any pending action awaiting trial, to deprive the defendant of a time-bar which had already accrued on expiry of the three-year limitation period at the date of issue of the writ. If that was the intention in the case of pending actions, it must likewise have been the intention where the three-year time-bar had accrued but no action had yet been started.

j In considering what, if any, further retrospective operation in depriving defendants of accrued time-bars can be ascribed to any provision in the 1963 Act, I find it quite unrealistic to examine in isolation the special case of the cause of action in a claim for damages for personal injuries which accrued before 1954 against an authority entitled to the protection of s 21 of the 1939 Act without considering at the same time the case of a pre-1954 cause of action in a personal injury claim accruing against an ordinary defendant

and subject therefore to the six-year period of limitation prescribed by the unamended s 2(1) of the 1939 Act. The point that most troubled me in the course of the argument was what, as it seemed to me, would be the absurdity of attributing to the legislature an intention to give retrospective effect to the new limitation provisions so as to deprive an ordinary defendant of the right to rely on a time-bar accrued under the unamended provisions of the 1939 Act but at the same time to leave intact the defence of a public authority acquired by virtue of the special position that public authorities previously enjoyed under s 21 of the 1939 Act in regard to limitation of actions. The philosophy which was once thought to justify the distinction between public and private defendants in this regard had fallen wholly into disrepute when the distinction was swept away in 1954, and, so far as I am aware, has never subsequently regained any reputable currency. Hence, if the distinction was reintroduced in relation to the retrospective operation of the 1963 Act, it surely can only have been by some accident of inadvertent draftsmanship. It is for this reason that I should strive to avoid construing the Act as effecting such a distinction unless plainly compelled by its language to do so.

The Court of Appeal, as is clear from the admirably lucid judgment of Ralph Gibson LJ, with which the other members of the court agreed, was aware of this aspect of the matter, but was embarrassed by the prior Court of Appeal decision in *Knipe v British Rlys Board* [1972] 1 All ER 673, [1972] 1 QB 361, which it was free to criticise but not free to overrule, in so far as it decided that the 1963 Act applied retrospectively to deprive a defendant of an accrued six-year time-bar under s 2(1) of the 1939 Act prior to its amendment by the 1954 Act. The plaintiff's cause of action in that case had accrued in March 1948 and thus became time-barred in March 1954. The main issue in the case was whether the plaintiff had satisfied the conditions as to knowledge prescribed by s 1(3), as the trial judge and the Court of Appeal held that he had. It does not appear from the report that any point was pleaded or argued for the defendant on the issue of the retrospective action of the statute and the decision in relation to that issue might be said to be per incuriam but for a passage in the judgment of Lord Denning MR, in which he adverts to the point and determines it in the plaintiff's favour (see [1972] 1 All ER 673 at 677, [1972] 1 QB 361 at 368-369). The passage is set out in full in the judgment of Ralph Gibson LJ, who forcefully criticises the reasoning on which Lord Denning MR's conclusion rests (see [1987] 2 WLR 245 at 257-258). I respectfully agree with the criticism and need not repeat it.

In any event, your Lordships are not, of course, bound by the decision in *Knipe's* case. A matter that concerns me is that the point is not directly in issue in the present appeal. But, for the reasons I have indicated, it seems to me in the highest degree improbable that the legislature in 1963 could have intended, as a matter of deliberate policy, in giving retrospective effect to the new limitation code in personal injury actions to differentiate between causes of action governed by the six-year period under the unamended s 2(1) of the 1939 Act and those governed by the one-year period under the repealed s 21 of the 1939 Act. I am thus persuaded that your Lordship both can and should consider and determine the effect of the 1963 Act in relation to a pre-1954 six-year case as part of the necessary process of reasoning in reaching a conclusion as to its effect in relation to a pre-1954 one-year case.

The proposition that the 1963 Act failed to remove the accrued six-year time-bar in any personal injury case where the cause of action accrued before 4 June 1954 is, at first blush, a startling one for the simple reason that the *Cartledge* case which triggered the change in the law was itself a case where the plaintiffs' causes of action all accrued in or before 1950, and, if the 1963 Act failed to extend to such cases, it could, in one sense, be said that it failed to remedy the very injustice which prompted its enactment. I was much impressed by this consideration in the course of the argument. But on reflection I believe that this approach involves an over-simplification of the issue. In legislating four years after the *Cartledge* case had come to trial it is not necessarily to be assumed that Parliament's intention was shaped by the particular facts of the *Cartledge* case when

considering how far the new statute should operate retrospectively. However that may be, it is in any event from the language of the statute alone, if it is unambiguous, that the extent of the intended retrospection must be determined.

I have already set out the terms of s 1(1) of the 1963 Act. The only time-bar of which defendants are in terms deprived of by this subsection is the three-year time-bar which accrued under s 2(1) of the 1939 Act as amended in 1954. This is made clear both by the words in parenthesis and by s 15 of the Act. There is certainly no context in s 1 which would permit the reference to s 2(1) of the 1939 Act to be construed as a reference to that subsection as originally enacted. The words in parenthesis emphasise the contrary. This is perhaps sufficient to lead to the conclusion that there is nothing in s 1 of the 1963 Act which in any way affects the availability, after 1963 as before, of a defence which had accrued on the expiry of the six-year period applicable to any cause of action in respect of personal injuries accruing before 4 June 1954. But, if further support for the conclusion be needed, it is found in s 1(3). The language of para (a) of this subsection is simply incapable of any sensible application to a case governed by a six-year period of limitation. In the result I would hold that the 1963 Act did not operate to deprive any defendant of a time-bar which had accrued on the expiry of the six-year limitation period prescribed by s 2(1) of the 1939 Act in its original form which, by virtue of s 7 of the 1954 Act, continued to govern any cause of action in a personal injury case accruing before 4 June 1954. *Knipe's case* [1972] 1 All ER 673, [1972] 1 QB 361 was, therefore, wrongly decided. I would like to acknowledge that I owe this analysis of the effect of s 1 of the 1963 Act to the able arguments of both leading and junior counsel for the board, the force of which I confess I did not appreciate until I reflected on them at leisure.

If the 1963 Act had no effect on accrued time-bars derived from the six-year period of limitation under the unamended s 2(1) of the 1939 Act, it is hardly to be expected that it was intended to have any effect on accrued time-bars derived from the one-year period of limitation under s 21. The operative provision is s 1(4)(a) of the 1963 Act, which reads:

‘Nothing in this section shall be construed as excluding or otherwise affecting—
(a) any defence which, in any action to which this section applies, may be available by virtue of any enactment other than section 2(1) of the Limitation Act 1939 (whether it is an enactment imposing a period of limitation or not) or by virtue of any rule of law or equity . . .’

The Court of Appeal rejected the argument that s 21 of the 1939 Act was an ‘enactment other than section 2(1) of [the 1939 Act]’ within the meaning of this subsection on the ground that the phrase was not apt to apply to a repealed enactment. It nevertheless held that this subsection left the defence of an accrued time-bar under s 21 intact on the ground that it was a defence available ‘by virtue of any rule of law’, which included a reference to the rule of law stated in *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833, [1983] 1 AC 553. With respect, I would reach the same conclusion as to the effect of this subsection by the simpler and more direct route of holding that the defence of an accrued time-bar under s 21 of the 1939 Act is available ‘by virtue of’ an ‘enactment other than section 2(1) of [the 1939 Act]’ and that it is by these words that the defence is expressly preserved. As was cogently pointed out in the course of the argument by my noble and learned friend Lord Oliver, the defence of an accrued statutory time-bar can only be regarded as available ‘by virtue of’ the enactment which imposed the relevant period of limitation and remains so available notwithstanding that the enactment has subsequently been repealed.

The Law Reform (Miscellaneous Provisions) Act 1971, s 1(1) had the effect of extending the period allowed to a plaintiff by s 1(3) of the 1963 Act for commencing an action otherwise statute-barred from one to three years from his date of knowledge of ‘material facts . . . [which] were or included facts of a decisive character’ relating to his cause of action.

The only other statute preceding the 1980 consolidation which it is necessary to

consider is the Limitation Act 1975. This was enacted following the presentation in May 1974 of the 20th Report of the Law Reform Committee (see Interim Report on Limitation of Actions: in Personal Injury Claims (Cmnd 5630)) and substantially implemented its recommendations. Here again certain passages in the report are relied on in argument by counsel for the widow but, save to the limited extent that I shall later indicate, I do not think the report throws any significant light on the problem presently under consideration. It is, however, instructive to note, by reading the Act in conjunction with the summary of the committee's conclusions in para 148 of the report, which the Act clearly sets out to implement, what are the principal objects and effects of the Act. Omitting provisions dealing with persons under a disability, which are not presently relevant, these are as follows. First, the period of three years from the accrual of the cause of action or the plaintiff's 'date of knowledge', if later, is retained as the normal period of limitation applicable to personal injury actions. Second, to resolve the doubts and difficulties which had arisen on the interpretation of s 1(3) of the 1963 Act, what is to constitute 'knowledge' for this purpose is elaborately and precisely defined by the statute. Third, the Act gives the court a discretion to override the normal period of limitation in an appropriate case. Fourth, the need to obtain the leave of the court to sue out of time is abolished. Finally, as one would expect, the Act contains transitional provisions, the effect of which I do not attempt to summarise as I shall have to examine them in detail later.

The principal machinery adopted to achieve these objects and effects is the elaborate amendment of the 1939 Act. The proviso to s 2(1) of the 1939 Act is removed by the repeal of s 2 of the 1954 Act. By Sch 1, para 2 a new sub-s (8) is added to s 2 of the 1939 Act, which provides: 'This section has effect subject to section 2A below.' The 1975 Act then introduces new ss 2A, 2B, 2C and 2D into the 1939 Act. Section 2A(1) provides:

'This section applies to any action for damages for negligence, nuisance or breach of duty . . . where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.'

It will be noted that this repeats the language of s 1(2) of the 1963 Act. Section 2A(2) provides: 'Section 2 of this Act shall not apply to an action to which this section applies.' The effect of the remaining subsections of s 2A may be summarised. Subsections (3) and (4) provide, subject to s 2D, for the normal time limit of three years from '(a) the date on which the action accrued, or (b) the date (if later) of the plaintiff's knowledge' to apply to personal injury actions. Subsections (5), (9) and (10) relate to actions under the Law Reform (Miscellaneous Provisions) Act 1934 and need not be separately considered. Subsections (6) to (8) contain the provisions defining the concept of date of knowledge. Section 2B applies to actions under the Fatal Accidents Acts. Section 2C is not presently relevant. Section 2D confers the discretion to 'disapply' the provisions of ss 2A or 2B in the circumstances and subject to the limitations laid down in the section. Finally, s 3 of the 1975 Act contains the all important transitional provisions which I set out in full:

'(1) The provisions of this Act shall have effect in relation to causes of action which accrued before, as well as causes of action which accrue after, the commencement of this Act, and shall have effect in relation to any cause of action which accrued before the commencement of this Act notwithstanding that an action in respect thereof has been commenced and is pending at the commencement of this Act.

(2) For the purposes of this section an action shall not be taken to be pending at any time if a final order or judgment has been made or given therein, notwithstanding that an appeal is pending or that the time for appealing has not expired.

(3) It is hereby declared that a decision taken at any time by a court to grant, or not to grant, leave under Part I of the Limitation Act 1963 (which, so far as it relates to leave, is repealed by this Act) does not affect the determination of any question in

proceedings under this Act, but in such proceedings account may be taken of evidence admitted in proceedings under the said provisions repealed by this Act.

(4) In this section "action" includes any proceeding in a court of law, an arbitration and a claim by way of set-off or counterclaim. ✓

Mr Ogden based his decision on the generality of the open words of s 2A: 'This section applies to any action...' (see [1986] 3 WLR 171). He did not refer in terms in his judgment to the transitional provisions in s 3 of the 1975 Act but he must have had them in mind, because without s 3 the 1975 Act could not have operated retrospectively at all. Ralph Gibson LJ refuted Mr Ogden's view in a lengthy passage of his judgment, which relied in substantial measure on a comparison of the language of ss 2A and 2B (see [1987] 2 WLR 245 at 260-262). Whilst I do not dissent from, I do not find it necessary to follow, this somewhat elaborate reasoning, because it seems to me that it is possible to arrive at the same conclusion as that reached by the Court of Appeal by a simpler route, which perhaps may not have been open to the Court of Appeal on account of the effect of *Knipe's* case [1972] 1 All ER 673, [1972] 1 QB 361 by which it was bound.

To my mind the key question is to determine the extent to which s 3 of the 1975 Act was intended to give retrospective effect to the earlier sections embodied by way of amendment of the 1939 Act. It will have been observed that s 3(1) and (2) of the 1975 Act use the same terms as s 6(1) and (3) of the 1963 Act. This correspondence adopts precisely the Law Reform Committee's recommendation in para 147 of their report. Reliance is placed on this by the counsel for the widow, but, by itself, it seems to me a neutral factor. It is clear that, for the same reasons as I have expressed earlier in relation to s 6 of the 1963 Act, s 3 of the 1975 Act was intended to have *some* retrospective effect. If the 1975 Act had been the next relevant statute immediately following the 1954 Act without the intervening 1963 Act, I should have taken precisely the same view of its effect as that expressed by Mr Ogden. In those circumstances, s 21 of the 1939 Act having already been repealed, there would, as I think, have been no effective counter to the argument that the generality of the language of the new s 2A of the 1939 Act, in the light of the retrospective effect given to it by s 3 of the 1975 Act, had swept away all time-bars in personal injury actions previously acquired since 1939, leaving all causes of action accruing since that date to be determined by the application of the new statutory provisions.

But it must be legitimate and necessary to construe the 1975 Act in the light of the preceding legislative history. To give full effect to the remedies which the Law Reform Committee proposed in order to correct the defects which they discovered in the operation of the regime for the limitation of personal injury actions under the 1963 Act as amended by the Law Reform (Miscellaneous Provisions) Act 1971 it was clearly necessary, for the reasons they explained in paras 137 to 146 of their report, to embody in the new statute transitional provisions giving the benefit of the new regime to plaintiffs whose causes of action had accrued during the period governed by the preceding regime, i.e. at any time between 1954 and 1975. Thus, plaintiffs whose causes of action had accrued between those dates would be entitled, where appropriate, to the exercise of the court's discretion under s 2D of the 1939 Act, they would not require the leave of the court to sue and their date of knowledge would be determined under the provisions of s 2A(6) to (8). All this was an essential part of curing the defects which the Law Reform Committee had exposed in the state of the law as they found it. But there is not the slightest hint in the report that the extent of the retrospective operation of the 1963 Act was an aspect of the law calling for any remedial action. It is in this negative sense that the report seems to me to give support to the case for the board.

Consistently with the presumption that a statute affecting substantive rights is not to be construed as having retrospective operation unless it clearly appears to have been so intended, it seems to me entirely proper, in a case where some retrospective operation was clearly intended, equally to presume that the retrospective operation of the statute

extends no further than is necessary to give effect either to its clear language or to its manifest purpose. Construing ss 2A to 2D of the 1939 Act in the light of s 3 of the 1975 Act, I think that full effect is given both to the language and to the purposes of the legislation if it is held retrospectively applicable to all personal injury actions previously governed by the three-year limitation period under the 1954 Act, whether as then enacted or as amended by the 1963 Act. Conversely, I can find nothing in the language or discernible purposes of the statute which leads clearly, let alone unavoidably, to the conclusion that defendants previously entitled to rely on the accrued six-year and one-year time-bars under the original 1939 Act which the 1963 Act left were intended to be deprived of those accrued rights by the 1975 Act.

Not being bound by *Knipe's* case, your Lordships are able to take a broader view of the effect of the legislation as a whole than was open to the Court of Appeal. But this does not prevent me from echoing and indorsing the sentiments expressed by Ralph Gibson LJ at the conclusion of his examination of the 1975 Act, where he said ([1987] 2 WLR 245 at 262):

'For my part, I was content to reach this conclusion because it would, I think, have been a surprising consequence of the Act of 1975 if it had deprived this defendant of an accrued right which, on my view of the true effect of the Acts of 1954 and 1963, had remained unimpaired for the 31 years from 1944 to 1975.'

Accordingly, I would dismiss the appeal.

LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bridge. I agree with it and for the reasons explained in it I would dismiss this appeal.

LORD BRIGHTMAN. My Lords, I agree with the speech of my noble and learned friend Lord Bridge and for the reasons given by him would dismiss this appeal.

LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge. I agree that the appeal should be dismissed for the reasons which he has given.

LORD OLIVER OF AYLMEYTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge. I agree that the appeal should be dismissed for the reasons which he has given.

Appeal dismissed.

Solicitors: *Lawford & Co* (for the widow); *Berryman's*, agents for *Godfrey Diggines & McKay*, Birmingham (for the board).

Mary Rose Plummer Barrister.

**a R v Immigration Appeal Tribunal, ex parte
Ruhul
and other appeals**

COURT OF APPEAL, CIVIL DIVISION

b SLADE, STEPHEN BROWN LJ AND SIR JOHN MEGAW
16, 17, 31 JULY 1987

Immigration – Rules – Commonwealth citizens, wives and children settled in United Kingdom at coming into force of statute – Rules not to make Commonwealth citizens less free to enter or leave United Kingdom than if statute had not been passed – Amendment of rules – Rule made in 1980 requiring children over 18 of Commonwealth citizens settled in United Kingdom to qualify for entry in their own right – Pre-1971 rules giving immigration officers discretion to give adult sons over 18 leave to enter – Whether 1980 rule rendering adult sons over 18 less free to come into United Kingdom than if Act had not been passed – Immigration Act 1971, ss 1(5), 3(2) – Statement of Changes in Immigration Rules (HC Paper (1979–80) no 394), para 47.

d The applicants were the sons of Commonwealth citizens who were settled in the United Kingdom when the Immigration Act 1971 came into force. In 1980, when they were aged between 18 and 21 and living in Bangladesh, the applicants applied for entry clearance for settlement in the United Kingdom. In each case entry was refused by the entry clearance officer, acting under para 47^a of the Statement of Changes in Immigration Rules made in 1980 by the Secretary of State under s 3(2)^b of the 1971 Act, which **e** provided that Commonwealth children over the age of 18 had to qualify for entry in their own right unless there were exceptional compassionate circumstances. The refusals were upheld by the Immigration Appeal Tribunal. The applicants applied for judicial review of the respective decisions, contending that s 1(5)^c of the 1971 Act imposed an obligation on the Secretary of State so to frame the 1980 rules that children of Commonwealth citizens settled in the United Kingdom were ‘not . . . any less free to come into . . . the United Kingdom than if [the] Act had not been passed’ and that, since **f** the pre-1971 rules gave immigration officers a discretion whether to admit dependent sons over the age of 18 if they formed part of the family unit overseas, para 47 of the 1980 rules had rendered the applicants less free to enter and therefore the old rules were to be applied. The judge granted the applications and quashed the decisions. The tribunal **g** appealed.

Held – The tribunal’s appeals would be allowed for the following reasons—

(1) The purpose of s 1(5) of the 1971 Act was to ensure that the rules promulgated by the Secretary of State under s 3(2) made provision for wives and children under 16 of Commonwealth citizens already settled in the United Kingdom to continue to be ‘free to come into . . . the United Kingdom’. However, since the applicants were over 18 they would not have been ‘free’ to come into the United Kingdom under the pre-1971 rules because under those rules their entry would not have been as of right but would have depended on the exercise of a discretion by the immigration officer. It followed that para 47 of the 1980 rules did not render the applicants less free to come into the United Kingdom than they would have been prior to the 1971 Act (see p 715 **c** to **h** and p 716 **d** **e**, post); dicta of Lord Denning MR and Geoffrey Lane LJ in *R v Chief Immigration Officer, Heathrow Airport, ex p Salamat Bibi* [1976] 3 All ER at 846, 850 doubted.

a Paragraph 47 is set out at p 711 **j**, post

b Section 3(2), so far as material, is set out at p 710 **g h**, post

c Section 1(5) is set out at 711 **b**, post

(2) Moreover, even if para 47 did have the effect of rendering the applicants less free to come into the United Kingdom than they would have been before the 1971 Act came into force, it was not the passing of that Act which was responsible for the rules becoming less favourable and for persons such as the applicants becoming less free to come into the United Kingdom, because even before that Act was passed the Secretary of State could have given directions to immigration officers which were just as unfavourable to persons in the position of the applicants as was para 47 (see p 716 *a* to *c*, post).

Notes

For persons having right of abode in the United Kingdom and admission of children of such persons, see 4 Halsbury's Laws (4th edn) paras 974-975, 990.

For the Immigration Act 1971, ss 1, 3, see 31 Halsbury's Statutes (4th edn) 49, 52.

Cases referred to in judgment

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] KB 223, CA.

R v Chief Immigration Officer, Heathrow Airport, ex p Salamat Bibi [1976] 3 All ER 843, [1976] 1 WLR 979, CA.

R v Immigration Appeal Tribunal, ex p Rashida Bibi and Khalida Purvez [1986] Imm AR 61.

R v Secretary of State for the Home Dept, ex p Ademuyiwa [1986] Imm AR 1.

Visa Officer, Islamabad v Saeedan [1983] Imm AR 131, Imm App Trib.

Case also cited

R v Secretary of State for the Home Dept, ex p Zalihe Huseyin (1987) Times, 1 June, QBD.

Appeals

R v Immigration Appeal Tribunal, ex p Ruhul

The Immigration Appeal Tribunal appealed against the judgment of Taylor J hearing the Crown Office list on 21 November 1985 whereby he granted the applicant, Amin Ruhul, an order of certiorari to quash (i) the decision of the Immigration Appeal Tribunal (Mr D L Neve (chairman), Miss P G Liverman and Mr L W Chapman) on 24 January 1984 allowing an appeal by the entrance clearance officer, Dacca against the determination of an adjudicator who had allowed an appeal by the applicant against the refusal of entry clearance for settlement in the United Kingdom and remitted the matter for hearing de novo, (ii) the decision of an adjudicator on the rehearing dated 15 March 1985 dismissing the applicant's appeal from the refusal of entry clearance and (iii) the decision of the Immigration Appeal Tribunal dated 29 May 1984 refusing the applicant leave to appeal against the adjudicator's decision. The facts are set out in the judgment of the court.

R v Immigration Appeal Tribunal, ex p Rahman

The Immigration Appeal Tribunal appealed against the judgment of Taylor J hearing the Crown Office list on 21 November 1985 whereby he granted the applicant, Naziur Rahman, an order of certiorari to quash (i) the determination of an adjudicator on 13 August 1984 dismissing an appeal by the applicant from the refusal of entry clearance for settlement in the United Kingdom and (ii) the decision of the Immigration Appeal Tribunal (chairman Professor D C Jackson) dated 13 October 1984 refusing the applicant leave to appeal against that decision. The facts are set out in the judgment of the court.

R v Immigration Appeal Tribunal, ex p Haque

The Immigration Appeal Tribunal appealed against the judgment of Taylor J hearing the Crown Office list on 21 November 1985 whereby he granted the applicant, Mohammed Hamidul Haque, an order of certiorari to quash the decision of the Immigration Appeal Tribunal (Mr A Hooton (chairman), Miss P G Liverman and Mrs B Warburton) on 17 March 1983 which allowed an appeal by the entry clearance officer, Dacca against the determination of an adjudicator allowing an appeal by the applicant against the refusal of entry clearance for settlement in the United Kingdom. The facts are set out in the judgment of the court.

Roger Ter Haar for the tribunal.

- a John Platts-Mills QC and G M G Haque for the applicant Mr Haque.
N Alsolaimani for the applicant Mr Ruhul.
M U Ahmed for the applicant Mr Rahman.

Cur adv vult

- b 31 July. The following judgment of the court was delivered.

SLADE LJ. There are before the court three appeals by the Immigration Appeal Tribunal from a judgment of Taylor J given on 21 November 1985 (see [1986] Imm AR 27). They raise what we have been told is an important question concerning the rights of adult sons of Commonwealth citizens who were settled in the United Kingdom at the coming into force of the Immigration Act 1971 to enter this country. The answer to the question ultimately turns on the construction and effect of s 1(5) of that Act.

- c The judgment was given on three applications for judicial review arising out of decisions by entry clearance officers refusing admission to three Bangladeshi young men who had wished to enter the United Kingdom. The applicants were, respectively, Mr Amin Ruhul, Mr Naziur Rahman and Mr Mohammed Hamidul Haque. The submissions
d of counsel for Mr Haque who has appeared before us, as he did in the court below, have been adopted by counsel for Mr Ruhul and counsel for Mr Rahman.

- The issues of law which arise in each case are the same, as is indicated by the identical form of the grounds set out in each of the three notices of appeal. The facts of each case are briefly set out in the judgment of Taylor J, to which reference may be made for some further details of the circumstances of the individual applicants. For the purposes of this
e judgment it will suffice to summarise the common features of each of the three cases, as follows: (1) the relevant application for an entry certificate was made in 1980 and was refused in 1982; (2) the applicant was under 21, but over 18, at the date of the application; (3) the father of the applicant was a Commonwealth citizen who had been settled in the United Kingdom at the coming into force of the 1971 Act; (4) the entry clearance officer
f refused an entry certificate basing himself on para 47 of the rules contained in the Statement of Changes in Immigration Rules (HC Paper (1979-80) no 394), which were the rules under the 1971 Act in force at the date of refusal.

- In Mr Ruhul's case the Immigration Appeal Tribunal, on 24 January 1984, had allowed an appeal by the Home Office from the decision of an adjudicator, who had allowed an appeal from the refusal of entry clearance and remitted the matter for a fresh hearing.
g After a second adjudication, the adjudicator, on 15 March 1984, dismissed the appeal from the refusal of entry clearance. An application for leave to appeal from that decision was dismissed by the Immigration Appeal Tribunal on 29 May 1984. Taylor J granted an application for judicial review of the three decisions of 24 January 1984, 15 March 1984 and 29 May 1984.

- In Mr Rahman's case an adjudicator, on 13 August 1984, dismissed an appeal from the refusal of entry clearance, and on 23 October 1984 the Immigration Appeal Tribunal
h refused leave to appeal. Taylor J granted an application for judicial review of the decisions of 13 August 1984 and 23 October 1984.

- In Mr Haque's case there was an appeal from a refusal of entry clearance to an adjudicator, which was allowed. The Secretary of State then appealed from that decision to the Immigration Appeal Tribunal which, on 17 March 1983, allowed the appeal.
j Taylor J granted an application for judicial review of that decision.

In opening this appeal on behalf of the tribunal, counsel for the tribunal, in the course of his able address, took us through a very helpful review of the more recent history of the relevant legislation, to which counsel for Mr Haque paid generous tribute. We will begin with a similar, if rather more condensed summary, since this will assist to explain not only the issues of law which arise on these appeals, but also our answers to these issues.

Before the coming into effect of the 1971 Act the admission of Commonwealth Citizens into the United Kingdom was primarily governed by the Commonwealth Immigrants Act 1962 as subsequently amended. a

By virtue of s 1(1) of that Act, the provisions of Pt I were expressed to have effect 'for controlling the immigration into the United Kingdom of Commonwealth citizens to whom this section applies'. Section 1(2) designated the Commonwealth citizens to whom the section was to apply, in other words who were to be subject to immigration control. This subsection was in terms which would have included the applicants in this case. b
Section 2(1) provided, subject to the following provisions of the section:

'... an immigration officer may, on the examination under this Part of this Act of any Commonwealth citizen to whom section one of this Act applies who enters or seeks to enter the United Kingdom,—(a) refuse him admission into the United Kingdom; or (b) admit him into the United Kingdom subject to a condition restricting the period for which he may remain there, with or without conditions for restricting his employment or occupation there.' c

The general rule thus was that Commonwealth citizens to whom s 1 applied required the immigration officer's leave to enter. However, s 2(2) and (3) provided:

'(2) The power to refuse admission or admit subject to conditions under this section shall not be exercised, except as provided by subsection (5), in the case of any person who satisfies an immigration officer that he or she—(a) is ordinarily resident in the United Kingdom or was so resident at any time within the past two years; or (b) is the wife, or a child under sixteen years of age, of a Commonwealth citizen (not being a person who is on that occasion refused admission into the United Kingdom) with whom she or he enters or seeks to enter the United Kingdom. d

(3) Without prejudice to subsection (2) of this section, the power to refuse admission under this section shall not be exercised, except as provided by subsections (4) and (5), in the case of a Commonwealth citizen who satisfies an immigration officer either—(a) that he wishes to enter the United Kingdom for the purposes of employment there, and is the person described in a current voucher issued for the purposes of this section by or on behalf of the Minister of Labour or the Ministry of Labour and National Insurance for Northern Ireland; or (b) that he wishes to enter the United Kingdom for the purpose of attending a course of study at any university, college, school or other institution in the United Kingdom, being a course which will occupy the whole or a substantial part of his time; or (c) that he is in a position to support himself and his dependants, if any, in the United Kingdom otherwise than by taking employment or engaging for reward in any business, profession or other occupation; and the power to admit subject to conditions under this section shall not be exercised in the case of any person who satisfies such an officer of the matters described in paragraph (a) of this subsection.' e

Section 2(4) and (5) contained certain provisions of which the broad effect was to authorise an immigration officer to refuse admission on medical grounds or in the case of persons who suffered from mental disorder or who had been convicted of a criminal offence or whose admission would, in the opinion of the Secretary of State, be contrary to the interests of national security or in respect of whom a deportation order was in force. f

However, the broad effect of s 2(2) and (3) was to give a Commonwealth citizen to whom s 1 applied, but who did not fall within the exceptions contained in s 2(4) and (5), a statutory right to receive leave to enter the United Kingdom because, by virtue of the subsections, the immigration officer, on being satisfied that the applicant fell within s 2(2) or s 2(3), could not exercise his power to refuse admission. g

It is, however, to be noted that children over the age of 16 of Commonwealth citizens resident in the United Kingdom were not as such given any such statutory right because h

a they did not fall within s 2(2)(b). The 1962 Act placed no specific fetters on the powers of immigration officers to refuse admission to such persons.

However, s 16(3) imposed an important general restriction on the powers of immigration officers by providing:

‘In the exercise of their functions under this Act, immigration officers shall act in accordance with such instructions as may be given by the Secretary of State . . .’

b Section 16(3), by necessary implication, thus empowered, but did not oblige, the Secretary of State to give instructions to immigration officers as to the exercise of their functions under s 2 of the 1962 Act.

On 1 March 1968 s 2 of the Commonwealth Immigrants Act 1968 came into effect. This substituted a series of new subsections for sub-ss (1) and (2) of s 2 of the 1962 Act. In particular, it substituted for the classes of persons to whom statutory rights to receive
c leave to enter had been given by s 2(2) of the 1962 Act the classes of persons set out in the substituted s 2(2) and (2A), which read as follows:

‘(2) The power to refuse admission shall not, except as provided by subsection (5) of this section, be exercised on any occasion in respect of a person who—(a) satisfies an immigration officer that he is ordinarily resident in the United Kingdom or was
d so resident at any time within the past two years, or (b) being a woman, satisfies an immigration officer that she is the wife of a Commonwealth citizen who is resident in the United Kingdom or of a Commonwealth citizen who enters or seeks to enter the United Kingdom with her.

(2A) Without prejudice to subsection (2) of this section, the power to refuse admission shall not be exercised on any occasion in respect of a person who satisfies
e an immigration officer—(a) that he is under the age of sixteen; (b) that he has at least one parent who is a Commonwealth citizen; and (c) either that both of his parents are resident in the United Kingdom, or that both of them are entering or seeking to enter the United Kingdom with him, or that one of his parents is resident in the United Kingdom and the other is entering or seeking to enter the United
f Kingdom with him.’

However, children over the age of 16 of Commonwealth citizens were still not given any statutory rights to receive leave to enter.

Section 20 of the Immigration Appeals Act 1969 further amended the substituted
g s 2(2)(b) and (2A) by authorising immigration officers to refuse entry to wives and to children under 16 if they did not hold current entry certificates.

Following the passing of the 1962 Act, and as was contemplated by s 16(3) of that Act, the Home Secretary from time to time issued instructions to immigration officers as to the exercise of their functions under s 2. These instructions were embodied in a series of Command Papers. Though it appears that, before the 1971 Act came into force, the Home Secretary was under no obligation to place any such instructions before Parliament,
h he regularly did so and his practice in this respect was inferentially recognised in the definition of ‘immigration rules’ contained in s 24(2) of the 1969 Act. Those currently in force when the 1971 Act came into operation were those entitled ‘Commonwealth Immigrants Acts 1962 and 1968. Instructions to Immigration Officers’ (Cmd 4298).

Immediately before the 1971 Act came into force, persons in the position of the applicants in the present case would have had no statutory right to enter or to receive
j leave to enter the United Kingdom, because they would have been subject to immigration control under s 1 of the 1962 Act and would not have fallen within any of the privileged categories referred to in s 2(2), (2A) and (3) of the 1962 Act, as amended. However, they would have had good prospects of obtaining admission to the United Kingdom in the exercise of the immigration officers’ discretion, since para 40 of Cmd 4298, which contained the current instructions to immigration officers, provided as follows:

'As a general rule persons of 18 or over must qualify for admission in their own right, for example as the holders of employment vouchers or as students. But exceptions may be made. For example, it will be proper to admit an unmarried and fully dependent son or unmarried daughter under 21 who formed part of the family unit overseas if the whole family is coming to settle in the United Kingdom; or to admit a widowed daughter of any age who is dependent on a parent in this country if the parent undertakes to provide for the widow and her dependants.'

Before turning to the 1971 Act, we should perhaps refer briefly to the position of aliens. Before that Act came into effect, they were treated quite separately from Commonwealth citizens. The admission of aliens to this country was controlled by Orders in Council made under the Aliens Restrictions Acts 1914 and 1919, as renewed annually by the Expiring Laws Continuance Acts. Aliens had no rights of entry under those orders. They had in general to obtain permission to land from an immigration officer at the point of arrival, and he in turn was required to carry out his duties in accordance with the instructions of the Secretary of State. When the 1971 Act came into operation the instructions currently in force were those entitled 'Aliens. Instructions to Immigration Officers' (Cmnd 4296).

The 1971 Act, which came into force on 1 January 1973, introduced an entirely new system of immigration laws which applied respectively to United Kingdom citizens, Commonwealth citizens and aliens. Section 2 designated a number of categories of persons who were to have the 'right of abode', and thus, in general, would not require leave to enter this country. Section 1(1) provided:

'All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.'

Significantly, the categories of persons designated in s 2 did not include the privileged categories specified in s 2(2), (2A) and (3) of the 1962 Act, as amended. Persons belonging to those categories would still require leave to enter by virtue of s 3(1)(a).

Parliament, in the 1971 Act, chose to deal with persons 'not having the right of abode' in a novel manner not adopted in the earlier legislation. Firstly, s 3(2) placed a mandatory obligation on the Secretary of State to lay down rules regulating the entry into and stay in the United Kingdom of persons not having the right of abode. So far as material, it provided:

'The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter . . .'

The subsection further obliged the Secretary of State to amend the rules if any such statement is disapproved by Parliament.

Secondly, s 34, for all material purposes, repealed the 1962 and 1968 Acts and thereby removed or, but for s 2(4) and (5) would have removed, the entrenched statutory rights to receive leave to enter previously enjoyed by the privileged categories specified in s 2(2)(b), (2A) and (3). Provision was made for the protection of these categories, not by the insertion of equivalent subsections, but in a somewhat roundabout manner. Thus, thirdly, the privileged categories specified in s 2(3) of the 1962 Act were catered for by s 1(4) of the 1971 Act, which made it obligatory for the rules laid down by the Secretary of State under s 3(2) to—

'include provision for admitting . . . persons coming for the purpose of taking employment, or for purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom.'

Fourthly, s 1(5) of the 1971 Act provided:

'The rules shall be so framed that Commonwealth citizens settled in the United Kingdom at the coming into force of this Act and their wives and children are not, by virtue of anything in the rules, any less free to come into and go from the United Kingdom than if this Act had not been passed.'

Since this is the critically important subsection on these appeals, it will require further examination in this judgment. For the present, suffice it to say that, whether or not it was intended to cater, in addition, for other categories (as the applicants in the present case contend), s 1(5) was, in our judgment, indisputably intended to cater for the privileged categories specified in s 2(2) and (2A) of the 1962 Act, as amended. Whether or not it had further effect, s 1(5) imposed (i) a mandatory obligation on the Secretary of State to include in the rules appropriate provisions to reflect the previous statutory rights of these categories of persons to be given leave to enter and to give them equivalent protection, and (ii) a negative obligation on him not to derogate from these rights in framing new rules.

Though we understand that it replaced some earlier rules made under the 1971 Act, the earliest statement of Immigration Rules for Control on Entry made by the Secretary of State under s 3(2) of the 1971 Act, to which we have been referred, was HC 79, which was laid before Parliament on 25 January 1973. So far as material, para 44 of HC 79 provided:

'Generally, children aged 18 or over must qualify for admission in their own right; but subject to the requirements of paragraphs 39 and 40, an unmarried and fully dependent son under 21 . . . who formed part of the family unit overseas may be admitted if the whole family are settled in the United Kingdom or are being admitted for settlement.'

This paragraph thus contained the favourable consideration for dependent sons which had existed under para 40 of Cmnd 4298, the last set of relevant instructions to immigration officers given under the pre-1971 Act legislation.

However, by a Statement of Changes in Immigration Rules laid before Parliament on 20 February 1980 (HC Paper (1979-80) no 394) the Home Secretary, with effect from 1 March 1980, made changes in the rules laid down by him as to the practice to be followed in the administration of the 1971 Act for regulating entry into and stay of persons in the United Kingdom and contained in HC 79, as amended. As required by s 1(4) of the 1971 Act, these rules included specific provision for admitting persons coming for the purpose of taking employment or for purposes of study or as visitors or as dependants of persons lawfully in or entering the United Kingdom. Paragraphs 42 to 46 of HC 394 also contained rules which had the effect of rendering it obligatory to grant leave to enter to the categories of persons set out in s 2(2)(b) and (2A) of the 1962 Act, as amended. Paragraphs 56 to 58 made provision for returning residents (cf s 2(2)(a)).

However, para 47 of HC 394 contained a provision much less favourable to children aged 18 or over than the equivalent provisions of HC 79 (para 44) and Cmnd 4298 (para 40). So far as material, para 47 of HC 394 provided:

'Children aged 18 or over must qualify for settlement in their own right unless there are the most exceptional compassionate circumstances (in which case their cases should be considered under paragraph 48). Special consideration may, however, be given to fully dependent and unmarried daughters over 18 and under 21 who formed part of the family unit overseas and have no other close relatives in their own country to turn to . . .'

As we have already said, it was in reliance on this para 47 that the entry clearance officers in each of the three instant cases refused leave to enter. a

As Taylor J observed in his judgment ([1986] Imm AR 27 at 30):

'It is to be noted that in that paragraph no special consideration is given to dependent unmarried sons under 21. They fall to be considered in the first sentence . . . It is not suggested by [counsel for the applicant Mr Haque] or counsel appearing for the other applicants here that exceptional compassionate circumstances could be said to exist in these cases.'

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The judge then continued as follows:

'Therefore, if that rule is the appropriate one to apply, the applicants here would be in grave difficulties. Therefore, there is a marked difference in the approach indicated by CP 4298 and maintained in HC 79 against that substituted in HC 394.'

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The judge, however, accepted the submissions of counsel for the applicant Mr Haque that the wording of s 1(5) of the 1971 Act obliged him to conduct a comparison of the relevant rules in force before the 1971 Act (para 40 of Cmnd 4298) with the post-1971 Act rule on which the entry clearance officers relied (para 47 of HC 394), and that, since, in his view, para 47 of HC 79 rendered the children of Commonwealth citizens settled in the United Kingdom at the coming into force of the 1971 Act, less free to come and go than they had been under para 40 of Cmnd 4298, the old rule must prevail and the previous position had to obtain in relation to the applicants (see [1986] Imm AR 27 at 30-31). In his view, therefore, in each of the cases 'the entry certificate officer applied the wrong test' (see [1986] Imm AR 27 at 32).

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In reaching his conclusion that a comparison of the new rule with the old rule was necessary, the judge found support in two decisions on which counsel for the applicant Mr Haque relied. The first was the decision of this court in *R v Chief Immigration Officer, Heathrow Airport, ex p Salamat Bibi* [1976] 3 All ER 843, [1976] 1 WLR 979. In that case an applicant who required an entry certificate in order to enter the United Kingdom attempted to circumvent this requirement by relying on s 1(5) of the 1971 Act which, it was suggested, eliminated the need for any such certificate. This court rejected this argument. Lord Denning MR said ([1976] 3 All ER 843 at 846, [1976] 1 WLR 979 at 983):

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'I do not think that section gives any right to the wife and children to come in without entry clearance. The section is not dealing with rights at all. It is only dealing with the rules which are to be made by the Secretary of State. It says that the rules for wives and children who come after 1st January 1973 are not to be any more restrictive than the previous rules. So we have to look at the rules applying before January 1973 and the rules applying afterwards. Before January 1973 the rules were contained in command paper 4298. The rule about wives and children is in para 34. That made it clear (as did s 20 of the Immigration Appeals Act 1969) that the wife of a Commonwealth citizen was not free to come into this country unless she was in possession of a current entry certificate granted to her. It said: "If she has no entry certificate, she is not to be admitted." After January 1973 the rules relating to Commonwealth citizens were contained in HC 79. This contained the same restrictions as before. The wife of a Commonwealth citizen was not to be admitted unless she had a current entry certificate. Paragraph 40 says ". . . a passenger seeking admission as a dependant . . . must hold a current entry clearance granted to him for that purpose". So the rules after 1973 contained the same restrictions as before 1973. The wives of Commonwealth citizens were not to be admitted unless they held a current entry clearance. In these circumstances counsel for the applicant has to admit that the rules in HC 79 do comply with s 1(5) of the 1971 Act.'

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Geoffrey Lane LJ said ([1976] 3 All ER 843 at 850, [1976] 1 WLR 979 at 987-988):

a 'For the reasons already advanced by Lord Denning MR it is quite clear that the rules, in fact, abide precisely by that injunction. In any event the rules as to visas and entry certificates are the same as they were before, and it is conceded that this applicant did not comply with those rules, and therefore she must inevitably fail on that point.'

b It is, in our judgment, clear that these dicta of Lord Denning MR and Geoffrey Lane LJ were not necessary to their decision, in so far as they suggested that the right approach in principle to s 1(5) of the 1971 Act was to compare the old rules with the new rules. A comparison of the rules made no difference to the position of the applicant in that case, since both sets of rules rendered a current entry certificate mandatory. Taylor J accepted that these dicta were obiter, and counsel for the applicant Mr Haque has not submitted c to the contrary in this court.

Nevertheless, as did the judge, counsel for the applicant Mr Haque naturally relied strongly on these passages in the *Salamat Bibi* case as authority for the proposition that the right approach is to compare the old rules and the new rules in the manner indicated by the judge. Further reliance was placed on *R v Secretary of State for the Home Dept, ex p Ademuyiwa* [1986] Imm AR 1, in which Farquharson J appears to have adopted a similar d approach to s 1(5) in a case concerning an applicant who wished to enter the United Kingdom as a returning resident. After citing the subsection, he said (at 3):

'The applicant benefits from this provision and when his case was reviewed, regard was had to Command Paper 4298, which embodied the relevant instructions in 1970.'

e Having proceeded to consider these provisions and HC Paper (1982-83) no 169, Farquharson J said (at 4):

'Those rules seem at least as beneficial to the applicant as the ones which were current in 1969 and I consider them as being the relevant ones to apply.'

f A similar approach to the interpretation of s 1(5) was adopted by Kennedy J in *R v Immigration Appeal Tribunal, ex p Rashida Bibi and Khalida Purvez* [1986] Imm AR 61, in which he followed the decision of Taylor J in the present cases.

The views expressed in the three last-mentioned decisions together represent a formidable body of authority and are, of course, entitled to the greatest respect. However, none of them are binding on this court and, with the greatest respect, we find ourselves unable to follow the approach to s 1(5) adopted in them.

g First, at least in Farquharson J's judgment, the suggestion appears to be that, if, in any given case, an applicant falling within the category referred to in s 1(5) could show that the rules for the time being laid down by the Secretary of State under s 3(2) of the 1971 Act were less beneficial to the applicant than the equivalent rules contained in Cmnd 4298, then the last mentioned rules would be 'the relevant ones to apply'. And, indeed, h that has been the submission of counsel for the applicant Mr Haque to this court.

On any footing, we do not see how this can be right. The effect of s 1(5) is to place certain defined limits on the powers of the Secretary of State to make rules; it places both mandatory and negative obligations on him in the framing of new rules, the nature of which we have already described. If, in drafting a new rule, he fails to comply with those obligations, the inevitable consequence is, on our judgment, that, subject to any questions j of possible severance, the new rule is ultra vires and therefore void. If it is ultra vires, however, we do not see how this can resurrect Cmnd 4298, which must have ceased to have effect as soon as the 1971 Act came into force.

Accordingly, though the applicants' case has not been presented in this manner, it seems to us that the inevitable consequence of the submissions of counsel for the applicant

Mr Haque as to the construction of s 1(5) of the 1971 Act, if correct, would be that, subject to any questions of possible severance, para 47 of HC 394 would be void, as having been made by the Secretary of State ultra vires. However, it by no means follows from this alone that these submissions as to the construction of s 1(5) are not well-founded, or that the applicants are entitled to no relief. a

We therefore turn to consider these submissions. Counsel for the applicant Mr Haque rightly pointed out that the words of s 1(5) must be given their ordinary meaning and directed attention to the critically important phrase 'free to come . . . and go'. In his submission, this phrase must refer to the totality of the relevant rights of a potential applicant. Section 1(5), he submitted, requires a comparison of the new rules relating to the persons therein specified, as drafted, with the rights which before the 1971 Act gave such persons the freedom to come into and go from the United Kingdom, from whatever source such rights stemmed (whether from statute or from rules or instructions given by the Secretary of State). It was irrelevant that before the 1971 Act came into force the Secretary of State gave directions to his officers in the form of instructions and that, since then, he has given them in the form of rules made under the 1971 Act. Whether before or after the 1971 Act, an applicant of the class referred to in s 1(5) was entitled to expect the officer concerned to give him the full benefit of the relevant current instructions or rules, relating to the grant of leave to enter, which must inevitably accompany the relevant current statute. Any such applicant was entitled to expect that that discretion would be exercised properly by the officer, acting in accordance with *Wednesbury* principles (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] KB 223) and the principles of good administration. Otherwise the exercise of the officer's discretion would be subject to judicial review. The published instructions or rules in force before the 1971 Act came into effect are, in the submission of counsel for the applicant Mr Haque, part of the 'freedom' from which the Secretary of State must not derogate in the framing of rules under the 1971 Act. Thus, when para 47 of HC 394 is compared with para 40 of Cmnd 4298, the inevitable conclusion, it was submitted, is that para 47 of HC 394 renders persons in the position of the applicants 'less free to come into . . . the United Kingdom' than they would have been if this Act had not been passed. Accordingly, in the present case, it was contended, the entry clearance officers were wrong to refuse the applicants leave to enter in reliance on para 47. b
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The judge accepted submissions to this effect, saying ([1986] Imm AR 27 at 34):

'The subsection prescribes how subsequent rules shall be framed, and what it clearly says is that wives and children are not to be less free to come and go by virtue of anything in those rules whether they be of discretionary or of an entitlement nature than if this Act had not been passed. It seems to me that the proper interpretation of that subsection is that which has been contended for by [counsel for the applicant Mr Haque]; the subsection contemplates that following the enactment of this statute, those who wish to enter the United Kingdom under this provision shall not be in any worse position than they were at the time prior to its coming into force. That takes account not only of statutes and entitlements and rights, as [counsel for the tribunal] would contend; but "by virtue of anything in the rules" it also takes into account any discretionary options that they may have had as at that time.'

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The submissions made on behalf of the applicants are attractive in their simplicity. If s 1(5) merely contemplates a comparison of para 47 of HC 394 with para 40 of Cmnd 4298, there can be no doubt that the applicants are, to use the words of the subsection, 'by virtue of . . . the rules . . . less free to come into . . . the United Kingdom'. However, in the light of the argument of counsel for the tribunal and his reference to the helpful determination of the Immigration Appeal Tribunal in *Visa Officer, Islamabad v Saeedan* [1983] Imm AR 131, we are persuaded that this is not the relevant comparison and that the applicants' construction of s 1(5) is not the correct one, for two reasons. i

a The first reason stems from the words 'free to come into . . . the United Kingdom'. In our judgment, on the ordinary meaning of words, a person could not be said to be 'free to come into the United Kingdom' under the law in force before the 1971 Act unless under such law either (a) he did not require leave to enter, or (b) he had a right to be given leave to enter, which did not depend on the exercise of any other person's discretion, or (c) he had actually been given leave to enter. In our judgment, a person whose hopes and expectations of being given leave to enter this country depended on the exercise of their discretion by immigration officers, in accordance with instructions given by the Secretary of State from time to time, could not be said to be 'free to come into the United Kingdom' on any ordinary use of language.

c As we have already pointed out, s 1(5) indisputably imposed a mandatory obligation on the Secretary of State, in framing rules under the 1971 Act, to include in them appropriate provisions to reflect the previous statutory rights conferred by s 2(2)(b) and (2A) of the 1962 Act, as amended, on those categories of wives and children of Commonwealth citizens settled in this country, which were set out in those subsections. Wives and children falling within those categories were, indeed, 'free to come into' this country before the passing of the 1971 Act because, by virtue of the two last-mentioned subsections, they had a statutory right to be given leave to enter. Any new rules had to reflect these entrenched statutory rights.

d However, persons in the position of the applicants, that is to say sons over the age of 18, but under 21, of Commonwealth citizens settled in this country, even before the 1971 Act became law, were not, in our judgment, free to come into this country on any ordinary meaning of words. They had to obtain leave to enter and had no right to be given leave. All they possessed was a right to have their applications for leave to enter fairly and properly considered in accordance with the Secretary of State's instructions to immigration officers from time to time in force. The Secretary of State could at any time have altered the directions relating to Commonwealth children over the age of 16 contained in para 40 of Cmnd 4298, as he did in fact do by para 47 of HC 394.

e After the passing of the 1971 Act (both before and after the making of para 47 of HC 394) persons in the position of the applicants were in essentially the same position. All they possessed was a right to have their applications for leave to enter fairly and properly considered in accordance with the rules made by the Secretary of State under s 3(2) of the 1971 Act. Indeed, as was pointed out in the *Saeedan* case [1983] Imm AR 131 at 134, it might be said that it was actually easier for the Secretary of State to change the rules under the earlier legislation, to the prejudice of Commonwealth children over the age of 16, since rules made under the 1971 Act had to be made in accordance with the procedure specifically laid down in that Act and had to be approved by Parliament. Accordingly, in our judgment, para 47 of HC 394 rendered persons in the position of the applicants no less 'free to come into . . . the United Kingdom' than they would have been if the 1971 Act had not been passed, since even before the passing of the 1971 Act they would not have been free to come into the United Kingdom. Accordingly, the first reason why we would reject the applicants' attack on para 47 of HC 394 is that it did not have the effect of rendering persons in their position less free to come into the United Kingdom, because they never had been free to do so.

h In case this conclusion be wrong, however, and para 47 did have the effect of rendering such persons 'less free to come into the United Kingdom' than they were before the 1971 Act came into operation, we turn to the second reason, which arises from the last eight words of s 1(5), 'than if this Act had not been passed', and, in our judgment, by itself is an answer to the applicants' attack on para 47.

j Taylor J, in his judgment, said that he did not see any reason why these eight words should be read in any other way than—

'to indicate a comparison in point of time with the state of the rights and options of would-be entrants before the Act was passed, and a similar surveillance of their rights and options afterwards.'

(See [1986] Imm AR 27 at 34.)

We respectfully disagree with this view, which involves reading the last eight words of the subsection in a purely temporal sense as if their meaning merely was 'than they were before the passing of the Act'. In our judgment, in the face of these words, if the applicants are to succeed in their attack on para 47 of HC 394, they have to show a causal connection (a causa sine qua non) between the enactment of the 1971 Act and the diminution of their rights of entry, if, contrary to our view, a diminution has occurred. This, in our judgment, they cannot show. Even before the passing of the 1971 Act, the Secretary of State could have given instructions to immigration officers no less unfavourable to persons in the position of the applicants (or even less favourable) than para 47 of HC 394:

'So it was not the passing of the 1971 Act which was responsible for the rules becoming less favourable and such children becoming less free to come to this country'.

(See the *Saeedan* case [1983] Imm AR 131 at 134.)

For these reasons, we are not able to accept the attack on para 47 made on behalf of the applicants. In our judgment, it is based on a fundamental misconception as to the meaning and purpose of s 1(5). The subsection was, in our judgment, not intended to have the effect of rendering immutable and sacrosanct the hopes or expectations of the categories of persons therein mentioned of being given leave to enter by the permanent maintenance of rules at least as favourable to them as the provisions of para 40 of Cmnd 4298. It was merely intended to ensure that the rules which the Secretary of State was obliged to make under s 3(2) of the 1971 Act should make provision so as to ensure that those persons falling within the category of 'Commonwealth citizens settled in the United Kingdom at the coming into force of this Act and their wives and children' who before 1 January 1973 had been free to come into this country, in the sense indicated above, should continue to be no less free. Unfortunately for the applicants in the present case, being over the age of 16, they did not fall into this category.

We should perhaps add that, if the meaning and effect of s 1(5) had been that contended for by the applicants, their proper remedy would, in our judgment, have been to seek to have para 47 (or part of it) declared void as being ultra vires. If this point had been reached, it would probably have been necessary to adjourn the hearing in order to give the Secretary of State, as the person responsible for the rules of which the validity was in question, the opportunity to be represented.

As things are, for the reasons stated above, which accord closely with the submissions of counsel for the tribunal, we allow these appeals. We set aside the orders of Taylor J and dismiss each of the three applications for judicial review.

Appeals allowed. Orders of Taylor J set aside and applications for judicial review dismissed. Notices of appeal in cases of Ruhul and Rahman to be amended to reflect the relevant orders of the Immigration Appeal Tribunal. No order for costs. Leave to appeal to the House of Lords refused.

Solicitors: *Treasury Solicitor; M G Hafiz & Co* (for the applicants).

Mary Rose Plummer Barrister.

Re D (a minor)

COURT OF APPEAL, CIVIL DIVISION

KERR AND WOOLF LJJ

25, 26 MARCH, 19 MAY 1987

- b* Education – Special educational needs – Wardship – Jurisdiction of court over ward with special educational needs – Intervention by court – Duty of local education authority to determine special educational needs – Conflict between wardship jurisdiction and education authority's duty – When court should intervene – Education Act 1981, ss 5, 7.

Ward of court – Practice – Judicial review – Concurrent wardship and judicial review proceedings – Importance of hearing wardship and judicial review proceedings at same time.

- c* Although the court retains jurisdiction over a ward who has special educational needs notwithstanding the statutory powers and duties conferred on local education authorities in respect of such children by the Education Act 1981, the court should decline to intervene in the education of the ward if such an intervention would create a conflict, or the risk of conflict, between the respective roles of the court and the local education authority. However, the court is entitled to intervene when it is desirable for it to do so in order to assist the authority to perform their statutory duties and ought to intervene when invited to do so by the authority. If the court, exercising its wardship jurisdiction, decides what educational provision should be made for the child the education authority are entitled, in the exercise of their discretion, to conclude that there is no need for them to determine and state the child's educational needs pursuant to ss 5^a and 7^b of the 1981 Act (see p 724 *d e*, p 727 *a* to *d* and p 729 *d f g*, post); *A v Liverpool City Council* [1981] 2 All ER 385, *W v Hertfordshire CC* [1985] 2 All ER 301 and *A v B and Hereford and Worcester CC* [1986] 1 FLR 289 applied; *Re Baker (infants)* [1961] 3 All ER 276 considered.

- e* Where both wardship and judicial review proceedings are on foot in respect of a child, it is important that steps are taken to ensure that, so far as possible, both proceedings are heard on the same day by the same judge of the Family Division (see p 731 *j* to p 732 *c*, post).

Notes

For wardship jurisdiction and local authority powers, see 24 Halsbury's Laws (4th edn) para 580, and for cases on the subject, see 28(2) Digest (Reissue) 911–916, 940–943, 2220–2248, 2432–2443.

- g* For the duties of local education authorities with respect to the provisions of special education and the assessment of children with special educational needs, see Supplement to 15 Halsbury's Laws (4th edn) paras 174A–174B.

For the Education Act 1981, ss 5, 7, see 15 Halsbury's Statutes (4th edn) 310, 312.

Cases referred to in judgment

- h* *A v B and Hereford and Worcester CC* [1986] 1 FLR 289.
A v Liverpool City Council [1981] 2 All ER 385, [1982] AC 363, [1981] 2 WLR 948, HL.
Baker (infants), *Re* [1961] 3 All ER 276, sub nom *Re B (infants)* [1962] Ch 201, [1961] 3 WLR 694, CA.
M (an infant), *Re* [1961] 1 All ER 788, [1961] Ch 328, [1961] 2 WLR 350.
R v Secretary of State for Education and Science, ex p Lashford (1987) Times, 13 May, CA.
i *Tameside Metropolitan BC v Shofield* (11 November 1986, unreported), Fam D.
W v Hertfordshire CC [1985] 2 All ER 301, sub nom *Re W (a minor)* (wardship: jurisdiction) [1985] AC 791, [1985] 2 WLR 892, HL.

a Section 5, so far as material, is set out at p 724 *f g*, post

b Section 7, so far as material, is set out at p 724 *h*, post

Interlocutory appeal

By an originating summons in wardship dated 29 August 1985 the plaintiffs, the mother and stepfather (the father) of the third defendant, a minor, applied to make the minor a ward of court, and for care and control of him to be vested in them and that he continue to be educated at a general comprehensive school in Bolton, or at such other school as the Secretary of State for Education and Science should direct. By an order dated 1 November 1985 the Bolton Metropolitan Borough Council intervened in the proceedings and were joined as second defendants in place of the Secretary of State. In the wardship proceedings the local authority sought an order directing that the minor be examined by a medical practitioner and an educational psychologist to assess his special educational needs. On 18 December 1986 Waite J ordered, in the wardship proceedings, that the minor remain a ward of court, that he be placed in the local authority's care pursuant to s 7(2) of the Family Law Reform Act 1969, that the local authority be at liberty to make the necessary arrangements for the minor to attend a suitable school, that pending such placement the minor remain in the plaintiffs' day-to-day care and control, that the local authority be at liberty in their discretion to arrange access to the minor by the plaintiffs in school holidays and exeat and that the local authority be at liberty to have the minor medically examined at Great Ormond Street Hospital. The plaintiffs appealed from Waite J's orders and sought to have them set aside. The minor's natural father was the first defendant. The facts are set out in the judgment of the court.

The father appeared in person on behalf of himself and the mother.

Graham Platts for the local authority.

Gordon Murdoch for the Official Solicitor as guardian ad litem.

The first defendant did not appear.

Cur adv vult

19 May. The following judgment of the court was delivered.

WOOLF LJ. This is an appeal by the parents of a minor against orders which were made by Waite J on 18 December 1986 in wardship proceedings. The minor was born on 19 August 1973 and is therefore now 13. Unfortunately his physical growth and mental development are retarded, and it is common ground that he has special educational needs.

The minor's parents are the plaintiffs. The minor is the third defendant and is represented by the Official Solicitor. The Bolton Metropolitan Borough Council, the local authority for the area in which the parents live, are the second defendants.

Although represented by solicitors and counsel in the court below, the parents were refused legal aid for this appeal and the father therefore conducted it in person on their behalf. In doing so he showed exceptional ability, and, although he undoubtedly feels extremely deeply about the issues raised on the appeal, he advanced his submissions with exemplary courtesy and in a remarkably articulate and lucid manner.

The principal (the jurisdiction issue) on this appeal is of general importance since it concerns the extent, if any, to which the court's powers in wardship proceedings are curtailed by the statutory duties and powers of the local authority with regard to the education of children in their area. In that context the father has also been granted leave to apply for judicial review in respect of the activities of the local authority and the Secretary of State for Education and Science in relation to the minor's education. Although this application is not directly before us, it is therefore desirable to consider the relationship between those proceedings and the powers of the court in wardship proceedings (the judicial review issue), and we accordingly do so at the end of this judgment. Above all, and in the light of the jurisdiction issue, we have to consider

a whether, if Waite J had the necessary jurisdiction, he erred in its exercise (the merits issue) so as to call for a review of the orders which he made.

The facts

b The person to whom we have referred as the father is in fact the minor's stepfather. His natural father married the minor's mother after his birth, and a second son was born in November 1975. But the marriage was extremely unhappy and involved scenes of violence which were probably witnessed by the minor. In November 1977, just three years after the marriage, the mother presented a petition for divorce and the decree absolute was pronounced about a year later.

c Thereafter the minor's natural father played no part in his life. He was brought up by his mother and her present husband (the father), whom she married on 10 November 1978. She is now in her early thirties and he is about 37.

c The father had previously had a daughter, who is now about 16 and also lives with the family. In addition, there are two young daughters who are the children of the second marriage.

d It is necessary that we should say something about the father. He left school at the age of 16 and became an apprentice and then a bus conductor. But he was anxious to improve his education and returned to college for the necessary O levels to proceed to higher education. He then obtained teacher training qualifications in certain technical subjects, a degree in psychology and a qualification in legal studies.

e Apart from referring to this remarkable career, it is necessary to say something about the father's personality, since it has undoubtedly played a large part in the history of these proceedings. Having conducted the appeal in person, it was possible to form a much better impression of his personality than is usual on an appeal. Although, as he himself now admits, his conduct can be criticised, we have no doubt that he genuinely believed that his actions were justified throughout, and in the minor's best interests. His character appears to us to be admirably encapsulated in the following passage from the judgment:

f 'The father (like most of us) has his virtues and his failings, and the latter tend to be the obverse side of the former. He is single-minded, resolute, eloquent, emotionally committed, intellectually bright, and has a sound appreciation of the workings of our legal system. He is a powerful figure emotionally and has a tremendous determination allied to a passionate belief in the righteousness of any cause he adopts. The result is that his good qualities are swiftly turned, if his purposes are thwarted, to their obverse side. The single-mindedness, resolution and eloquence are liable to develop into obsessiveness, obstinacy and verbosity; and the emotional commitment and legal awareness are liable to be transferred into over-reaction and threats, sometimes implemented by litigation against those who appear to stand in his way.'

h We have not had an opportunity of forming our own judgment of the mother. However, the judge heard her evidence. His assessment was that she clearly admires and loves the father and has drawn strength and security from her marriage to him. But the judge added that, while she defers to him, she has a mind of her own.

With regard to both parents, it is of the greatest importance to note that Waite J said:

j '... no one doubts that they are loving parents who have made, and are willing to continue making, substantial sacrifices of time, leisure and money in caring for [the minor].'

But, notwithstanding those qualities of his parents, there have undoubtedly been considerable problems in relation to the minor's upbringing. We turn to the history in that regard.

The minor started at a primary school in September 1978 when he was five. At a very early age it was noted by the school that he was backward, and special schooling was suggested even at that stage. In January 1979 the family moved to Bolton and it became clear that the minor was intellectually and linguistically retarded. The local education authority recommended that he should attend a special school. However, both parents were strongly opposed to this. They thought that it was most important for the minor's upbringing that he should go to a normal school and be educated among ordinary children. But his educational problems were unfortunately combined with physical problems. His growth was retarded, and he is of very short stature for his age. He suffers from a compulsive thirst. He is also an epileptic and has had convulsions since he was a baby, but this condition is now controlled by medication. While the relevant history has in the main been directly concerned with the minor's education, it is important not to lose sight of these other matters. a

In September 1980 the minor moved to St Matthew's Primary School. He was then seven, but he had to be placed with five-year-olds. His stunted growth was also becoming apparent. From February until the autumn of 1982 he was away from the school because of an acute attack of ringworm. He returned in October 1982, but his attendance was only sporadic, and he finally left in June 1983. c

In the autumn of 1983 he started at a fee-paying school, a normal school for children up to 11, but because of his difficulties he was placed in a class for six-year-olds. At the end of 1983, when he was ten, his speech therapist stated that his verbal comprehension was delayed at a four- to five-year-old level. d

In April 1984 he had to leave that school because his parents could no longer afford the fees, which they had met by making considerable financial sacrifices.

The local authority, as the education authority for the minor, then decided to carry out the statutory assessment procedure under the Education Act 1981 with a view to placing him in a suitable special school. Because of their opposition to his going to such school the father and mother refused to co-operate and embarked on a course of conduct designed to frustrate this assessment procedure. e

In July 1985 the minor was placed in the remedial unit of Dean School, which is a general comprehensive school. In August 1985 the local authority started care proceedings in the magistrates' court seeking an interim care order under the Children and Young Persons Act 1969. By initiating these proceedings the local authority were not intending to remove the minor from the care of his parents. They were using the care proceedings as the only method open to them for dealing with the tactics of the minor's parents which were effectively stalling their attempts to assess the minor's needs. The response of the parents was to issue the wardship proceedings on 29 August 1985. This resulted in the care proceedings being adjourned sine die. f

In addition to issuing wardship proceedings the father made an application to the Secretary of State for Education and Science seeking directions with regard to complaints made on 21 September 1983 and 20 February 1984 about the conduct of the local authority. He wanted the Secretary of State to make use of his powers under ss 68 and 99 of the Education Act 1944 and to give directions to the local authority. g

Originally the Secretary of State was a defendant in the wardship proceedings and the local authority were not joined as a party. However, the local authority intervened and on 1 November 1985 an order was made as a result of which the Secretary of State ceased to be a party. The father appealed against that order to Bush J and then to the Court of Appeal. Both appeals were dismissed. h

In the wardship proceedings the parent sought care and control of the minor and a direction that he should continue to be educated at the comprehensive school, or such other school as the Secretary of State for Education and Science should direct. The local authority sought a direction that the minor should be examined by a medical practitioner and an educational psychologist to enable them to make an assessment of the minor's needs under the Education Act 1981. j

a In December 1985 the father was having to take so much time off from his work as a supply teacher to go to Dean School to deal with reports that the minor was suffering from bouts of sickness that he lost his job. However, despite his efforts, the minor was suspended from the school in February 1986 because the school felt they could no longer cope with the minor's medical and behavioural problems. Between that time and the hearing before Waite J in December 1986 the minor received no school education.

b In consequence of the Official Solicitor being appointed the minor's guardian ad litem, he became responsible for obtaining the appropriate medical reports which were undoubtedly needed for the wardship proceedings. Reports were received from Professor Preece, professor of child health and growth in the University of London and a consultant at the Hospital for Sick Children at Great Ormond Street, from Professor Wall, who, although now retired, is a distinguished educational psychologist who has held many senior posts including that of professor of psychology of education in the University of London, and from Dr Boothroyd Brooks, a consultant child psychiatrist at the Westminster Hospital, London.

c Waite J accurately summarised the conclusions of these experts as follows:

d '[The minor] is a boy whose epilepsy is now controlled by medication. His physical growth, however, is uniformly retarded. His mental development is delayed to the point that he has the chronological age of 13.4 but the physical and mental state of development of a seven-year-old. He suffers from a compulsive thirst, forcing him to seize any liquid to hand. He has associated problems of enuresis and alternating bouts of constipation and diarrhoea. He is a boy of attractive appearance, which may later make him morally vulnerable.'

e By the date of the hearing the parents appeared to have had a change of heart as to whether or not the minor could be educated at an ordinary school and to accept that it might well be necessary in the minor's best interests that he should be educated at a special school. Having regard to this reaction, Waite J adopted a sympathetic approach to the parents' former opposition. He said in his judgment:

f '... there was one matter that received a great deal of emphasis at the hearing, but which I regard as of only marginal relevance. That is the fact that the parents have in the past maintained a hostile and litigious attitude towards the council in the discharge of its statutory educational functions. I am satisfied that the parents now accept that [the minor's] future falls to be determined within the wider framework of the wardship jurisdiction, where his welfare is the paramount consideration and where there can be no future for legalistic arguments based on an enforced compliance by the local education authority with its statutory duties.'

g In relation to the preparation of the medical reports the father is concerned that, because the experts have a London background, they have formed an inappropriately jaundiced view of the parents' home conditions in Bolton. But the evidence does not justify such a conclusion, and it is clear that the father's strong social and political views h have influenced his distrust of the expert's views. In any event Waite J did not fall into any such error, since he clearly recognised that the minor's home was important to him. He summarised the minor's home conditions as follows:

i 'He is a member of a united and boisterous family. The children all live in cramped conditions but in friendly contact with each other and with other children in the street. [The minor] is devoted to his brother and sisters, and is particularly attached to the baby.'

Based on the reports which he had obtained, it was the Official Solicitor's opinion that the minor's best interests would be served by his attending a specialist residential school. He made recommendations which included the minor being committed to the care of the local authority pursuant to s 7(2) of the Family Law Reform Act 1969 designed to

ensure that the minor could go to an appropriate school and that his care and education would not be interfered with by his parents. a

While accepting that the minor might need special schooling, the parents were strongly opposed to his going to a boarding school. Waite J therefore regarded the choices before the court as to the minor's education as being either that he should go to a special day school or a special boarding school. He found that there was a special day school in the area of an adjoining local authority some five to six miles from the parents' home where the minor could probably go. The alternative boarding school choice was limited to two Rudolph Steiner schools in the south of England, a long distance from Bolton. Having weighed up the conflicting considerations Waite J came to the conclusion 'that the balance of advantage for [the minor] lies in directing that he shall be placed as soon as possible in a suitable residential boarding school'. The judge appreciated that the parents would regard his decision as a bitter blow and he expressed the hope that they would not continue to feel 'as though they inhabit a world in which every man's hand is against them and their child', but that instead— b

'They should see themselves rather as one of those couples, of whom there are very many within our society, who share with them the special agonies, as well as the special privileges, which accompany responsibility for the upbringing of a handicapped child.' c

In that connection the judge went on to point out that the minor had not thrived or grown as he should within their loving and devoted home, although the reason for this was not known. He said that before it is too late the minor therefore deserved the chance of seeing whether he can benefit from another kind of care in different surroundings and with children who share some of his own problems. d

In accordance with his conclusions and the recommendations of the Official Solicitor, the judge ordered (i) that the minor should remain a ward, (ii) that he should be placed in the care of the local authority pursuant to s 7(2) of the 1969 Act, (iii) that the local authority should make the necessary arrangements for the minor to attend a suitable school, such school to be approved by Professor Wall and the Official Solicitor, (iv) that pending such placement the minor should remain in the care and control of his parents, and (v) that the local authority, at their discretion, should arrange access by the parents in the school holidays and exeat. e

In the course of the hearing the local authority had made it clear that in connection with their powers under the Education Acts, they were willing to accept the judge's conclusions in the wardship proceedings concerning the best way of providing for the minor's educational needs. This was strongly challenged by the father as an impermissible abdication of their statutory duties by the local authority. As Waite J had anticipated, the outcome was a bitter blow to the parents. They had initiated the wardship proceedings to prevent the local authority assessing the minor's special needs, but in the event the minor was being taken from their care and sent to a boarding school, a course which no one had suggested when the wardship proceedings were commenced. It is therefore not surprising that initially they refused to co-operate with the local authority. Although not in receipt of legal aid, they promptly, in person, lodged a notice of appeal to this court. In addition, they made an application to the judge under RSC Ord 58, r 6(2)(b) to set aside and discharge the judgment of 18 December 1986. That application was heard by the judge on 17 February 1987 and dismissed on the following day as misconceived. However, other events had by then taken place which required further orders. f

In the interim, and without reference to the local authority, the minor had been sent by the parents to another private school in an attempt to demonstrate that no special schooling was required. However, the local authority had meanwhile managed to find a place for the minor at the Sheilings School at Ringwood in Hampshire, one of the Rudolph Steiner Camphill Schools which Professor Wall had described as 'outstanding' in the education of the handicapped. In addition, and again without reference to anyone, g

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a the parents had arranged for the minor to be seen by Professor Milner, the head of the department of pediatrics at the University of Sheffield. In a report dated 4 February 1987 Professor Milner indicated that the minor's short stature could possibly be caused by edeopathic growth hormone deficiency. He expressed the view that a six-month clinical trial of growth hormone therapy was justified. Some of the money needed to meet the cost of the trial had been raised as a result of a public appeal which had been supported by the media. According to the father, Professor Milner also advised him that no major
b step concerning the minor's education should be taken until the results of the growth hormone treatment were available. However Professor Milner had no knowledge of the views which had been expressed by the medical experts in the wardship proceedings. The father says that he did not feel it right to mention them because he had been warned not to disclose anything about the wardship proceedings. All these actions speak for themselves. At the hearing before us both the Official Solicitor and the local authority
c made it clear through counsel that they still had considerable reservations about the father's willingness to co-operate with the authorities.

Professor Preece had in fact also considered the question of growth hormone treatment. In his evidence he expressed the wish for an opportunity of carrying out further tests at Great Ormond Street in order to eliminate the possibility (which he regards as very unlikely) of the minor's difficulties having an inherited or organic origin, but this had
d not been possible by the time of the hearing.

In dismissing the parents' application on 18 February 1987 Waite J also found it necessary to make specific orders to ensure that on 23 February the minor was taken to the Great Ormond Street hospital and then to the Sheiling School on the following day. The parents co-operated, but only with great reluctance. The minor was then seen by Professor Preece and went on to the Sheiling School, where he has been since 24 February.
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The fact that the parents remained unwilling to accept the decision of Waite J is also apparent from their application dated 17 February 1987 for judicial review. That has now been adjourned and transferred to the Family Division, to be listed before any judge other than Waite J, and the local authority and the school have been given notice of the application. This is for an order of prohibition to prevent the local authority and the
f governors of the Sheiling School admitting the minor to the school or to any other special school until his special educational needs have been assessed under the Education Acts and a statement of such needs has been obtained by the local authority. We refer to these matters later on. In addition, it appears that the parents have instituted proceedings in the Bournemouth County Court against the governors of the school for damages. We have no other information about this, but the father made it clear that the action formed
g part of his earlier campaign to resist the order in the wardship proceedings.

For the hearing of the appeal Professor Preece prepared an interim report indicating that the investigations which have already taken place showed a normal profile of growth hormone release. It is therefore unlikely that any lack of growth hormone or subtle abnormality of its secretion lies behind the minor's slow progress. Professor Preece suggests further studies with regard to the minor's water balance and excessive drinking,
h but no results of any further tests are yet available. He concluded his short report as follows:

'I do not think it is important to put these various tests into context. Although I think it is important that we clarify [the minor's] medical state, we must not lose sight of the many other major problems relating to his education and social circumstances. I feel that the dominant problems that should be addressed are still
i the special needs that [the minor] clearly has and that the endocrine investigations are unlikely to change our recommendations in this area.'

The final matter is that we were informed by counsel for the local authority during the hearing that they are proposing to carry out an assessment of the minor's educational needs pursuant to s 5 of the 1981 Act over the next two months or so, while he is at the

Sheiling School. In doing so, they do not admit that this is being done as a matter of statutory obligation. The father, on the other hand, asserts the existence of the obligation, but contends that it can only properly be discharged in the natural setting of the minor's home. a

After what has had to be a long recital of facts, we turn to the issues argued on the appeal.

The jurisdiction issue

The father contends that any direction given to the local authority by the court in wardship proceedings must not be inconsistent with the duties imposed on it by Parliament and that in this case the directions are inconsistent with the duties placed on the local authority under the Education Acts 1944 to 1986 and under the Child Care Act 1980. In affidavits sworn since the main hearing before Waite J the father elaborates his grounds of appeal. He submits that a child can only be placed in a special school after he has been assessed as having special educational needs under the Education Act 1981 and a statement of those special educational needs maintained by the local authority in respect of the child. Since the local education authority have now started the procedure of formal assessment, the father contends that the role of the court is confined to supplementing the local authority's role as provided by the Education Acts. He also argues that the court should not intervene unless this is necessary, and except on an application for judicial review the court has no power to review the manner in which a local authority exercise their statutory duties and powers under the Education Acts. b

There can be no doubt that the minor has special educational needs and that the Education Act 1981 provides a self-contained code designated to provide for children with such needs without the intervention of the courts. Section 1 provides that 'a child has "special educational needs" if he has a learning difficulty which calls for special educational provision to be made for him' and learning difficulty is defined as 'a significantly greater difficulty in learning than the majority of children of his age'. c

The duty of the local education authority to make an assessment of a child's special educational needs is contained in s 5. Section 5(1) provides: d

'Where, in the case of a child for whom a local education authority are responsible, the authority are of the opinion—(a) that he has special educational needs which call for the authority to determine the special educational provision that should be made for him; or (b) that he probably has such special educational needs; they shall make an assessment of his educational needs under this section.' e

The assessment procedure under s 5 requires that parents should be notified of the authority's decision and, if the authority decide that no special educational provision should be made for the child, the parent has a right to appeal to the Secretary of State under s 5(6). f

Under s 7(1) if, after an assessment has been made, 'the local education authority ... are of the opinion that they should determine the special educational provision that should be made for [the child]' they must make a statement of his special educational needs and maintain that statement in accordance with the 1981 Act. The local authority under s 7(2) are then under a duty 'to arrange that the special educational provision specified in the statement is made for him unless his parent has made suitable arrangements'. g

Provision is made for consultation to take place between the education authority and the parent under s 7(5) and (6). Furthermore, there is a right of appeal against the special educational provision specified in the statement to an appeal committee, with a further right of appeal to the Secretary of State. h

Section 9 of the 1981 Act gives the parent the right to ask the authority to arrange for an assessment to be made of the child's needs and the authority are then under a duty to comply with that request unless in their opinion the request is unreasonable. j

a In the course of the appeal, the question arose whether or not the father remained a parent for the purposes of the Act after the minor had been committed to the care of the local authority. The 1981 Act has to be construed as one with the principal Act, the Education Act 1944 (s 21(2)), and s 114 of that Act defines 'parent' as including 'a guardian and every person who has the actual custody of the child or young person'.

b The definition in s 114 of the 1944 Act extends rather than limits the meaning of 'parent' and there can be no dispute that, up to the time that Waite J made his order, the minor's father was for the purposes of the 1981 Act a parent. The order committing the minor to the care of the local authority was made under s 7(2) of the Family Law Reform Act 1969, which provides:

c 'Where it appears to the court that there are exceptional circumstances making it impracticable or undesirable for a ward of court to be, or to continue to be, under the care of either of his parents . . . the court may, if it thinks fit, make an order committing the care of the ward to a local authority; and thereupon Part III of the Child Care Act 1980 (which relates to the treatment of children in the care of a local authority) . . . shall apply . . . as if the child had been received by the local authority into their care under section 2 of that Act.'

d The provisions of Pt III of the 1980 Act do not deal with parental powers and, unlike the position where a care order is made by a juvenile court, the order does not itself vest parental powers and duties in the local authority. Where a child is in their care under s 2 of the 1980 Act, the local authority have the power to assume parental rights and duties under s 3, but that section does not apply to committals into their care by the High Court exercising its wardship jurisdiction and making an order under the 1969 Act. It therefore appears that the making of the care order would not affect the minor's parents' rights to seek an assessment of the minor's special education needs under the 1981 Act. However, we did not hear full argument on this point because the local authority have not formally challenged the parents' rights in this case.

e The authority which provides the most support for the father's submission is *Re Baker (infants)* [1961] 3 All ER 276, [1962] Ch 201. In that case a mother of four infants of compulsory school age had been convicted on two occasions for failing to comply with school attendance orders. Nevertheless she persisted in her refusal to comply with the orders and failed to satisfy the authorities that her children were receiving efficient full-time education. The local authority sought to overcome the difficulties which the mother created by making the children wards of court and by seeking directions from the court as to their education. Pennycuik J decided that it would be outside the scope of the proper jurisdiction of the court to make directions as to their education and ordered that they cease to be wards of court. His decision was upheld by the Court of Appeal.

g In giving the first judgment of the Court of Appeal Ormerod LJ said ([1961] 3 All ER 276 at 281, [1962] Ch 201 at 215-216):

h 'In the result the position would appear to be that the Education Act, 1944, provides for the education of children of compulsory school age, and it is enacted that it is the duty of the local education authority to satisfy themselves that such children are being properly educated, and, if in the view of the authority they are not being so educated, it is then the duty of the authority to see that they are and to take such steps as are prescribed by the Act of Parliament to attain that end. It would appear, therefore, that there is a discretion in the local education authority which they must exercise in accordance with the terms of the statute; and there is also a duty laid on them by s. 40(2) of the Act of 1944 to take steps prescribed in that section in the circumstances therein laid down, if in their view there is a breach of any order made by them. It follows that in such circumstances an anomalous situation might very easily be created if the court, for instance, were asked to give directions relating to the education of one or other of those children which were

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inconsistent with the orders made by the local education authority. It seems, therefore, that the second of the principles laid down by the Master of the Rolls in *Re M. (an infant)* ([1961] 1 All ER 788 at 795, [1961] Ch 328 at 345) applies in this case, and that the prerogative of the Crown has been limited by the statute in that it may no longer be exercised in relation to the particular matters dealt with by the Education Act, 1944. This power has now been vested in the local education authority and to be within the ambit of the powers of the local authority and also of the Crown in proceedings of this kind might, as I have already said, result in many anomalies. The position is, therefore, that the jurisdiction of the Crown in relation to the matters vested in the local education authority should not be exercised in these circumstances.' a

Upjohn LJ expressed himself in similar terms. He said ([1962] Ch 201 at 218; cf [1961] 3 All ER 276 at 282): b

'These specific and positive duties cast upon the authority cannot be delegated or surrendered by our law, and the authority cannot disregard their statutory duties and merely ask for directions as to the education of children.' c

He added ([1961] 3 All ER 276 at 283-284, [1962] Ch 201 at 220):

'I think that the Education Act, 1944, has imposed on local education authorities a complete code of powers, duties and remedies which they are bound to carry out, and it would not be proper for the court to lend its assistance to them in carrying out those powers and duties. Many difficulties might arise if the court assumed a concurrent jurisdiction.' d

Finally, in a later passage he said ([1961] 3 All ER 276 at 284, [1962] Ch 201 at 220-221): e

'These considerations lead me to the conclusion that Parliament never intended that the local education authority should have power to apply to the Chancery court solely to assist them in the enforcement of their purely statutory duties in relation to elementary education. Alternatively, if there is some residual power in the authority to do so, it should not be exercised in the absence of special circumstances, and there are none present here. Nothing that I have said in this judgment must be taken as suggesting in any way that, on application by a person having a proper interest in the welfare of infants, the court lacks jurisdiction to make infants wards of court even where the education authority are proposing to make, or have made, a school attendance order; though it is, it seems to me, quite clear that in such proceedings the court would have no power whatever to make orders in conflict with the exercise of duties cast on the local education authority by the Act, unless it be shown that there was some impropriety on the part of the authority in the exercise of their statutory duties and powers under the Act, as distinct from their wisdom (to use the words of LORD EVERSHERD, M.R., in *Re M. (an infant)* ([1961] 1 All ER 788 at 793, 795, [1961] Ch 328 at 342, 345)). For these reasons I come to the conclusion, again with much regret, that the court has no power to assist the local education authority in the exercise of their statutory duties, and therefore that the appeal must be dismissed.' f

The father submits that the position is exactly the same with regard to the education of a child such as the minor who undoubtedly has special education needs. He says that there is a statutory code which places duties on the local authority in respect of children with such needs and that the court should not make orders in relation to decisions or issues which are covered by the code, even at the invitation of the local authority. He also submits that the local authority cannot properly surrender or delegate the exercise of their statutory powers and duties to the court. g

a In our view these submissions go too far if they treat *Re Baker (infants)* [1961] 3 All ER 276, [1962] Ch 201 as laying down rules which restrict the wardship jurisdiction of the court. The true position is that the jurisdiction remains but that the court must limit the exercise of its jurisdiction so as to avoid coming into conflict with the exercise by the local authority of their statutory powers and duties. As Pearson LJ said in the same case ([1961] 3 All ER 276 at 286, [1962] Ch 201 at 223):

b '... the effect of such an Act may be, not, I think, if one speaks accurately, to restrict the jurisdiction, but to restrict the scope of the proper exercise of the jurisdiction.'

c Furthermore, notwithstanding the statutory code, there is no reason whatever why the court should refrain from exercising its jurisdiction when it is desirable for it to do so in order to assist a local education authority to perform their statutory duties. It is only if the effect of exercising its powers would be to create a conflict between the role of the court and the role of the education authority, or the risk of such conflict, that the court should decline to intervene.

d If there were any doubt that the court retains jurisdiction to intervene in appropriate cases, that it does so was made clear by the speeches in the House of Lords in *A v Liverpool City Council* [1981] 2 All ER 385, [1982] AC 363 and *W v Hertfordshire CC* [1985] 2 All ER 301, [1985] AC 791. Neither of these cases was dealing with the possible conflict between the court's wardship powers and duties of the local authority with regard to the education of children. They dealt with the relationship between the court's wardship jurisdiction and the local authority's powers and duties when children are committed to their care. But there is no reason to distinguish between the role of a local authority as an education authority and their role as the authority into whose care children are committed. In both cases the House of Lords emphasised that the wardship jurisdiction does not entitle the courts to review the exercise by a local authority of their powers and duties in relation to children in care, but it also recognised the court could still have a part to play.

f Lord Wilberforce explained the position in the following terms in *A v Liverpool City Council* [1981] 2 All ER 385 at 388–389, [1982] AC 363 at 372–373:

g '... given that both the High Court and the local authority have responsibilities for the welfare of the child, what is the relationship, or dividing line, between them? I think that there is no doubt that the appellant, the child's mother, is arguing for a general reviewing power in the court over the local authority's discretionary decision; she is, in reality, asking the court to review the respondents' decision as to access and to substitute its own opinion on that matter. Access itself is undoubtedly a matter with the discretionary power of the local authority. In my opinion the court has no such reviewing power. Parliament has by statute entrusted to the local authority the power and duty to make decisions as to the welfare of children without any reservation of reviewing power to the court. There are, indeed, certain limited rights of appeal as to the care order itself: under s 2(12) of the 1969 Act there is an appeal to the Crown Court against the care order; the appellant did not exercise this right and is now long out of time. Or the appellant could apply to the juvenile court under s 21 of the 1969 Act to discharge the care order or to vary it; this she has not done, and any such application would not be likely to succeed. Furthermore, if the facts so permitted, she could apply to the High Court for judicial review of the care order or the local authority's actions under it; there is no suggestion of any ground on which this would be possible in the present case. Nowhere is there any suggestion in the legislation that the High Court was to be left with a reviewing power as to the merits of local authorities' decisions ... This is not to say that the inherent jurisdiction of the High Court is taken away. Any child, whether under care or not, can be made a ward of court by the procedure of s 9(2) of the Law Reform

(Miscellaneous Provisions) Act 1949. In cases (and the present is an example) where the court perceives that the action sought of it is within the sphere of discretion of the local authority, it will make no order and the wardship will lapse. But in some instances there may be an area of concern to which the powers of the local authority, limited as they are by statute, do not extend. Sometimes the local authority itself may invite the supplementary assistance of the court. Then the wardship may be continued with a view to action by the court. The court's general inherent power is always available to fill gaps or to supplement the powers of the local authority; what it will not do (except by way of judicial review where appropriate) is to supervise the exercise of discretion within the field committed by statute to the local authority.' a

Lord Roskill summarised the position at the end of his judgment in the following terms ([1981] 2 All ER 385 at 393, [1982] AC 363 at 379): b

'Its exercise must, however, be closely circumscribed. I do not think that any useful purpose would be served by your Lordships attempting to define the limits within which that circumscription must exist, for cases of this class vary infinitely. Clearly the jurisdiction can be invoked by a local authority when its own powers are inadequate to make the welfare of the child paramount or when it is necessary to this end to take action against some stranger. But the courts must not, in purported exercise of wardship jurisdiction, interfere with those matters which Parliament has decided are within the province of a local authority to whom the care and control of a child has been entrusted pursuant to statutory provisions.' c

In *W v Hertfordshire CC* the House of Lords reaffirmed the same approach. Lord Scarman said ([1985] 2 All ER 301 at 304, [1985] AC 791 at 797): d

'The High Court cannot exercise its powers, however wide they may be, so as to intervene on the merits in an area of concern entrusted by Parliament to another public authority. It matters not that the chosen public authority is one which acts administratively whereas the court, if seized of the same matter, would act judicially. If Parliament in an area of concern defined by statute (the area in this case being the care of children in need or trouble) prefers power to be exercised administratively instead of judicially, so be it. The courts must be careful in that area to avoid assuming a supervisory role or reviewing power over the merits of decisions taken administratively by the selected public authority.' e

Although the father himself initiated the wardship proceedings in the present case, he now contends on the authority of these decisions that the local authority have wrongly surrendered their powers to the courts and that this has deprived him of having the minor's future education dealt with in accordance with the statutory framework. He contends that the proper approach for the local authority to have adopted was to have continued with the care proceedings which they had themselves initiated and that once, at any rate, the local authority had embarked on the statutory procedures set out in the 1981 Act the court should withdraw. f

However, although the local authority had commenced the care proceedings with a limited objective, after the father had initiated the wardship proceedings and made the minor a ward of court the investigations conducted by the Official Solicitor showed that the case was one of singular complexity and difficulty and that much wider issues as to the minor's future were involved than merely his special educational needs. The width of the problems made it a case which was peculiarly suitable, and in the minor's best interests, to require an examination in depth by means of the wardship proceedings. Furthermore, it is of the greatest importance that the local authority welcomed the intervention of the High Court. This attitude on their part means that the risks of there being a conflict between the local authority's jurisdiction and that of the court is remote, g

particularly having regard to the form of intervention adopted by the wardship court.

a Although the minor has now been committed to the care of the local authority, the court has a statutory power to give directions to the local authority as to the manner in which they exercise their jurisdiction, and this can materially limit the discretion which a local authority normally have with regard to children in their care (see s 7(3) of the Family Law Reform Act 1969 and s 43(5) of the Matrimonial Causes Act 1973, as amended).

b In his submissions on behalf of the local authority counsel for the local authority also relied on the judgment of Sir John Arnold P in *A v B and Hereford and Worcester CC* [1986] 1 FLR 289 at 290, where he said:

c 'It seems to me that common sense dictates that where the care authority welcomes the intervention of the court to assist them in the exercise of powers otherwise available to them by giving the appropriate direction, it must be right that the court should accede to that request, even if the case is such that if the local authority opposed the exercise of the court's power, the court would yield to avoid a circuitous process in a case in which the local authority could themselves invoke the powers of the court in wardship. It must be right if some other person, having sufficient interest, does involve those powers and the local authority do not oppose the exercise of the wardship powers, the court must be enabled to exercise them, and I so rule.'

d

While this passage undoubtedly provides a most useful general guide, which will normally provide the answer in practice, we consider that in law the father is right in his submission that the local authority cannot voluntarily surrender their statutory obligations. However, when examined, those obligations will usually provide the authority with a discretion as to how they are to be exercised. Thus, in relation to their

e duties in respect of a child who has special education needs, the Education Act 1981 gives the local education authority a considerable degree of discretion as to how they exercise their powers and fulfill their duties (as is confirmed by *R v Secretary of State for Education and Science, ex p Lashford* (1987) Times, 13 May, a decision of another division of this court given after this judgment was prepared but before it was delivered). For example,

f under s 7(1) of the 1981 Act, the local authority are only under an obligation to make a statement of the child's special educational needs 'if they are of the opinion that they should determine the special educational provision that should be made for him'. If the wardship court, after a full investigation, has decided what educational provision should be made at the invitation of the local authority, it is reasonably to be expected that the local authority would be of the opinion that there remains no further need to determine

g the special education provision to be made for the child under s 7. We therefore conclude that on the facts of this case the commonsense approach indicated by Sir John Arnold P can safely be followed.

Counsel for the Official Solicitor also referred to a transcript of another unreported decision of Waite J sitting at Manchester in *Tameside Metropolitan BC v Shofield* (11 November 1986). In that case the judge adopted a submission of counsel for a parent that

h if—

'the local authority have seen fit at their own request to surrender their statutory powers under the Children Act and have invited the court to become a judicial parent. What is good for the Children's Act is good . . . for the Education Act, and once the jurisdiction has been invoked, it has been invoked for all purposes.'

j The judge went on to add:

'Once wards of court, these children are "in for a penny, in for a pound", and I hold that I have just as full and unfettered a jurisdiction to decide their educational future, notwithstanding the statutory code, as I have to determine any other step that requires to be taken in their lives . . .'

With respect, this clearly goes too far. The court in wardship proceedings cannot prevent the local education authority from exercising their statutory jurisdiction if they decide to do so. a

But in this case no conflict or other difficulty arises. The wardship proceedings supplemented any powers which the local authority wanted to exercise but did not purport to oust such powers or their exercise. This is demonstrated by the fact that the local authority are now carrying out their own educational assessment. b

The merits

We turn to consider the father's arguments that, even if the court has jurisdiction, it should not have made the orders which it did. The father relies on the history and the fact that, apart from his earlier resistance to the local authority's attempts to determine the minor's special educational needs, he and his wife have been parents who, to use his words, are 'impeccable'. He attractively conceded that in the past he had been at fault in relying too much on what he genuinely believed were his rights instead of giving priority to his responsibilities to the minor. But he stressed that he was not solely at fault. The local authority had also been at fault, in particular, by failing to attach sufficient importance to the minor's problems until he was in effect driven to take drastic action. Furthermore, he submits that there have been two significant changes since the decision of Waite J: first, the report of Professor Milner; and, second, the willingness of the local authority now to carry out an assessment under the 1981 Act of the minor's special educational needs. c
d

On the evidence before the judge, he rightly identified the principal issue which he had to decide as being whether the minor's problems required him to go to a special local school while continuing to reside at home or to a special boarding school. His decision that the minor should go to a boarding school was not one that this court can fault. Nor can we fault the choice of boarding school made by him on the basis of the medical evidence before him. As the judgment indicates, it was an extremely difficult decision. Once this decision was taken, the next question was how it was to be implemented. In the light of the history the judge was also perfectly entitled to conclude that the parents would find it impossible to co-operate with his order to the extent necessary to achieve for the minor the chance which the judge felt he needed. Having listened to the father develop his arguments in this court, and in the light of his actions since the substantive hearing before Waite J, we are in no doubt that the father will still have immense difficulty in co-operating with the carrying out of the order. In these unusual circumstances, and having regard to the minor's unusual needs, it was proper for the judge to take the view that there were exceptional circumstances which made it impractical or undesirable for the minor to continue to be under the care of either of his otherwise impeccable parents. Accordingly, we conclude that on the facts of this case an order under s 7(2) of the 1969 Act could appropriately be made. e
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It is true that under s 7(4) of the 1969 Act the court has an alternative power of making a supervision order. But the judge cannot be criticised for not adopting this alternative. The preliminary report of Professor Milner would certainly not justify this court in interfering. As Professor Preece made clear, the orders presently in force are in no way inconsistent with the minor receiving the necessary treatment at Great Ormond Street, and we were told that there would now be discussions between Professor Preece and Professor Milner as to the best treatment to adopt. The outcome of the assessment by the local authority is not yet known and when the result is known it would be subject to the parents' rights of appeal under the statutory scheme and it could possibly be affected by the general supervisory role of the Secretary of State under ss 68 and 99 of the 1944 Act which the father has evidently invoked. However, it is very unlikely that this will result in any real change in the situation. Bearing in mind that the minor is now attending the new school and at least until the outcome of the assessment is known, the father rightly accepted that it would be wrong to disrupt his life and education again at this stage. In h
j

a all the circumstances, we consider that it is unnecessary to direct any remission to the judge, either in the light of the submissions made to us or of the events since the hearing. The matter should only go back to him if there is any substantial change, either as the result of the assessment or for any other reason. In this connection we note that Waite J rightly agreed to reserve this case to himself for the next year, subject to his being available.

b Finally, the court was concerned that the local authority should arrange proper access for the parents. Since the hearing, and at our request, we have been provided with the local authority's proposals which are agreed by the Official Solicitor. These contain generous proposals for access, and that is another reason why the present orders should stand unless and until the situation changes. In that connection it is clear that the father fully appreciates that it is always open to the court to reconsider the minor's best interests if there should be a sufficient change to require this. Moreover, if in taking advantage of
c the access proposals which are offered the parents show that they are capable of co-operating fully with the local authority and the Official Solicitor, who like themselves are concerned with the promotion of the minor's best interests, then this could be a most important factor in persuading the court that it may no longer be necessary for the minor to remain in the care of the local authority. The manner in which the access proposals
d work out in practice will provide the means of judging the genuineness of the father's avowed intention to put his responsibilities for the minor before his mistaken conception of his rights. In this way, with the passage of time, the parents should be able to provide the necessary basis for having the care order discharged. At any rate, the means now lie in their own hands.

Judicial review

e Although not directly before us, we consider it to be in the minor's best interests to say something about the parents' application for judicial review dated 17 February 1987. It was addressed to the Secretary of State for Education and Science, the local education authority and the governors of the Sheiling School as respondents. An order of prohibition was sought to prevent the local authority and the governors from admitting the minor
f to the school or any other special school until his special educational needs had been assessed and a statement of such needs maintained by the local authority.

Seven grounds are set out in support of the application. The first three deal with matters which are now only part of the background history to the present situation. The fourth complains of the local authority having relinquished their statutory powers and duties under the Education Acts 1944 to 1986 to the High Court, contrary to the House
g of Lords decisions to which reference has been made earlier. The sixth ground recites the fact that the parents have asked the Secretary of State to prevent the council and the school from admitting the minor pending his being assessed by the local education authority, and the fifth and seventh grounds refer to the fact that since January 1987 the local authority have agreed to assess the minor's educational needs but complain that the local education authority and the governors of the school are refusing 'to desist placing
h the minor in the school . . . pending assessment'.

It appears that the application was made partly in reliance on what the father was told on a previous application to the Court of Appeal about the different powers of the court on an application for judicial review and in wardship and partly on the basis of the speeches of the House of Lords in the two cases already referred to.

i As we have stated, it is now clearly established that the court will not use its jurisdiction in wardship to review the acts and decisions of local authorities either in relation to their powers and duties with regard to children committed to their care or in respect of decisions exercising their statutory powers as the relevant educational authority. But it can also be seen from this judgment that some of the issues raised by the father were in fact appropriate for consideration by judicial review.

Where a situation arises where both wardship and judicial review proceedings may be

appropriate, it is most important that steps are taken to ensure that the proceedings are heard together so far as possible. Although applications for judicial review are normally heard by a judge of the Queen's Bench Division and wardship proceedings by a judge of the Family Division, in appropriate cases arrangements can be, and are, made for judicial review proceedings to come before a judge of the Family Division. So long as the application for leave to apply for judicial review is made promptly, it should be perfectly practical for the wardship application and the judicial review application to be listed before the same judge on the same day. Because wardship proceedings are in chambers and judicial review proceedings are normally in open court, they may not be able to be actually heard at the same time. However, if they are listed in this way they can be heard in the appropriate order one after the other. In this way the danger of conflict can be avoided and the length of the hearing substantially curtailed by the elimination of duplication of the evidence and argument.

Even if it is not appreciated at the outset of the wardship proceedings that an application for judicial review is necessary, it is always possible by abridging time and dispensing with service in practice for the judicial review proceedings to be accelerated, so as to avoid the necessity of the hearing of the two proceedings being separated or the wardship proceedings being delayed. While it is important to maintain the protection of public bodies provided by the requirements of proceedings under RSC Ord 53, those requirements need not, and should not, be allowed to interfere with the interests of justice, particularly in cases involving the welfare of children. With the co-operation of the court and the parties, the procedural requirements should not cause problems in practice.

In this case the judicial review proceedings are now regrettably quite separate from the wardship proceedings. This is because the application for leave was only made by the parents when they were dissatisfied with the order made by Waite J in the wardship proceedings. In effect the parents were seeking to use the judicial review proceedings as a way of staying the effect of the orders in the wardship proceedings. Since Waite J undoubtedly had the jurisdiction to make the orders which he did, and his orders were perfectly proper, and since the local authority did not act improperly in leaving the issues as to the minor's future to be determined by the judge, the application for leave to apply for judicial review can now be seen to be misconceived. Moreover, since the local authority have now decided to carry out the assessment of the minor's special educational needs, they cannot in any event be said to be in breach of any of their statutory duties and powers. Once the matter was properly within the jurisdiction of the wardship court it is difficult to conceive of any basis on which the Secretary of State would wish to intervene.

The governors of the school were merely co-operating in the carrying out of an order made by the High Court. If, which is highly doubtful, they could ever properly be made respondents to an application for judicial review, they could certainly not be criticised for their actions in relation to the minor.

In these circumstances, although the proceedings for judicial review are not directly before this court, in view of the importance, in the minor's interests, for finality as to the present position, this court considers it right to indicate its view that there appears to be no basis on which relief should be given in the proceedings for judicial review. In these circumstances we greatly hope that the father will take the opportunity of demonstrating the sincerity of what he repeatedly said in the course of argument, about the need to be conscious of his responsibilities to the minor, and discontinue those proceedings. We have not seen the pleadings in the Bournemouth County Court proceedings. However, there is every indication that it would be vexatious to pursue them because they cannot possibly have any substantive merit. In these circumstances we hope that they will be discontinued as well. Putting the matter generally, it is greatly to be hoped that instead of involving themselves in more and more litigation, the parents will now feel able to co-

operate with the local authority and the Official Solicitor and thereby create a different atmosphere for the minor's upbringing.

The appeal is dismissed.

*Appeal dismissed. No order for costs against parents; local authority to pay Official Solicitor's costs. Leave to appeal to the House of Lords refused.**

11 November. The Appeal Committee of the House of Lords (Lord Brandon of Oakbrook, Lord Templeman and Lord Oliver of Aylmerton) dismissed a petition for leave to appeal.

Solicitors: J W G MacGregor (for the local authority); Official Solicitor.

Wendy Shockett Barrister.

Gumbley v Cunningham

Gould v Castle

QUEEN'S BENCH DIVISION

WATKINS LJ AND MANN J

8, 28 JULY 1987

Road traffic – Driving while unfit to drive through drink or drugs – Evidence – Back-calculation – Specimen to determine driver's blood-alcohol level taken some hours after driving – Specimen showing blood-alcohol level below prescribed limit – Whether evidence of calculation of amount of alcohol eliminated between driving and providing specimen admissible – Road Traffic Act 1972, ss 6(1), 10(2).

Where a person is charged under s 6(1)^a of the Road Traffic Act 1972 with driving, attempting to drive or being in charge of a motor vehicle after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit and the specimen provided by the person shows an alcohol level below the prescribed limit, the prosecution is nevertheless entitled to adduce evidence which shows, by means of 'back-calculation', ie by calculation of the amount of alcohol eliminated in the period between driving and providing a specimen, that the person's alcohol limit was above the prescribed limit at the time of driving, since s 6(1) is concerned with the alcohol level at the time of driving or being in charge of a vehicle and not with the time when a specimen is given, and s 10(2)^b (which provides that the proportion of alcohol at the time of driving is to be assumed to be not less than in the specimen) does not preclude the admissibility of evidence other than a specimen to show the alcohol level at the time of driving (see p 737 g h, post).

The prosecution should not seek to rely on back-calculation unless the evidence will be easily understood by the magistrates and clearly persuasive of the presence of excess alcohol at the time when the defendant was driving (see p 737 j to p 738 b, post).

Notes

For driving a vehicle with excess alcohol, see 40 Halsbury's Laws (4th edn) para 496, and for cases on the subject, see 39(1) Digest (Reissue) 507–509, 3740–3748.

^a Section 6(1) is set out at p 735 b, post

^b Section 10(1), so far as material, is set out at p 735 d to f, post

For the Road Traffic Act 1972, ss 6, 10 (as substituted by the Transport Act 1981, s 25(3), Sch 8), see 51 Halsbury's Laws (3rd edn) 1427, 1434. a

Cases referred to in judgment

Anderton v Lythgoe [1985] 1 WLR 222, DC.

Rowlands v Hamilton [1971] 1 All ER 1089, [1971] 1 WLR 647, HL.

Smith v Geraghty [1986] RTR 222, DC. b

Cases also cited

Gordon v Thorpe [1986] RTR 358.

Heydon's Case (1584) 3 Co Rep 7a, 76 ER 637, Exch.

Cases stated

Gumbley v Cunningham c

Stephen Gary Gumbley appealed by way of case stated by the Crown Court at Birmingham (his Honour Judge Ross QC and two justices) in respect of its adjudication on 18 November 1986 whereby it dismissed his appeal from the decision of justices sitting at Birmingham on 25 June 1986 convicting him of driving a motor vehicle on a road with excess alcohol concentration in his blood, contrary to s 6(1) of the Road Traffic Act 1972, on an information laid by Thomas Joseph Cunningham. The question for the opinion of the High Court is set out at p 735 j, post. The facts are set out in the judgment of the court. d

Gould v Castle

Steven Adrian Gould appealed by way of case stated by the justices for the county of Hertford acting in and for the petty sessional division of St Albans in respect of their adjudication as a magistrates' court at St Albans on 16 January 1987 whereby they convicted the appellant of driving a motor vehicle on a road with excess alcohol concentration as demonstrated by a breath sample, contrary to s 6(1) of the Road Traffic Act 1972, on an information laid by Chief Inspector Castle. The question for the opinion of the High Court is set out at p 736 b to d, post. The facts are set out in the judgment of the court. e f

Dominic Roberts for the appellant Gumbley.

Richard O'Rorke for the appellant Gould.

Roger D H Smith for the respondents.

Cur adv vult g

28 July. The following judgment of the court was delivered.

MANN J. There are before the court two appeals by way of case stated. The appellant in the first appeal is Stephen Gary Gumbley and the respondent is Thomas Joseph Cunningham, who is a police officer. The appellant in the second appeal is Steven Adrian Gould and the respondent is Chief Inspector Castle. The first case was stated by his Honour Judge Ross QC and two justices in respect of their adjudication as a Crown Court sitting at Birmingham on 18 November 1986 when they dismissed the first appellant's appeal against his conviction by Birmingham justices that he on 7 May 1985 did drive a motor car after consuming so much alcohol that the proportion thereof exceeded the prescribed limit contrary to s 6(1) of the Road Traffic Act 1972 as substituted by s 25 of and Sch 8 to the Transport Act 1981. The second case was stated by justices for the county of Hertford acting in and for the petty sessional division of St Albans in respect of their adjudication as a magistrates' court on 16 January 1987. On that day the justices convicted the second appellant of an offence against s 6(1) of the 1972 Act as so substituted being an offence which was alleged to have been committed on 3 July 1986. h i

a The two cases raise a common and important question. The second case has a discrete point which is of no general significance.

The common and important question is whether evidence can be admitted to show that a defendant's alcohol level was at the time of an alleged drink and driving offence higher than that shown in an analysis. The question cannot be understood without reciting the legislative context in which it has arisen. The context is that of some of the provisions substituted by the 1981 Act for ss 6 to 12 of the 1972 Act as originally enacted.

b Section 6(1) now provides:

'If a person—(a) drives or attempts to drive a motor vehicle on a road or other public place; or (b) is in charge of a motor vehicle on a road or other public place; after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he shall be guilty of an offence.'

c The 'prescribed limit' is interpreted in the substituted s 12(2) of the 1972 Act in these terms:

'... "the prescribed limit" means, as the case may require—(a) 35 microgrammes of alcohol in 100 millilitres of breath; (b) 80 milligrammes of alcohol in 100 millilitres of blood; or (c) 107 milligrammes of alcohol in 100 millilitres of urine

d ...'

Section 10(1) and (2) now provides:

'(1) The following provisions apply with respect to proceedings for an offence under ... section 6 of this Act.

e (2) Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by the accused shall, in all cases, be taken into account, and it shall be assumed that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged offence was not less than in the specimen; but if the proceedings are for an offence under section 6 of this Act ... the assumption shall not be made if the accused proves—(a) that he consumed alcohol after he had ceased to drive, attempt to drive or be in charge of a motor vehicle on a road or other public place and before he provided the specimen; and (b) that had he not done so the proportion of alcohol in his breath, blood or urine would not have exceeded the prescribed limit ...'

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The facts to which the legislative provisions are to be applied are as follows. In the first appeal the appellant was driving his motor vehicle on 7 May 1985 when at 11.15 pm he was involved in a fatal accident. At 3.35 am on the next day he gave a specimen of blood in accord with the statutory procedure and on analysis the specimen was found to give a concentration of not less than 59 mg of alcohol in 100 ml of blood. The concentration was thus below the prescribed limit. However the respondent gave evidence to the effect that a person of the appellant's height, age, weight and physical condition would eliminate alcohol from his blood stream at between 10 and 25 mg per 100 ml per hour and that accordingly the concentration of alcohol in his body at the time of the accident would have been in the region of 120–130 mg per 100 ml of blood. That concentration is above the limit. The justices held that the respondent's evidence was admissible, accepted it, convicted the appellant, fined him £200, endorsed his licence and imposed a 12-month disqualification. The Crown Court dismissed the appellant's appeal and posed the following question for the opinion of this court:

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i '... whether on a true construction of s. 6(1) and s. 10(2) of the Road Traffic Act 1972, as amended, the [prosecutor] is entitled to adduce evidence other than by way of the specimen of breath or blood provided by the accused in order to prove the proportion of alcohol in the accused's breath or blood at the material time.'

In the second appeal the appellant was driving his motor vehicle on 3 July 1986 when at 11.58 pm he was involved in an accident. At 3.45 am on the next day he gave two

specimens of breath in accord with the statutory procedure. On analysis the lower of the two specimens showed 28 µg of alcohol in 100 ml of breath. The concentration was thus below the prescribed limit. However, the respondent led evidence to the effect that the appellant would have eliminated between 15 and 37 µg of alcohol per 100 ml of breath between the time of the accident and the provision of the specimen and was thus 'likely' to have had a breath alcohol concentration of between 43 and 65 µg per 100 ml of breath at the time of the accident. That concentration is above the limit. The justices held that the respondent's evidence was admissible, accepted it, convicted the appellant, fined him £150, endorsed his licence and imposed a 12-month disqualification. The justices pose the following questions for the opinion of this court:

'a) whether the wording of the Road Traffic Act 1972 Section 10 entitled us to admit and consider evidence of the amount of alcohol in the appellant's breath at the relevant time by a process of back calculation from the sample of breath actually obtained when that sample was below the prescribed limit; b) whether we are entitled to feel sure of the appellant's guilt beyond reasonable doubt when the only evidence in support of the prosecution in relation to the amount of alcohol in the appellant's breath was that of the Forensic Scientist, who after an estimation known as the "countback" procedure, calculated that "[the appellant] is likely to have had a breath alcohol concentration of between 43 and 65 microgrammes per 100 millilitres at the time of the incident".' (The justices' emphasis.)

The question of the admissibility of evidence such as was in each case admitted for the prosecution has not previously been before this court. In *Smith v Geraghty* [1986] RTR 222 this court held that a defendant could lead evidence to show that, but for an alcoholic drink which he thought was non-alcoholic, he would have been below the prescribed limit at the time of driving and that accordingly there was a special reason for not imposing a disqualification (see s 93(1) of the 1972 Act). Glidewell LJ said (at 232):

'Going back to the level of alcohol in the blood at the time of driving is clearly permissible but only practicable, in my judgment, provided that there is reasonably clear, straightforward and relatively simple evidence to show it. In other circumstances, though, as I say, it is for them, I would take the view that justices ought not to be drawn into any detailed scientific calculation.'

The point in *Smith v Geraghty* is plainly different from that which we now have to decide, but the cautionary words used by Glidewell LJ about the production of and reliance on expert evidence is a matter which is of concern to us in the present case.

Counsel for the appellants showed us the provisions previous to the existing legislation. The first provision was s 1(1) of the Road Safety Act 1967. It provided:

'If a person drives or attempts to drive a motor vehicle on a road or other public place, having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provides a specimen under section 3 of this Act, exceeds the prescribed limit at the time he provides the specimen, he shall be liable . . .'

This provision was substantially reproduced as the original s 6(1) of the 1972 Act. In *Rowlands v Hamilton* [1971] 1 All ER 1089, [1971] 1 WLR 647 the House of Lords held that the prosecution could not adduce evidence to show what the blood-alcohol concentration of a defendant would have been at the time of driving when he had consumed alcohol after ceasing to drive but before providing a specimen. Lord Guest said ([1971] 1 All ER 1089 at 1092-1093, [1971] 1 WLR 647 at 653-654):

'I am sure that the appellant was right in admitting that in the case where the "driver" consumes alcohol after he ceases to drive, the alcohol content at the time of the test could not be taken without adjustment to allow for the whiskies subsequently

a consumed. Otherwise, a person might have driven and taken no alcohol before driving, but he would be liable to be convicted if, after he had ceased to drive, he had consumed alcohol which resulted in the blood specimen showing an excess over the prescribed limit. The mischief aimed at by the Act was drinking before driving, not drinking after driving. For the appellant to succeed it is, therefore, necessary for him to show that the adjustment made to eliminate the post-driving alcohol content could legitimately be made under the section. It is at this point that the words in s 1(1) "as ascertained from a laboratory test" become important. Detailed provisions are made in s 3 regarding laboratory tests and "the prescribed limit" referred to in s 1(1) is given as the arithmetical proportion of 80 milligrammes of alcohol per 100 millilitres of blood. These provisions make it clear, to my mind, that the Act intended an automatic calculation to be made by means of a chemical analysis as to whether an offence had been committed. It is against the background of the disputes in the courts under the previous Road Traffic Acts as to the effect of alcohol on an individual's capacity to drive that Parliament has in the 1967 Act provided for automatic proof of guilt by the analysis. For Dr Dolan to make the adjustment of the proportions it would be necessary to go outside the "laboratory test" provided in s 1(1) and make calculations based on certain assumptions as to the individual concerned and the time factor. It would ultimately depend on the expert opinion of the doctor or chemist. I am convinced that Parliament never intended such calculations to be made and that these calculations would not be justified by the terms of the section. I am not satisfied that the section is ambiguous, but if it were I should unhesitatingly take the construction most favourable to the subject. We were pressed by the appellant that if the respondent's contention were right it would leave a loophole in the Act through which the "hip-flask" driver, as he has been described, would escape. This may be so, but if the Act is not watertight then it is for Parliament and not the courts to supply the omission. I am more impressed by the argument for the respondent that if the appellant's argument were sustained it would result in cases such as the present in lengthy arguments and evidence before the court, which would not lead to the clarity in which the law should be expressed.'

f The 'hip-flask' driver is now given the burden of establishing that his specimen revealed a level above the prescribed limit because of the consumption of alcohol after ceasing to drive (see the substituted s 10(2) of the 1972 Act). It was urged on us by the appellants that we should construe the substituted provisions in the 1981 Act as doing no more than eliminate the loophole disclosed by *Rowlands v Hamilton*. We are driven to say we cannot agree. The new s 6(1) is different from the old. The question is now simply as to the proportion of alcohol at the moment of driving or of being in charge. The old s 6(1) raised the quite different question as to excess at the time of providing the specimen which was the subject of the laboratory test. Evidence which is material to the question of what was the proportion of alcohol at the moment of driving must be admissible. The provisions of s 10(2) do not preclude evidence other than that revealed by a specimen to show a greater level of alcohol although, subject to the hip-flask defence, the specimen will always provide a 'not less' or base figure. If that figure is above the prescribed limit, other evidence is unnecessary to establish the offence.

j Our conclusion means that those who drive whilst above the prescribed limits cannot necessarily escape punishment because of the elapse of time. However, our conclusion also means that in cases where a sample provided a substantial period of time after driving has ceased shows a level below the prescribed limit justices may find themselves confronted with evidence of a complicated and scientific nature. Back calculations involve a great number of factors (see *Wilkinson's Road Traffic Offences* (13th edn, 1987) vol 1, para 4.75). This is regrettable but inevitable. We think it needs to be said, therefore, that in our view the prosecution should not seek to rely on evidence of back-calculation save where that evidence is easily understood and clearly persuasive of the presence of

excess alcohol at the time when an accused person was driving. Moreover, justices must be very careful especially where there is conflicting evidence not to convict unless on the scientific and other evidence which they find it safe to rely on they are sure an excess of alcohol was in the defendant's body when he was actually driving as charged.

There remains the second question in the second appeal which relates to the justices' acceptance of evidence that it was 'likely' that at the time of the accident the appellant's breath-alcohol concentration was above the prescribed limit. We are unable to proceed on the basis that acceptance of evidence that a level was 'likely' is equivalent to being satisfied so as to be sure that it was.

The result is accordingly that in the first appeal the question is answered Yes and the appeal is dismissed. In the second appeal the first question is answered Yes and the second No with the consequence that the appeal is allowed.

We should add that in the second appeal the appellant was not offered an opportunity to provide a specimen of blood or urine which he should have been as the lower of his two specimens of breath contained less than 50 µg of alcohol in 100 ml of breath (see the substituted s 8(6) of the 1972 Act). The specimen of breath (on which the back-calculation was based) should not therefore have been admitted (see *Anderton v Lythgoe* [1985] 1 WLR 222). The point was not taken before the justices and understandably is not raised in the case. Had we not allowed the appeal on other grounds, the wrongful admission might have had to be considered in some other proceedings.

Appeal of Mr Gumbley dismissed. Appeal of Mr Gould allowed. The court refused leave to appeal to the House of Lords but certified, under s 1(2) of the Administration of Justice Act 1960, that the following point of law of general public importance was involved in the decision: whether on a true construction of s 6(1) and s 10(2) of the Road Traffic Act 1972, as amended, the prosecutor is entitled to adduce evidence other than by way of the specimen of breath or blood provided by the accused in order to prove the proportion of alcohol in the accused's breath or blood at the material time.

Solicitors: *Cremin Small & Co* (for the appellant Gumbley); *Wynter Davies & Lee*, Hertford (for the appellant Gould); *Crown Prosecution Service*.

Sophie Craven Barrister.

Allied Arab Bank Ltd v Hajjar and others

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

LEGGATT J

16, 17, 18, 19, 23 FEBRUARY 1987

Equity – Ne exeat regno – Writ – Application for writ and Mareva injunction – Arrest of defendant in England under writ ne exeat regno – Grant of Mareva injunction against defendant – Whether writ can be issued to enforce Mareva injunction.

Practice – Pre-trial relief – Mareva injunction – Discovery or interrogatory in aid of injunction – Order to disclose assets within jurisdiction – Whether order can be extended to encompass disclosure of assets outside jurisdiction – Supreme Court Act 1981, s 37.

The first defendant, a Jordanian citizen, was one of the guarantors of a substantial loan made by the plaintiff bank to a company which subsequently went into liquidation. The plaintiffs brought an action for damages for fraudulent conspiracy against the first defendant and others alleging that he and his associates had procured a number of companies to dissipate the borrowed funds so as to render them irrecoverable by the plaintiffs. On 13 January, while the first defendant was in England, the plaintiffs obtained and served on him a writ ne exeat regno ordering him to be detained unless he raised £36m as security. The first defendant was unable to do so and was remanded in gaol overnight. The following day he appeared before the court and gave certain undertakings to disclose his own assets, the assets of the other defendants within the jurisdiction and certain inter-company dealings, and also undertook not to leave the jurisdiction. The judge also issued a Mareva injunction restricting him from dealing with or disposing of any of his assets until after the trial of the action. The first defendant duly filed affidavits making certain disclosures and then applied to the court for (i) discharge of the writ on the ground that it should never have been issued, (ii) an inquiry as to damages and (iii) variation or discharge of the injunction. The plaintiffs applied, inter alia, for an order requiring the first defendant to make disclosure of the defendants' assets outside the jurisdiction and for leave to cross-examine the first defendant on his earlier affidavits, contending that extended disclosure and cross-examination were necessary and reasonable to achieve the purpose of the Mareva injunction and that the court had jurisdiction to make such ancillary orders under s 37^a of the Supreme Court Act 1981. The plaintiffs also contended that the conditions necessary for the service of the writ ne exeat regno had been made out and that, in any event, the writ was necessary to support the Mareva injunction.

Held – (1) A writ ne exeat regno could not be issued for the primary purpose of enforcing a Mareva injunction, because one of the requirements for the issue of a writ ne exeat regno was that the absence of the defendant from England would materially prejudice the plaintiff in the prosecution of his action, and since a Mareva injunction was a remedy in aid of execution and could not by itself be part of 'the prosecution of an action' a plaintiff could not satisfy that requirement merely by showing that the enforcement of a Mareva injunction would be prejudiced by the defendant's absence from the jurisdiction. Accordingly, since the primary purpose of the writ was to require the first defendant to identify assets in relation to which the Mareva injunction would operate, that did not constitute part of the prosecution of the action and therefore one of the conditions for the issue of the writ was not satisfied. A further condition, namely that the action was one in which the defendant would formerly have been liable to arrest at law, was also not

^a Section 37, so far as material, is set out at p 745 h j, post

satisfied because the plaintiffs were claiming damages rather than seeking to enforce a debt. Furthermore, the scope of the writ *ne exeat regno* was confined to equitable claims and none of the plaintiffs' claims were equitable. It followed that the writ would be discharged and an inquiry as to damages ordered (see p 744 *a* to *e g* and p 745 *b*, post); dictum of Megarry J in *Felton v Callis* [1968] 3 All ER at 679 applied; *Al Nahkel for Contracting and Trading Ltd v Lowe* [1986] 1 All ER 729 considered.

(2) The plaintiffs' application for extension of disclosure by the defendant would be refused because the scope of a Mareva injunction was restricted to assets within the jurisdiction and any disclosure in aid of the injunction was usually similarly restricted, and there were no special grounds to justify an exception being made requiring disclosure of assets outside the jurisdiction. Nor were the affidavits made by the defendant under the previous order so deficient as to justify an order for cross-examination, and the application for such an order would also be refused (see p 746 *c d f h*, post); dictum of Neill LJ in *Ashtiani v Kashi* [1986] 2 All ER at 980 applied.

Per curiam. The joinder in one action of a cause of action in respect of which a defendant would have been liable to arrest in law with one in respect of which he would not cannot entitle a plaintiff to procure the issue of a writ *ne exeat regno* for the purpose of prosecuting the latter action (see p 744 *f*, post).

Notes

For the writ of *ne exeat regno*, see 16 Halsbury's Laws (4th edn) para 1288, and for cases on the subject, see 20 Digest (Reissue) 663-664, 4895-4900.

For Mareva injunctions, see 37 Halsbury's Laws (4th edn) para 362, and for cases on the subject, see 37(2) Digest (Reissue) 474-476, 2978-2990.

For the Supreme Court Act 1981, s 37, see 11 Halsbury's Statutes (4th edn) 792.

Cases referred to in judgment

Al Nahkel for Contracting and Trading Ltd v Lowe [1986] 1 All ER 729, [1986] QB 235, [1986] 2 WLR 317.

Ashtiani v Kashi [1986] 2 All ER 970, [1987] QB 888, [1986] 3 WLR 647, CA.

Bankers Trust Co v Shapira [1980] 3 All ER 353, [1980] 1 WLR 1274, CA.

Bayer AG v Winter [1986] 1 All ER 733, [1986] 1 WLR 497, CA.

Bekhor (A J) & Co Ltd v Bilton [1981] 2 All ER 565, [1981] QB 923, [1981] 2 WLR 601, CA.

Colverson v Bloomfield (1885) 29 Ch D 341, CA.

Drover v Beyer (1879) 13 Ch D 242, CA.

Felton v Callis [1968] 3 All ER 673, [1969] 1 QB 200, [1968] 3 WLR 951.

House of Spring Gardens Ltd v Waite [1985] FSR 173, CA.

Lister & Co v Stubbs (1890) 45 Ch D 1, [1886-90] All ER Rep 797, CA.

Norwich Pharmacal Co v Customs and Excise Comrs [1973] 2 All ER 943, [1974] AC 133, [1973] 3 WLR 164, HL.

Parker v Camden London BC [1985] 2 All ER 141, [1986] Ch 162, [1985] 3 WLR 47, CA.

Practice Note [1983] 3 All ER 33, [1983] 1 WLR 922, CA.

RCA Corp v Reddingtons Rare Records [1975] 1 All ER 38, [1974] 1 WLR 1445.

Summons and cross-summons

The plaintiffs, Allied Arab Bank Ltd, sought damages from, inter alios, the first defendant, Taj El Arefin Hajjar, for fraudulent conspiracy to remove beyond the recovery of the plaintiffs' moneys lent by the plaintiffs to the tenth defendant, Murray Clayton Ltd (in liquidation). With leave of Hirst J granted on 13 January 1987 the plaintiffs obtained and served on the first defendant a writ *ne exeat regno*, pursuant to which he was detained. On 14 January 1987 Hirst J issued a Mareva injunction restraining the first defendant from dealing with or disposing of any of his assets within the jurisdiction until two weeks after the trial of the action. On 3 February the first defendant issued a summons for the discharge of the writ and the variation or discharge of the Mareva injunction. By

a summonses issued on 26 January and 6 February the plaintiffs sought an order requiring the first defendant to make disclosure of assets outside the jurisdiction and sought leave to cross-examine the first defendant. The summonses were heard together in chambers but judgment was given by Leggatt J in open court. The facts are set out in the judgment.

*James Wadsworth QC, L J West-Knights and Michael Pooles for the plaintiffs.
Roger Buckley QC and Richard M Sheldon for the first defendant.*

b The other defendants did not appear.

Cur adv vult

23 February. The following judgment was delivered.

c **LEGGATT J.** At 9 pm on 13 January 1987 there was served on the first defendant, who is a Jordanian citizen then temporarily resident within the jurisdiction, a writ *ne exeat regno*. It had been issued earlier that day by leave of Hirst J, and was duly marked with the sum by way of bail or security which the first defendant must find if he was to avoid arrest. He was unable, or in the words of the writ, he refused, to pay the required **d** sum. So he was forthwith arrested and taken to Kingston gaol where he spent one of the most distressing and humiliating nights of his life. The sum with which the writ was marked was £36m.

On the next day the first defendant was brought before Hirst J. Undertakings were exacted from him as the price of release from prison. They were that he comply, subject to minor variations, with the discovery orders which the judge had made under specified **e** paragraphs of his order relating to the first defendant's own assets, to the assets of the other defendants, and to inter-company dealings between the various defendant companies. There were also undertakings not to leave the jurisdiction without the consent of the court or the plaintiff's solicitors, forthwith to deliver up his passport, to swear an affidavit that he had no other passport, not to apply during the currency of the undertaking as to discovery for any other travel documents and to accept service of these **f** proceedings.

Thereafter a Mareva injunction was issued restraining the first defendant from dealing with or disposing of any of his assets until two weeks after the trial of this action.

The order continued:

g 'AND THE COURT being satisfied that for the purpose of tracing assets which may already have been dissipated or converted it is appropriate to order discovery of all the proposed Defendants' assets within the jurisdiction:—2. IT IS ORDERED that the proposed first Defendant do within 21 days of the date of this Order:—(a) disclose the full value and whereabouts of his assets held within the jurisdiction which . . . exceed the sum of £1,000 as at the date of this Order; (b) disclose the full **h** value and whereabouts to the best of his knowledge and belief of the assets of any of the other proposed Defendants held within the jurisdiction which individually exceed the sum of £1,000 as at the date of this Order; (c) identify with particularity the nature of such assets at such date.'

The references which follow in this judgment to paragraphs are to paragraphs in that order.

i Paragraph 3 of the order explained the degree of particularity demanded of the first defendant in making the disclosure required by para 2; and para 4 required him to do so on affidavit. Paragraph 5 of the order (as subsequently varied) ordered the first defendant to give affidavit on discovery—

'of the extent to which he has caused or permitted the transfer by any proposed Defendant herein of any monies advanced to that proposed Defendant by the

intended Plaintiff herein to or for the benefit of any other proposed Defendant herein or to or for the benefit of any body corporate controlled or beneficially owned by him and/or any one or more of the other proposed Defendants herein.' a

The first defendant now applies for the discharge of the writ on the ground that it ought never to have been made, for an inquiry as to damages suffered by him by reason of the issue of the writ, to be released from his undertakings, for the return of his passport, and for an order that the requirements of paras 2(b) and (c), 3, 4 and 5, to which I have referred, be set aside or varied. The discharge of the writ is not opposed by the plaintiffs for the reason that the need for it is now spent. b

The plaintiffs apply for orders that para 2(a) and (b) be varied so as to apply also to assets without the jurisdiction as well as within, and for disclosure of a transcript of the first defendant's examination as a judgment debtor in an action between Arab Bank Ltd as plaintiff and the first defendant and others as defendants. c

The plaintiffs also apply for orders that the first defendant do attend for cross-examination on his second, third and fourth affirmations in this action, and disclose full details of cheques in a list prepared by the plaintiffs. c

Owing to the importance of this matter, I have directed that it be adjourned into open court for the purposes of this judgment.

The plaintiffs' claim arises out of substantial lending by the plaintiffs to the tenth defendant, Murray Clayton Ltd, now in liquidation. The first defendant was one of the guarantors of that indebtedness. No defence is suggested to such part of the claim as is made under the guarantees. But the plaintiffs' overriding cause of action is for damages for fraudulent conspiracy. The first defendant and his associates are alleged to have dishonestly procured a number of companies, including those known as United Trading Group or UTG, so to dissipate the funds borrowed as to render them, and interest due on them, irrecoverable by the plaintiffs. For purposes of this action the first defendant, whilst denying that he acted fraudulently, admits that the plaintiffs have a good arguable case against him, and so are entitled to maintain their Mareva injunction. d

In December 1986 Arab Bank Ltd, which is not connected with the plaintiffs, obtained summary judgment against the first defendant and others for about \$90m. Although the plaintiffs contend that they could themselves obtain summary judgment against the first defendant on the guarantees, they have deliberately refrained from doing so, and indeed by proceeding in fraud have precluded themselves from doing so, in order to take advantage against the first defendant of interlocutory procedures which they do not believe would be available against him as a judgment debtor. As at present pleaded, the action is not, however, a tracing action; nor is it a proprietary claim. The phrase in the order which I have quoted, '... for the purpose of tracing assets which may already have been dissipated ...', therefore does not relate to any tracing procedure properly so called; and where dissipation has already occurred it can have no application to the Mareva injunction, the purpose of which is to prevent dissipation of assets. e

From this summary it is plain that the plaintiffs as bankers took a chance when they made loans without proper security which they knew were to be used for inter-company transactions extending outside the jurisdiction. Although what is alleged against the first defendant and his associates is a conspiracy to render themselves what is called 'judgment-proof', nothing pleaded in the points of claim running to some 100 pages was unlawful per se. f

In giving leave for the writ ne exeat regno to issue Hirst J said:

'... I was satisfied on the evidence then before us [sic] that there was a likelihood that the first defendant was about to leave the jurisdiction, that the plaintiffs had very substantial grounds for seeking the discovery sought which was likely to be unavailable once the first defendant had left the jurisdiction, and that the balance of convenience was decisively in favour of the order ne exeat regno ...' g

Later in his judgment the judge held:

a 'The voluminous evidence submitted by the plaintiffs demonstrates in my judgment a strong prima facie case (i) that the first defendant is indeed the controlling hand and moving spirit of the various corporate defendants, (ii) that he has repeatedly given and then broken promises to the plaintiffs on behalf of one or more of the defendant companies and/or on behalf of himself as guarantor to honour the obligations to the bank, (iii) that he has in recent months given misleading information as to his whereabouts, (iv) that he stayed out of the country during most of 1985 pending the settlement of the Customs and Excise proceedings referred to below, (v) that his present visit to this country was not disclosed to the plaintiffs notwithstanding their numerous attempts to fix a meeting with him and apparently co-operative responses from his side.'

c The judge concluded by asserting that the sole purpose of the undertakings (other than that relating to discovery) was to support the latter undertaking, and that as soon as it was fully and satisfactorily complied with the ancillary undertakings would lapse and the security would be discharged.

d The efficacy and scope of the writ ne exeat regno were considered by Megarry J in *Felton v Callis* [1968] 3 All ER 673, [1969] 1 QB 200. It originated in the thirteenth century as a prerogative writ. By Stuart times it had been adapted by equity as a means of coercing a defendant to give bail on pain of arrest in cases where the debt was equitable and he was not liable to arrest on mesne process. At least from that time judges have emphasised the need for caution in the grant of the writ. In 1838 arrest on mesne process was abolished except in certain cases in which the debtor could be arrested by order of a judge. The Court of Chancery exercised an analogous jurisdiction. Finally, the Debtors Act 1869 still further limited the power of arrest on mesne process, and the courts of equity once more followed the analogy.

e The practice was thus established whereby the writ would not be issued except in cases in which, though the debt was not a legal debt, the four conditions stipulated by s 6 of the 1869 Act are satisfied. They were summarised thus by Megarry J in *Felton v Callis* [1968] 3 All ER 673 at 679, [1969] 1 QB 200 at 211:

f '(i) The action is one in which the defendant would formerly have been liable to arrest at law. (ii) A good cause of action for at least £50 is established. (iii) There is "probable cause" for believing that the defendant is "about to quit England" unless he is arrested. (iv) "The absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action".'

g There is here no dispute about conditions (ii) and (iii).

h Counsel for the plaintiffs argues that condition (iv) is satisfied, because the 'prosecution' of the action may include obtaining discovery, interrogatories and a Mareva injunction. He accepts that the writ must be subordinate to some other part of the claim, but contends that it may issue, for example, to make an injunction effective. In *Al Nahkel for Contracting and Trading Ltd v Lowe* [1986] 1 All ER 729 at 732, [1986] QB 235 at 239 Tudor Price J concluded his judgment by saying:

i 'I was satisfied that in the present case all the four conditions set out above are satisfied and that it was a proper exercise of discretion to give leave to issue the writ. In my judgment this ancient remedy (or tool of the law, as Megarry J called it) is available in support of the modern Mareva injunction to prevent a defendant fleeing the jurisdiction with assets in order to frustrate a lawful claim before the court.'

He relied on a note of a judgment of Evans J to which, because it was given in chambers, I do not regard it as appropriate to refer.

Since Tudor Price J held that in the case before him the four conditions were satisfied,

there can be no quarrel with the issue of the writ in that case. His conclusion that the writ can issue in support of a Mareva injunction may have been intended to refer only to those cases in which both remedies may properly issue, with the result that the arrest of the debtor may incidentally prevent him from breaching the Mareva injunction. But, if it was intended to go further and to suggest that the writ may be ordered for the purpose of enforcing a Mareva injunction, I disagree: for that purpose the appropriate remedy is an injunction to restrain the defendant from leaving the jurisdiction.

A Mareva injunction issues for the purpose of preserving within the jurisdiction of the court assets against which a creditor may have recourse, provided that he is successful in obtaining judgment. The remedy is in aid of execution, and constitutes an exception to the principle enunciated in *Lister & Co v Stubbs* (1890) 45 Ch D 1, [1886-90] All ER 797. It is not part of the prosecution of the action. If the claim is a proprietary claim, or a tracing claim, it may well be appropriate for a writ to issue as well as a Mareva injunction. But in every case the question must be asked: for what purpose is the issue of the writ required? Here the primary purpose suggested is to require the first defendant to identify assets in relation to which the Mareva injunction would operate. That is not part of the prosecution of the action. It follows that condition (iv) is not satisfied. I would add that in so far as the issue of the writ was sought to be justified in aid of discovery of what may for convenience be termed the *Norwich Pharmacal* type (after the case of *Norwich Pharmacal Co v Customs and Excise Comrs* [1973] 2 All ER 943, [1974] AC 133) I do not consider that, if the point had been determinative, the need for this discovery would have been of such importance as would have justified the issue of the writ.

With regard to condition 1, it is plain that a debtor was never liable to arrest at law except for a debt certain, and equity followed the law in this respect: see *Colverson v Bloomfield* (1885) 29 Ch D 341. The plaintiffs are prosecuting their claim in this action for damages, having refrained from proceeding on the debt arising under the guarantees. In my judgment under condition (i) the first defendant would not have been liable to arrest at law, since the claim effectively being prosecuted is not the claim for debt; or alternatively, in so far as it is, it is not for the purpose of prosecuting that part of the claim that the writ was sought. The cause of action on the guarantees was not one for the prosecution of which the presence of the first defendant in England was required. Conversely, his absence will not materially prejudice the plaintiff in the prosecution of that claim. The joinder in one action of a cause of action in respect of which a defendant would have been liable to arrest at law with one in respect of which he would not cannot possibly entitle the plaintiff to procure the issue of the writ for the purpose of prosecuting the latter cause of action.

The scope of the writ was in any event confined to equitable claims. None of the plaintiffs' claims in this action is equitable. Counsel for the plaintiffs argues that because the forms of action are no longer observed, the writ ought no longer to be confined to equitable claims. He cites *Parker v Camden London BC* [1985] 2 All ER 141 at 146, [1986] Ch 162 at 173, where Sir John Donaldson MR said:

'For my part I do not accept that the pre-Judicature Act practices of the Court of Chancery or any other court still rule us from their graves.'

Sir John Donaldson MR was there concerned with a statute which gave in terms an unqualified power to appoint a receiver, and was meeting the submission that the power ought only to be exercised in circumstances in which the Court of Chancery would have before 1873. Understandably he rejected that submission. What I am concerned with is a power to issue a writ which is itself a survival. It does not seem to me that I am entitled on that account to extend its application. The logic of the argument of counsel for the plaintiffs appears to be that because there was power under the Debtors Act 1869, and still is since the statute has not been repealed, to arrest for legal debt, and because equity followed the law in relation to equitable debt, the courts ought since the fusion of law and equity to apply the equitable remedy indifferently. I find this argument unappealing.

a It is true that any court can now apply the remedy. But it does not follow that that remedy is to be treated as having a wider application than it formerly had. In any event, the Court of Appeal in *Drover v Beyer* (1879) 13 Ch D 242 decided that since the debt there in question was a mere legal demand, for which the plaintiff could not before the Supreme Court of Judicature Act 1873 have sued in the Court of Chancery, the defendant could only be prevented from leaving England under s 6 of the Debtors Act 1869. That decision is binding on me, and in my judgment on that ground also the plaintiffs were

b not entitled to the issue of the writ.

For the reasons I have recounted I conclude that, had Hirst J had the benefit of the argument inter partes which I have had, the writ would not have been issued. On this ground, therefore, as well as on the ground accepted by the plaintiffs that the purpose of its issue has sufficiently been fulfilled, I discharge the writ; and I also order an inquiry as to damages, which I adjourn sine die (with liberty to apply) in the expectation that it will

c not be heard until after the trial or abandonment of the action.

From this it follows that the first defendant's passport must be returned to him, and his bond for \$250,000 must be delivered up to him. He must be released from his undertaking not to leave the jurisdiction without leave of the court or the consent of the plaintiffs' solicitors. With the first defendant's release from this undertaking his undertaking not to apply for other travel documents lapses. His undertaking to swear an affidavit that he has no other passport than his Jordanian passport was fulfilled by his affirmation to that effect.

d

With the remaining matters I can deal more shortly. The first defendant applies to discharge also the undertakings in relation to para 2(a) (as to his own assets within the jurisdiction), para 2(b) (as to the assets within the jurisdiction of other defendants) and para 5 (as to transfers of any sum of or exceeding \$1m advanced to the first defendant by

e the plaintiffs for the benefit of any other defendant or any company controlled by him or them). At the same time it is convenient to consider the plaintiffs' applications to extend the scope of para 2(a) and (b) to include assets outside the jurisdiction, and for an order for cross-examination of the first defendant on his second, third and fourth affirmations, that is, those relating respectively to discovery under para 2(a) and (b) and 5 of the order for discovery.

f

In support of the claim for disclosure of the other defendants' assets the plaintiffs rely on *RCA Corp v Reddingtons Rare Records* [1975] 1 All ER 38, [1974] 1 WLR 1445, in which by application of the *Norwich Pharmacal* principle discovery extended to the identification of those persons known to the defendant to whom pirated records had been supplied. Also relied on was *Bankers Trust Co v Shapira* [1980] 3 All ER 353, [1980] 1 WLR 1274, but that was a tracing claim in which on the same principle discovery for

g that purpose was ordered against the bank concerned. The principle is less readily applicable to a claim for damages for fraudulent conspiracy.

Counsel for the plaintiffs cited four recent decisions of the Court of Appeal about orders for discovery and other orders in aid of Mareva injunctions. The scope of such injunctions is indicated by the language of s 37(1) and (3) of the Supreme Court Act

h 1981:

'(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.'

j

From the cases cited by counsel for the plaintiffs the following propositions may readily be derived.

(1) Inherent in the power given by s 37 is the power to make all such ancillary orders as appear to the court to be just and convenient, to ensure that the exercise of the Mareva jurisdiction is effective to achieve its purpose: see *A J Bekhor & Co Ltd v Bilton* [1981] 2 All ER 565 at 576, [1981] QB 923 at 940 per Ackner LJ. a

(2) Where an order has been made that a defendant identify his English assets and disclose their whereabouts, the court will take all such steps, including exercise of the power to order the defendant to attend for cross-examination on his affidavit, as are required to render its order effective: see *House of Spring Gardens Ltd v Waite* [1985] FSR 173. b

(3) Such injunctions and other orders will be granted as are reasonably necessary to render a Mareva injunction effective, but an injunction not to leave the jurisdiction should run, since it constitutes an interference with the liberty of the subject, for no longer than is necessary to give effect to the orders of the court: see *Bayer AG v Winter* [1986] 1 All ER 733, [1986] 1 WLR 497. c

(4) As the scope of a Mareva injunction is restricted to assets within the jurisdiction, in the ordinary way any discovery in aid of a Mareva injunction should be similarly restricted: see *Ashtiani v Kashi* [1986] 2 All ER 970 at 980, [1987] QB 888 at 905 per Neill LJ. d

I bear in mind the view of Hirst J that there exist in this case what he regarded as special grounds for ordering disclosure of foreign assets. But as Neill LJ said in *Ashtiani v Kashi* [1986] 2 All ER 970 at 980, [1987] QB 888 at 905: e

‘It is important to remember that this is not an action where any proprietary claim is made, nor is it a tracing action. It is an action founded on an alleged failure to pay moneys due under a contract. What basis is there, therefore, for an order for discovery of the defendant’s assets? It is not an order for discovery under RSC Ord 24. It seems to me that in the present state of the law the only basis for such an order is that it is made in aid of and ancillary to an injunction in the Mareva form . . . It seems to me to follow that, at any rate prima facie, discovery should be limited . . . to the ascertainment of assets which will be covered by the Mareva order (in other words, the ascertainment of assets within the jurisdiction) . . .’ f

I see no sufficient basis for the disclosure of the first defendant’s own assets outwith the jurisdiction, nor a fortiori of those of other defendants. The only question therefore is whether the disclosure made by any of the affirmations sought to be impugned was so deficient as to justify an order that the first defendant be cross-examined on them. It would be a strong order to make, where no urgency is shown to exist, without having first ordered any further affirmation that might prove necessary directed to specific matters. No particular criticisms of the affirmations are made. What is said is that a lack of candour revealed by the first defendant’s fifth affirmation (in relation to the writ ne exeat regno and other matters) was such as warrants cross-examination on the earlier affirmations. g

I need not review the criticisms in detail. Suffice it to say that in my judgment they do not justify an order for cross-examination: cf *House of Spring Gardens Ltd v Waite* [1985] FSR 173 at 181 per Slade LJ. The undertakings under paras 2(a) and (b) and 5 will therefore be discharged. Having been given as undertakings, and not orders, the first defendant cannot now complain of them. But in any event, I am not persuaded that in so far as they were confined to assets within the jurisdiction, they went beyond the scope of what it would have been permissible to order. h

I have therefore considered whether I should, on the contrary, order further discovery under any of these paragraphs. Counsel for the plaintiffs urges me to do so in relation to (a) ownership and assets of Flagstones, meaning the Liechtenstein Establishment and the house belonging to the first defendant’s wife, both of that name, (b) confusion said to exist as to the ownership of companies called Wishtrend Ltd and Opax Farm (Sales) Ltd, particularising and explaining the first defendant’s assertion in his fifth affirmation that j

a those companies are now owned by First Overseas Securities Corp, and (c) transfers of or in excess of \$1m caused or permitted by the first defendant.

As to these specific matters, I am not satisfied that the first two will not be sufficiently answered by the receiver of Flagstones; and, since the third relates only to moneys advanced by the plaintiffs, non-compliance is difficult to establish: it is not like the passing off of pirated records. Especially in view of the first defendant's declared willingness to make any specific discovery demanded of him, I have come to the
b conclusion that these matters are best left to be dealt with by a properly formulated request, and if need be summons, for further discovery. It will incidentally test the first defendant's bona fides.

Discovery is sought of a transcript of the first defendant's examination as a judgment debtor in an action between Arab Bank Ltd as plaintiffs and the first defendant and others. It is sought in quest of assets which the first defendant may have. It was referred to by junior counsel before Hirst J in seeking to demonstrate his client's good faith in returning voluntarily to this country for the purpose of that examination, and also for the purpose of asserting that it disclosed no assets within the jurisdiction. To order this disclosure would in my judgment give to the plaintiffs the status of judgment creditors which they have deliberately eschewed. Reference to the document by counsel (quite
c apart from the inherent likelihood on that account that it is true) ought not in the circumstances to render the document disclosable, especially since it obviously did not affect the mind of the judge in the first defendant's favour. The order sought would also infringe the rights of Arab Bank Ltd to object to disclosure. In the exercise of my discretion I refuse to order discovery of the transcript of the first defendant's examination.

The plaintiffs apply for disclosure on affidavit of all bank accounts to which the first defendant is a signatory whether solely or jointly, both within and without the
e jurisdiction. For reasons which follow from what I have said earlier in this judgment, I refuse this order. Accounts outside the jurisdiction go beyond what is necessary in aid of Mareva relief; and accounts within it will already have been the subject of the affirmation relating to the first defendant's assets within the jurisdiction. The details sought of the cheques which the plaintiffs have listed are said to be needed for the purpose of tracing the moneys which were the subject of them. Since no tracing claim is yet made by the
f points of claim, I decline the order sought.

The first defendant's application therefore succeeds and the plaintiffs' applications fail against the first defendant.

I am more than usually grateful to leading counsel for their assistance in this matter. But if ever there was a case which called for compliance with *Practice Note* [1983] 3 All
g ER 33, [1983] 1 WLR 922 this was it. Ten lever arch files containing nearly 4,000 pages could then have been reduced to the 100 or so documents to which counsel found it necessary to refer. For the purposes of these applications, the rest were otiose.

Order accordingly.

Solicitors: *Richards Butler* (for the plaintiffs); *Wm F Prior & Co* (for the first defendant).

K Mydeen Esq Barrister.

Dean v Ainley

a

COURT OF APPEAL, CIVIL DIVISION

KERR, GLIDEWELL LJ AND SIR GEORGE WALLER

4 JUNE, 14 JULY 1987

Sale of land – Damages for breach of contract – Breach of covenant to carry out remedial work prior to sale – Remedial works required by covenant not sufficient to prevent damage – Vendor contracting to sell house with patio on top of cellar – Water penetrating cellar from patio and surrounding ground – Vendor covenanting to waterproof patio – Vendor failing to carry out work – Waterproofing patio only capable of preventing 70% of water penetrating cellar – Whether purchaser entitled to substantial or merely nominal damages.

b

Sale of land – Damages for breach of contract – Measure of damages – Breach of covenant – Breach not causing damage – Damages serving no useful purpose – Water penetrating cellar from patio and surrounding earth – Vendor covenanting to waterproof patio – Vendor failing to carry out work – Waterproofing patio only capable of preventing 70% of water penetrating cellar – Whether award of damages serving any useful purpose – Whether purchaser entitled to damages – Whether purchaser required to expend any damages awarded on remedial work.

c

d

The terms of a contract for the sale by the defendant of a house to the plaintiff contained a covenant by the defendant to carry out work to prevent the 'leaking of water from the patio' into a cellar underneath. After the sale had been completed and the plaintiff had taken possession it was found that water was continuing to penetrate the cellar and that insufficient work had been carried out to prevent water leaking into the cellar from the patio. Water was also penetrating the cellar from the ground surrounding it. The plaintiff brought an action against the defendant for breach of contract and claimed damages of some £10,000. At the trial there was evidence that the only practicable method of preventing all water penetration was internal 'tanking' of the whole cellar at a cost of £10,580, while waterproofing the patio, in accordance with the terms of the contract, would cost about £7,500 but would only keep out less than 70% of the water and would have no effect on water penetrating from the surrounding ground. The judge held that since the plaintiff wanted a completely dry cellar but would have suffered from water penetration from the surrounding earth even if the contractual obligation to prevent leaking from the patio had been carried out, the plaintiff had suffered only nominal damage as the result of the defendant's breach of contract. The judge accordingly awarded the plaintiff nominal damages of £5. The plaintiff appealed.

e

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Held – The plaintiff had suffered damage, or (per Kerr LJ) a real economic loss, because sealing the patio in accordance with the defendant's contractual obligation would have made the cellar substantially less wet or damp, albeit not completely dry, and to that extent the plaintiff would have had a better and more usable space. It followed therefore that the plaintiff was entitled to substantial, rather than nominal, damages. On the measure of damages, however, the plaintiff was only entitled to the cost of sealing the patio because (per Glidewell LJ and Sir George Waller) that was the least expensive solution or (per Kerr LJ) that was the cost of what the defendant had undertaken to do. The appeal would accordingly be allowed and the plaintiff awarded £7,500 damages (see p 753 c to p 754 a to g j to p 755 b d to f, post).

h

j

Radford v De Froberville [1978] 1 All ER 33 applied.

Wigsell v School for Indigent Blind (1882) 8 QBD 357 and *James v Hutton* [1949] 2 All ER 243 considered.

Quaere. Whether a plaintiff must show not only that he has suffered some damage as a result of the defendant's breach of a covenant to carry out work but also that, if he is

a awarded substantial damages, he intends to use that award to pay for the work which was required by the covenant to be done (see p 753 c d f g and p 754 a b to d, post).

Notes

For damages for breach of contract for sale of land, see 42 Halsbury's Laws (4th edn) paras 265-272, and for cases on the subject, see 40 Digest (Reissue) 385-403, 3377-3596.

b Cases referred to in judgments

James v Hutton [1949] 2 All ER 243, [1950] 1 KB 9, CA.

Radford v De Froberville [1978] 1 All ER 33, [1977] 1 WLR 1262.

Wigzell v School for Indigent Blind (1882) 8 QBD 357, DC.

Appeal

c The plaintiff, Alan Dean, appealed against the order of Mann J made in the Queen's Bench Division at Birmingham on 28 January 1987 giving judgment for the plaintiff for nominal damages in the sum of £5 in his action against the defendant, Mary Ainley, for damages for breach of a contract for the sale of a house known as The Hoploft, Eardiston, Tenbury Wells, Worcestershire. The facts are set out in the judgment of Glidewell LJ.

d *Patrick McCahill* for the plaintiff.
Frederick Philpott for the defendant.

Cur adv vult

e 14 July. The following judgments were delivered.

f **GLIDEWELL LJ** (giving the first judgment at the invitation of Kerr J). This is an appeal against a judgment of Mann J, given on 28 January 1987 at Birmingham. In the plaintiff's action for damages for breach of a condition contained in a contract for the sale by the defendant to the plaintiff of a house the judge held that the defendant was in breach of the condition, but that the plaintiff had not proved that he had suffered more than nominal damage as a result of the breach. Accordingly, the judge gave judgment for the plaintiff for the sum of £5, and made no order as to the costs. The plaintiff now appeals against that decision. There is no cross-appeal by the defendant against the judge's findings that she was in breach of contract.

g The house in question is The Hoploft, Eardiston, Tenbury Wells, Worcestershire. It is the central part of a large building, originally constructed in the eighteenth century, which has been converted into three dwelling houses. It stands on the side of a hill. The front of the house faces south. Behind, ie to the north of the house, at the same level as the ground floor, is a windowless vault, referred to throughout the proceedings as 'the cellar'. It lies east-west across the whole rear elevation of the house, built of brick with a barrel vaulted roof, some 74 feet long by 10 feet wide and about 8 feet in height at the crown of the arch. The southerly wall of the cellar is separated from the northerly wall of the house by a short distance. There is a door in the east end of the cellar which gives access from the house.

j At some time in the past the area to the north of the ground floor of the house was filled with material which thus wholly encloses the cellar. On top of this fill there is a terrace or patio at the same level as the first floor of the house. This extends outwards for some 25 feet or so, and at its northern edge the ground rises again. The main entrance door to the house leads from the patio. Approximately the southerly half of the patio lies above the cellar. The patio is divided into two parts by a low wall. The smaller, easterly part was at all material times covered with quarry tiles over which a layer of asphalt had been laid. The western part of the patio was constructed of rectangular flagstones. There are two drain gullies to take surface water run off from the patio, and the judge found

that the falls to the gullies were properly laid. It is obvious, however, that water could seep through the joints between the flagstones.

In 1982 the defendant, Mrs Ainley, owned The Hoploft, and lived there with her late husband, who had until his retirement been a director of a major civil engineering company. The plaintiff, Mr Dean, became interested in buying the property. On visits to the property he saw several indications of defects, including buckets in the cellar placed to catch water percolating through the brickwork. He instructed a consulting engineer, who advised him that the water was penetrating the brickwork both vertically (ie from the terrace above) and laterally (ie from the fill material to the north of the cellar). According to the plaintiff, Mr Ainley said that he would have the problem of water penetrating the cellar remedied. Later, in the early part of 1983, Mr Ainley told the plaintiff that over the western part of the patio the flagstones had been lifted, a plastic membrane and an asphalt layer laid on a concrete base and the flagstones relaid.

Nevertheless, the plaintiff required a specific term in the contract of sale of the house obliging the defendant to rectify three defects, of which the water penetrating the cellar was the third. Special condition G provided, so far as is material:

'The Vendor will at her own expense prior to completion hereunder complete to the reasonable satisfaction of the Purchaser or his surveyor, the following works . . .
(c) Prevention of leaking of water from the patio into the premises beneath.'

Before the contract was exchanged the defendant's solicitor wrote to the plaintiff's solicitors on 1 February 1983 a letter in which he said:

'As to the works to the property listed in Special Condition G of the enclosed draft, my client informs me that all these works have now been carried out but I have included them in the draft contract so as to reflect the terms agreed between our respective clients.'

This confirmed what Mr Ainley had told the plaintiff. Parts of the contract were exchanged on 17 March 1983.

In reliance on those assurances, the plaintiff completed the purchase of The Hoploft, which was conveyed to him by the defendant on 23 April 1983.

In the autumn of 1983 it became apparent that water was again penetrating into the cellar through the brickwork. On investigation it became clear that although there was asphaltting and a plastic membrane covering some of the western part of the patio, over much of that part no work to prevent water leaking from the patio into the cellar had been carried out. Why Mr Ainley told the plaintiff the work had been done will remain unknown because sadly Mr Ainley died before the matter was investigated. Clearly, as the judge found, the defendant was in breach of special condition G of the contract of sale. Specific performance of the conditions was not possible because by the time the breach was discovered the property had been conveyed to the plaintiff, who had been in occupation for some months.

The questions therefore arose: what damage did the plaintiff suffer as a result of the breach of contract and to what sum was he entitled by way of damages?

The writ in this action was issued on 1 July 1985. The statement of claim originally served pleaded special condition G, alleged breach and claimed as damages the 'estimated cost of works necessary to prevent leaking of water from patio to cellar' at not less than £10,000. However, the chartered surveyor engaged by the plaintiff, Mr David Gould, advised that if works of the nature of those described by Mr Ainley were carried out, though the patio would be 'waterproofed', and water would no longer be able to enter the cellar vertically, water would still be able to penetrate horizontally through the surrounding ground. Accordingly Mr Gould suggested that the best solution would be to construct a waterproof envelope around the cellar, either outside or inside the brickwork, which would keep out all water. In the end his preferred solution was internal 'tanking', a view with which Mr Andrew Shepherd RIBA, who gave evidence for the defendant, concurred.

On 1 May 1986 the statement of claim was amended. After amendment the particulars of special damage read:

'The only remedial measure which can be carried out has to be designed on the principle that the whole of the cellar is to be enclosed in a waterproof envelope, either externally or internally or a combination of both. Estimated cost (as at October 1984) £11,152.70p inclusive of VAT.'

At the trial, at which both Mr Gould and Mr Shepherd gave evidence, they agreed that it would not be sensible to seal or waterproof the patio, and that the proper solution to the problem of water penetration into the cellar was internal tanking.

The witnesses differed, however, as to the respective proportions of horizontal and vertical water penetration. Mr Gould's opinion was that 60% to 70% of the water penetrated vertically (and thus would be prevented by sealing the patio). Mr Shepherd's view was that only 30% was vertical penetration, and 70% lateral penetration by ground water. The judge was not satisfied that Mr Gould's opinion in this respect was correct. He found 'the percentage contribution of ground water moving laterally' to be higher than 30% of the total.

On the question 'What damage has the plaintiff proved he has suffered?' the judge said:

'The onus of proving that he has sustained more than nominal damage in consequence of the breach of contract rests on the plaintiff. I ask what damage has the plaintiff shown that he has suffered by reason of the defendant's failure to prevent penetration from the patio? I am not satisfied that on the balance of probabilities he has shown any damage. Not one word has been heard as to the extent to which the tunnel would have been usable for any purpose had the patio been sealed. All I do know is that all the experts agree that sealing would not have been an answer to the problem of the tunnel. To say 30% only of intrusion is due to ground water movement tells me nothing, in that intrusion was not quantified. It could still be unusable for any purpose desired by the plaintiff.'

The finding that the proportion was greater than 30% then followed.

The judge did not in his judgment refer to any authorities, but counsel referred us to three. The first was the decision of this court in *James v Hutton* [1949] 2 All ER 243, [1950] 1 KB 9. In that case the lessee of a shop had been permitted by the lessor to erect a new shop front, but covenanted to restore the shop to its previous state at the termination of his lease. He failed to remove the new shop front and restore the building to its original condition. In an action for damages for breach of the covenant, the trial judge found that the lessor would not restore the shop to its former condition, and there was no likelihood that it ever would be so restored. There was no evidence that the old shop front was preferable, nor that its restoration would enhance the value of the building. As Lord Goddard CJ, giving the judgment of the court, said ([1950] 1 KB 9 at 15, cf [1949] 2 All ER 243 at 245) '... if the plaintiff obtains this sum as damages she will be enabled to put it into her pocket'.

Lord Goddard CJ later said ([1949] 2 All ER 243 at 246, [1950] 1 KB 9 at 16):

'In our opinion, the general rule as to damages for breach of contract ought to be applied, namely, to ascertain what the damage actually suffered amounts to. A covenant is only a special form of contract and the same rules apply to a breach of covenant as apply to a breach of a simple contract so far as damages are concerned. To apply to this case the rule as to the measure of damage for a breach of contract to deliver up a house in repair is, in our opinion, wrong, for there is no true analogy between the two cases. If a tenant fails to deliver up a house in repair, the landlord must suffer some damage at least so long as the house remains in existence. Instead of getting a house in a perfect state of repair he gets one which is dilapidated. It is

true that he may be able to let the dilapidated house for the same or even a higher rent than he was hitherto getting, but that may be due to market conditions and more especially to the demand for a certain class of premises. A dilapidated house must be worth less than a house in a proper state of repair. Presumably, if the house is sold in good repair, it would fetch more than a house which is out of repair. If a house can be let in good repair, it would ordinarily fetch a higher rent than one that is out of repair. Damage is, therefore, suffered. The measure of damage to be applied was laid down in *Joyner v. Weeks* ([1891] 2 QB 31). In that case the Divisional Court had applied the same rule as is applicable to a case where the lessee has failed to keep the house in repair during the term and ordered the damages to be assessed according to the injury done to the reversion. The Court of Appeal held that in these cases there was a well-defined rule which had become a rule of law that, on a failure to deliver up a house in good repair, the damage was the cost of the work necessary to put it into repair. LORD ESHER, M.R., in giving the judgment referred to the large number of cases in which this rule had been adopted, and said that such an inveterate practice amounted to a rule of law (at 43). He said it was a highly convenient rule, avoiding all the subtle refinements with which the court had been indulged and the extensive and costly inquiries which they would involve. It was a simple and business-like rule, and he was very much inclined to think it was an absolute rule. But, as we have already said, that case must be regarded as proceeding on the footing that the landlord must have suffered damage by the tenant yielding up the house out of repair. We see no ground here for assuming that the landlord in the present case has suffered any damage at all.'

The court therefore decided that the plaintiff was only entitled to nominal damages.

To the same effect was the earlier decision of the Divisional Court in *Wigsell v School for Indigent Blind* (1882) 8 QBD 357. In that case the defendants had purchased a plot of land on which they intended to build a school for the blind, and covenanted to erect a wall between the plot and the adjoining land retained by the vendor. They built neither school nor wall. The vendor sued for damages for breach of the covenant, rather than for specific performance. He claimed as damages the cost of erecting the wall himself, but was held only entitled to a sum equal to the diminution in value of his land as the result of the breach, which was less than the cost of the wall.

The facts of the third case, *Radford v De Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262, a decision of Oliver J, were similar, but the result was different. The plaintiff sold part of the garden of his house with planning permission for the erection of another house. The purchaser covenanted to erect a wall to separate the two plots. Neither the new house nor the wall were built. In an action for damages the question was whether the proper measure was the diminution in the value of the plaintiff's house as a result of the failure to build the wall or the cost of erecting the wall. Having considered earlier authorities, in particular *Wigsell v School for Indigent Blind*, Oliver J held that Mr Radford genuinely intended to build a wall on his own land to divide the two plots. For this reason, he decided, the proper measure of damages was the cost of the work.

On the difference between the decisions in *Wigsell v School for Indigent Blind* and *Radford v De Froberville*, the author of *McGregor on Damages* (14th edn) para 753 comments:

'That contrary results were reached in these two cases is not to be attributed in any way to the separation of a century but stems from two points of difference between them which are themselves related. In the earlier case, the plaintiffs could have claimed, but chose not to claim, specific performance, and it seems to have been accepted on all sides that they had no intention themselves of building the wall, it being no longer really required as the asylum project had been abandoned. In the later case, a claim for specific performance would have been futile as the property sold had been resold to a third party against whom the covenant, being of a positive nature, was unenforceable, and the court was convinced that the plaintiff had every intention of building the wall, and expending any damages awarded in

a doing so. Of these two differences it is clearly the second which is the key one—there can be no justification in awarding damages to do something which is not going to be done—but the existence of the first difference, which is capable of objective proof, gives some assistance in establishing whether the second difference, of a more subjective nature, is also present. For the failure to claim specific performance where it is not likely to be barred, whether by the intervention of a third party or for some other reason, may indicate a certain disinterest in the performance of the covenant.'

b *James v Hutton* [1949] 2 All ER 243, [1950] 1 KB 9, is not directly in point in the present case, though the passage I have quoted from the judgment of Lord Goddard CJ can be applied by analogy. The other two decisions are not binding on us, but in my view the approach adopted by Oliver J in *Radford v De Froberville* was correct. I thus conclude that if the plaintiff in the present case can show (i) that he has suffered some damage as a result of the defendant's breach of covenant and (ii) that, if he is awarded substantial damages, he intends to use the money to pay for the work which was required by the covenant, then the proper measure of damages is the cost of that work.

c The judge held that he was not satisfied that Mr Dean had suffered any damage. In reaching this conclusion, I believe that he adopted an argument which counsel for the defendant advanced before us, namely that what the plaintiff wanted was a dry cellar, that the evidence showed that the prevention of water leaking from the patio would not make the cellar completely dry, and thus the plaintiff had suffered no damage. In my view this argument is fallacious, and with respect to the judge he fell into error in adopting it, perhaps misled by the amendment of the statement of claim and the rejection by the expert witnesses of 'waterproofing' the patio as a suitable solution.

d The covenant required the vendor to carry out work to prevent water leaking from the patio into the cellar. The evidence established, and the judge accepted, that if this work had been done a substantial proportion, something less than 70%, of the total penetration of water would have been prevented. In my judgment the plaintiff has suffered damage as a result of the defendant failing to carry out this work.

e Has the plaintiff proved that he genuinely intends to carry out the work required by the covenant? During the course of giving evidence he gave a firm undertaking that, if damages were awarded to him, he would carry out the work of tanking the cellar internally. It is clear that tanking the cellar would be works which would prevent water leaking from the patio into the cellar in accordance with the covenant. Thus in my view the plaintiff did satisfy the conditions which entitled him to claim as damages the cost of carrying out work in compliance with the covenant.

f There remains, however, a question as to the amount of damages. Whilst, as I have said, tanking the cellar internally would prevent water leaking from the patio into the cellar, the work of waterproofing the patio itself would also achieve that objective. The evidence suggests that the latter would be less expensive than the former. Thus on general principle the plaintiff is only entitled to damages equal to the cost of the less expensive solution.

g The judge expressly accepted the evidence called for the plaintiff as to the cost of internal tanking, namely £10,580. Unfortunately, he made no finding as to the cost of work to the patio itself. For this work Mr Gould gave in evidence estimates (not based on a contractor's quotation) which varied between £7,525 (in total) and £8,750. The evidence for the defendant on this came from Mr Heywood, a structural engineer, who had only inspected The Hoploft a short time before he gave evidence. His figure was

j £3,960 plus value added tax, which totals £4,554. Neither party wishes us to send this issue back for decision by the judge or a master. Doing the best I can on the material before us, I would assess the cost of the works necessary to waterproof the patio at £7,500.

For the reasons I have given, I would therefore allow the appeal and substitute an award of £7,500 damages.

KERR LJ. I agree that this appeal should be allowed and with the order proposed by Glidewell LJ, but in some respects for slightly different reasons. a

The judge clearly took the view that the plaintiff was not entitled to substantial damages because the performance of the defendant's contractual obligation would only have reduced the total percolation of water into the cellar by about 30%. There had been evidence that the plaintiff had intended to use the cellar as a miniature rifle range or as a games room, and the judge appears to have concluded that this measure of relief from dampness, puddles or worse would still not have enabled the cellar to be suitable for any such purpose. But that does not entail the conclusion that the plaintiff is only entitled to nominal damages on the ground that he has effectively suffered no damage at all. Performance of the contractual obligation to render the patio watertight by sealing it off from the cellar would have made the cellar substantially less wet or damp, and to that extent a better and more usable space than if water continued to percolate from the patio vertically as well as from the surrounding earth laterally. The position might well have been different if the defendant had shown that performance of the contractual obligation would have served no purpose at all, because the cellar would have been unusable for any purpose at any time in any event. But this was not suggested and would have been unarguable, since the evidence showed that the cellar had in fact been used by the defendant for some purposes, despite water percolation from the patio as well as the sides. b
c
d

These are my reasons for concluding that the appeal must be allowed. But I should like to add some brief comments on two other aspects which were raised in the course of the argument.

The first concerns the measure of the damages recoverable by the plaintiff. The evidence showed that (a) sealing the patio would have cost less than internal 'tanking' but (b) the sensible course, in all the circumstances, was nevertheless to adopt the latter alternative, because this would have solved the problem entirely, whereas the former alternative would (on the judge's findings) only have effected an improvement of the order of 30%. But in my view these considerations are irrelevant to the measure of damages to which the plaintiff is entitled. The defendant did not undertake to make the cellar waterproof but merely to seal it off from the patio. The fact that the latter operation would have achieved much less than the former is on any view irrelevant to this extent: in no event could the plaintiff recover more than the cost of sealing the patio, since this is all that the defendant had undertaken to do. That is my view of the construction of special condition G(c) in the circumstances of this case. I therefore do not think that in this case it is necessary to resort to the principle that the damages must reflect the solution which is most favourable to the defendant. e
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The position would in my view only have been different if the cost of sealing the patio had been greater than that of 'tanking' the cellar. Since the latter would have been a much more effective way of improving the cellar, which was the sole object of the defendant's contractual obligation in question, then the plaintiff's entitlement to damages would have been limited to the lower cost of 'tanking'. The reason is that he would then have been bound to mitigate his loss by adopting this cheaper and more effective alternative in order to achieve the objective which the broken contractual obligation had been designed to achieve. In that event he could not have insisted, unreasonably and indeed capriciously, on the more expensive and less effective alternative of sealing the patio. g
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The second aspect concerns the authorities and the undertaking given by the plaintiff in this case to which Glidewell LJ has referred. In my view the test which distinguishes cases such as *Wigsell v School for Indigent Blind* (1882) 8 QBD 357 and *James v Hutton* [1949] 2 All ER 243, [1950] 1 KB 9 on the one hand from *Radford v De Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262 on the other is merely the question whether or not the plaintiff can show some economic loss as the result of the defendant's breach, ie a real loss which is properly to be assessed in terms of money and which therefore justifies an award j

of substantial, as opposed to merely nominal, damages. This was not the position in the earlier of these two cases, but it was the reality in the latter.

- a The present case falls clearly into the latter category, because the defendant's failure to improve the relative dryness of the cellar by his failure to seal the patio involved a real economic loss to the plaintiff. The cellar was at all times a usable part of the plaintiff's property, and the degree of its usefulness depended on what was done and expended to improve its dryness. In my view, that is all that the plaintiff needed to establish, as he
- b has, to entitle him to substantial damages, albeit limited to the extent discussed above. I do not accept that he has to go further by anything in the nature of an undertaking that he will in fact use any damages which he may recover in order to improve the cellar. Thus, my recollection is that we expressly released the plaintiff from an undertaking to this effect which he had given voluntarily at the trial, and that on appeal we merely said that we would take into account, so far as relevant, the plaintiff's proffered expression of
- c his sincere intention to use in this way any damages which he might recover. In my view, however, even that was unnecessary. It would have made no difference if he had said that he intended to sell the property or that it was uncertain whether he would do so or not. Nor would it make any difference if, having recovered £7,500 on this appeal, he were now to change his mind and decide, for whatever reason, not to spend anything on the improvement of the cellar. In my view all these matters are irrelevant in a case such
- d as the present, because the plaintiff has established a real economic loss by reason of the fact that the cellar of his property is substantially wetter, and therefore less usable or useful, than it would have been if the defendant had performed the contract. To that extent the plaintiff's property is clearly less valuable, so as to entitle him to damages (in this case properly assessable at £7,500 on the best that we can do with the evidence) whether he intends to use the cellar as it is, or to sell the property with the cellar as it is,
- e or to spend the damages on improving it.

SIR GEORGE WALLER. I agree that this appeal should be allowed. The evidence set out in the judgment of Glidewell LJ shows that if entry of water from the patio had been prevented the cellar would have been less damp to the extent of at least 30% than in fact it was. The fact that it would still have been damp does not mean that no damage had

f been suffered. Damage was suffered because the cellar was more damp than it would have been if the contract had been carried out. I agree with Kerr and Glidewell LJ that the judge was in error in finding that the damage was only nominal.

I agree with Glidewell LJ that the plaintiff is only entitled to the less expensive solution and that this is represented by the figure of £7,500.

- g *Appeal allowed. Leave to appeal to House of Lords refused.*

Solicitors: *Gateley Wareing & Co*, Birmingham (for the plaintiff); *Dean Jordan & Co*, Worksop (for the defendant).

Wendy Shockett Barrister.

Pickstone and others v Freemans plc

COURT OF APPEAL, CIVIL DIVISION

PURCHAS, NICHOLLS LJJ AND SIR ROUALEYN CUMMING-BRUCE

26, 27 JANUARY, 25 MARCH 1987

Employment – Equality of treatment of men and women – Equal pay for equal work – Equal pay for work of equal value – Inequality of pay – Female employee employed as warehouse operative – Female employee's work of equal value to that of male warehouse checker – Female employee paid less than male checker but the same as male operative engaged on like work – Whether woman entitled to equal pay for work of equal value when a man was paid the same as her for like work – Whether EEC equality provisions having direct application in United Kingdom – Equal Pay Act 1970, s 1(2) – EEC Treaty, art 119 – EC Council Directive 75/117, art 1.

The applicants were five women employed as warehouse operatives by the respondent employer. They were paid the same as male warehouse operatives but claimed that their work was of equal value to that done by a male warehouse checker who was paid more than they were. The applicants complained to an industrial tribunal, contending that they were entitled to equal pay with the male warehouse checker either under s 1(2)(c)^a of the Equal Pay Act 1970, because they were performing work of 'equal value' to his, or under art 119^b of the EEC Treaty, which required men and women to receive 'equal pay for equal work'. They submitted that the principle of equal pay, as clarified by art 1^c of EC Council Directive 75/117, entitled men and women not only to equal pay for the same work but also to equal pay for work to which equal value was attributed irrespective of whether there was another person of the same sex currently engaged in the same work as the person making the claim. The employer contended that since the applicants were employed on 'like work' for the same pay as that of male warehouse operatives, within s 1(2)(a) of the 1970 Act, and since a claim could only be made under s 1(2)(c) if the applicant's work was 'not . . . work in relation to which [s 1(2)(a) or (b)] applies', the applicants were not entitled to claim under s 1(2)(c). The employers further contended that the applicants could not invoke art 119 because s 1(2) was clear and unambiguous and art 119 was not directly applicable, and that it was only if there was no 'like work' to be compared that a comparison could be made with work of 'equal value'. The industrial tribunal dismissed the complaint and on appeal by the applicants its decision was upheld by the Employment Appeal Tribunal. The applicants appealed to the Court of Appeal.

Held – (1) Section 1(2)(c) of the 1970 Act was clear and unambiguous and only applied if a female applicant was employed on work to which para (a) or (b) of s 1(2) did not apply. Since the applicants' work fell within para (a) because they were 'employed on like work with a man in the same employment', i.e. warehouse operatives, they could not bring a claim under s 1(2)(c) that they were doing work of 'equal value' to that of a man in the same employment, i.e. a male warehouse checker. The claim under s 1(2)(c) accordingly failed (see p 759 d e, p 765 b c, p 769 e f and p 776 g, post).

(2) However, under art 119 of the EEC Treaty, which was directly applicable in the United Kingdom and prevailed over conflicting United Kingdom legislation, 'equal pay for equal work' meant not only equal pay for the same work but also equal pay for work to which equal value was attributed, since like work and work of equivalent value were not mutually exclusive concepts but integral parts of the same concept. Accordingly, a

a Section 1(2), so far as material, is set out at p 758 h to 759 b, post

b Article 119 is set out at p 760 a b, post

c Article 1 is set out at p 760 g, post

- a woman employed on work which was of equal value to the work of a man doing another job for the employer and for which he was paid more was not barred from claiming equal pay with him by reason of the fact that another man was doing the same work as she was for the same pay. It followed that the industrial tribunal had been wrong to dismiss the applicants' complaint. The appeal would therefore be allowed and the complaint remitted to the tribunal to be heard on the merits (see p 761 *efj* to p 762 *abfg*, p 763 *cd*, p 764 *ab*, p 766 *d* to *f*, p 771 *gh*, p 775 *e* to p 776 *afh* to p 777 *c*, post);
- b *Defrenne v Sabena* Case 43/75 [1981] 1 All ER 122, *Macarthy's Ltd v Smith* Case 129/79 [1981] 1 All ER 111 and *Worringham v Lloyds Bank Ltd* Case 69/80 [1981] 2 All ER 434 applied.

Notes

- c For equal treatment of men and women regarding terms and conditions of employment, see 16 Halsbury's Laws (4th edn) para 767 and 52 *ibid* paras 21.11–21.12, and for cases on the subject, see 20 Digest (Reissue) 579–595, 4466–4523.
- For the direct applicability of Community law, see 51 Halsbury's Laws (4th edn) paras 3.41–3.48.
- For the Equal Pay Act 1970, s 1, see 16 Halsbury's Statutes (4th edn) 188.
- d For the EEC Treaty, art 119, see 42A Halsbury's Statutes (3rd edn) 779.

Cases referred to in judgments

- Ainsworth v Glass Tubes and Components Ltd* [1977] ICR 347, EAT.
- Bulmer (HP) Ltd v J Bollinger SA* [1974] 2 All ER 1226, [1974] Ch 401, [1974] 3 WLR 202, CA.
- Defrenne v Sabena* Case 43/75 [1981] 1 All ER 122, [1976] ECR 455, CJEC.
- e *EC Commission v UK* Case 61/81 [1982] ECR 2601, CJEC.
- Garland v British Rail Engineering Ltd* Case 12/81 [1982] 2 All ER 402, [1983] 2 AC 751, [1982] 2 WLR 918, CJEC and HL.
- Jenkins v Kingsgate (Clothing Productions) Ltd* Case 96/80 [1981] 1 WLR 972, [1981] ECR 911, CJEC; subsequent proceedings [1981] 1 WLR 1485, EAT.
- f *Macarthy's Ltd v Smith* Case 129/79 [1981] 1 All ER 111, [1981] QB 180, [1980] 3 WLR 929, CJEC and CA.
- O'Brien v Sim-Chem Ltd* [1980] 2 All ER 307, [1980] 1 WLR 734, CA; *rvsd* [1980] 3 All ER 132, [1980] 1 WLR 1011, HL.
- Worringham v Lloyds Bank Ltd* Case 69/80 [1981] 2 All ER 434, [1981] 1 WLR 950, [1981] ECR 767, CJEC; subsequent proceedings [1982] 3 All ER 373, [1982] 1 WLR 841, CA.

g Cases also cited

- Customs and Excise Comrs v ApS Samex (Hanil Synthetic Fiber Industrial Co Ltd, third party)* [1983] 1 All ER 1042.
- EC Commission v Denmark* Case 143/83 [1986] 1 CMLR 44, CJEC.
- Johnston v Chief Constable of the Royal Ulster Constabulary* Case 222/84 [1986] 3 All ER 135, [1987] QB 129, CJEC.
- h *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* Case 152/84 [1986] 2 All ER 584, [1986] QB 401, CJEC.
- Rainey v Greater Glasgow Health Board* [1987] 1 All ER 65, [1986] 3 WLR 1017, HL.
- Shields v E Coomes (Holdings) Ltd* [1979] 1 All ER 456, [1978] 1 WLR 1408, CA.
- Sorbie v Trust Houses Forte Hotels Ltd* [1977] 2 All ER 155, [1977] QB 931, EAT.
- j *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948, [1978] 1 WLR 231, HL.

Appeal

The applicants, Mrs I Pickstone, Mrs A Hepburn, Mrs P J Woolner, Mrs C E Fyffe and Mrs R Roberts, appealed against the judgment of the Employment Appeal Tribunal (Garland J, Mr O O'Brien and Mrs M E Sunderland) given on 19 June 1986, dismissing

their appeal from a decision of an industrial tribunal (chairman Mr M B Scholfield) on 13 December 1985 dismissing their application for equal pay for work of equal value while employed by the respondents, Freemans plc (the employers). The facts are set out in the judgment of Nicholls LJ.

David Pannick for the applicants.

Christopher Carr QC and *Patrick Elias* for the employers.

Cur adv vult

25 March. The following judgments were delivered.

NICHOLLS LJ (giving the first judgment at the invitation of Purchas LJ). This appeal concerns equal pay in cases of work of 'equal value'. Shortly stated, the question raised is whether a woman employed on work which is the same as that of one man but which is also of equal value with the work of another man, can claim equal pay with that other man where she is already being paid as much as the man engaged on the same work as herself. Both the industrial tribunal and the Employment Appeal Tribunal have said No in answer to that question. We were told that there are many other claims before industrial tribunals awaiting the outcome of this appeal.

The five applicants, Mrs Pickstone and four of her female colleagues, are employed by Freemans plc (the employers), a mail order company, as 'warehouse operatives'. They contend that their work is of equal value to that of a Mr Phillips, who is employed by the employers as a 'checker warehouse operative'. They are not paid as much as he is. So they made a complaint to an industrial tribunal sitting at Cambridge. Before that tribunal the employers contended that men as well as women were employed as warehouse operatives, and paid equally, and that men and women were also employed as checker warehouse operatives. The employers submitted that in those circumstances it was not open to the applicants as warehouse operatives, paid equally with their male colleagues, to claim equality of pay with Mr Phillips, a checker warehouse operative. Issue was joined before the industrial tribunal on that submission of law, without the facts being investigated and without any formal admission by the applicants that there are male employees doing like work to them. Thus, in effect, the industrial tribunal heard and decided a preliminary question of law on assumed facts.

The applicants base their claims on s 1(2)(c) of the Equal Pay Act 1970 and also on art 119 of the EEC Treaty.

The Equal Pay Act 1970

Section 1(1) of the Equal Pay Act 1970 implies an equality clause into every contract of employment of a woman which does not already include such a clause. The nature and effect of an equality clause are set out in s 1(2). An equality clause has a similar effect in each of the three circumstances specified in paras (a), (b) and (c) of s 1(2). Accordingly, for convenience I will omit sub-paras (i) and (ii) from paras (b) and (c) when setting out the material parts of s 1(2), as follows:

'An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that—(a) where the woman is employed on like work with a man in the same employment—(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term; (b) where the woman is employed on work rated as equivalent with that of a man in the same employment [sub-paras (i) and (ii) follow as in para (a)]; (c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment [sub-paras (i) and (ii) follow as in para (a)].'

Like work (under para (a)) means work of the same or of a broadly similar nature where any differences between what the woman does and what the man does are not of practical importance in relation to terms and conditions of employment. Work is only rated as equivalent (under para (b)) if the woman's and the man's jobs have been rated as equivalent on a job evaluation study.

The employers' argument, which was accepted by the industrial tribunal and the Employment Appeal Tribunal, is straightforward. Paragraph (c), expressly and unambiguously, does not apply where the woman is employed on work to which either para (a) or para (b) applies. Paragraph (c) applies only where the woman is employed on work 'not being work in relation to which paragraph (a) or (b) above applies'. Hence, it was submitted, if the woman is in fact employed on like work with a man (meaning any man) in the same employment, para (a) applies to her case whether she likes it or not, and she is thereby excluded from the scope of para (c). Likewise with para (b).

The applicants' argument is that the exclusionary words in para (c) ('not being work' etc) are ambiguous, and that one of the possible meanings of the word 'applies' is applies in the sense that the woman is not employed on like work with, or on work rated as equivalent with that of, a man in the same employment *with whom the woman is comparing herself*. It is for the applicant to choose the man with whose work she wishes to compare hers (see *Ainsworth v Glass Tubes and Components Ltd* [1977] ICR 347), and Parliament, when adding para (c) to s 1(2) in 1983, cannot have intended to go against that principle and compel a woman to compare herself with a man under para (a). In the present case the applicants are doing what traditionally has been 'women's work' and they should be free to have recourse for comparison to other work of equal value to theirs.

In reply counsel for the employers submitted that this construction is untenable. The scheme of the section is to imply an equality clause into the woman's contract, with immediate effect, viz with effect from the inception of the woman's contract. Where a woman is employed on like work with a man, para (a) applies automatically, with the consequential, immediate, deemed modification of the relevant term in the woman's contract. Paragraph (a) applies in this way, irrespective of whether any complaint is made to the industrial tribunal. Hence, if a complaint is made and is successful, the woman has a claim not merely for the future: she can claim arrears of remuneration or damages (s 2(1)). But, continued counsel's submission, the construction of counsel for the applicants is inconsistent with this, because on counsel for the applicants' construction para (a) would not apply (and, indeed, none of the paragraphs would apply) unless and until the woman selects a male comparable.

Argument was also addressed to us on the mischief which s 1(2)(c) was intended to cure. This requires a consideration of Community law, because it was in response to a decision of the Court of Justice of the European Communities that s 1(2)(c) was added to the Equal Pay Act 1970.

Community law: EEC Treaty, art 119

The United Kingdom became a member of the European Economic Community on

1 January 1973, and the EEC Treaty was introduced into English law by s 2 of the European Communities Act 1972. Article 119 is in these terms:

'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job.'

This article had two objects: firstly, in the economic field, to avoid the situation in which undertakings established in states which had implemented the principle of equal pay would suffer a disadvantage in competition within the Community with undertakings established in states which had not then eliminated pay discrimination against women workers; secondly, in the social field, 'by common action, to ensure social progress and seek the constant improvement of the living and working conditions of [the member states'] peoples' (see *Defrenne v Sabena* Case 43/75 [1981] 1 All ER 122 at 133, [1976] ECR 455 at 472).

In 1975, concerned at the uneven progress being made by member states in the implementation of art 119, the EC Council adopted a directive, Directive 75/117 (which it will be convenient to call 'the equal pay directive'). The material parts of that directive read:

'THE COUNCIL OF THE EUROPEAN COMMUNITIES . . . Whereas implementation of the principle that men and women should receive equal pay contained in Article 119 of the Treaty is an integral part of the establishment and functioning of the common market; Whereas it is primarily the responsibility of the Member States to ensure the application of this principle by means of appropriate laws, regulations and administrative provisions . . . Whereas differences continue to exist in the various Member States despite the efforts made to apply the resolution of the conference of the Member States of 30 December 1961 on equal pay for men and women and whereas, therefore, the national provisions should be approximated as regards application of the principle of equal pay, HAS ADOPTED THIS DIRECTIVE:

Article 1

The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. In particular, where a job classification is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

Article 2

Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process after possible recourse to other competent authorities . . .

Article 4

Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual

contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.'

a

As authoritatively decided by the Court of Justice of the European Communities, the first sentence of art 1 of the equal pay directive restates the principle of equal pay set out in art 119 of the EEC Treaty, but art 1 'in no way alters the content or scope of that principle as defined in the Treaty'. The main purpose of art 1 of the directive was to facilitate the practical application of that principle (see *Jenkins v Kingsgate (Clothing Productions) Ltd* Case 96/80 [1981] 1 WLR 972 at 984, [1981] ECR 911 at 927).

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Thus, as restated in art 1 of the equal pay directive, the principle embodied in art 119 of the EEC Treaty is that men and women should receive equal pay for equal work, viz for the same work or for work to which equal value is attributed. What, so far, the European Court has not considered (indeed, we were referred to no decision of any court where the point has been considered) is the application of that principle in the case posed by the question stated at the beginning of this judgment. In the present proceedings the Employment Appeal Tribunal decided, for a different reason to which I shall come, that Community law was not applicable, and did not express a view on what the position would be under Community law if it were applicable. The industrial tribunal were bolder: in their view the equal pay directive envisages that the first matter to be considered is 'the same work': 'It is only if there is no same work that one goes to the alternative "work to which equal value is attributed".'

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In this court counsel for the applicants submitted that the principle of equal pay for equal work enunciated in art 119, as restated or clarified in art 1 of the equal pay directive, entitles men and women to equal pay for the same work and (likewise) to equal pay for work to which equal value is attributed. They are entitled to equal pay in both those instances, and their entitlement to equal pay for work of equal value is not dependent on there being no person of the other sex currently engaged in the same work as the person making the claim. If there is a man, or if there are men, doing the same work but being paid no more than the woman, that will be evidence, whose weight will depend on all the circumstances, that the payment of a higher wage to other men who are doing work which is different but of no greater value is due to a material factor other than the difference in sex.

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The argument in favour of the narrower construction of art 119 is that it makes sense for recourse not to be had to the less precise and much more difficult yardstick of work of 'equal value' when there is to hand the more precise and less controversial one of 'same work'. The second limb of art 1 of the equal pay directive (work to which equal value is to be attributed), preceded as it is by the disjunctive 'or', is applicable only when the first limb (same work) is not in point. If the first limb is applicable, so that there is a man doing the same work as the woman, but the woman is entitled none the less to compare herself to another man and his work, she would, as the industrial tribunal said in this case, 'have wandered into the territory of job evaluation'. The principle of equal pay for men and women doing equal work is intended to avoid discrimination on the grounds of sex, not to have effect on disputed differentials unrelated to sex. Moreover, the basis of the decision of the European Court in *EC Commission v UK* Case 61/81 [1982] ECR 2601 at 2617 was that the United Kingdom had failed to take steps to provide a remedy in cases other than like work and work covered by voluntary job classification schemes: 'equal value' was only needed as a supplement, a fall-back alternative.

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In my view the submission of counsel for the applicants, in support of the first of these two interpretations of art 119, is correct. Article 119 enshrines a broad, general principle: equal pay for equal work. The equal pay directive makes clear that in this context equal work embraces work of equal value as well as work which is the same. I can see no justification for implying into this general principle, whereunder equal work includes

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both these categories, a rigid and inflexible limitation, to the effect that, although a woman is entitled to compare herself with a man doing work of equal value, she is only so entitled if and so long as no man is doing the same work as herself, and that whenever and for so long as there is a man doing the same work the woman cannot make that comparison, even if the difference in pay is attributable solely to grounds of sex. It makes the presence per se of one man doing the same work, which in some cases might be wholly fortuitous or even, possibly, a situation contrived by an unscrupulous employer, a decisive factor, regardless of all the other circumstances of the case.

Although this precise point has not been considered by the European Court, support for the broad approach I have adopted to the interpretation of art 119 can be obtained from the decision of the European Court in *Macarthy's Ltd v Smith* Case 129/79 [1981] 1 All ER 111, [1981] QB 180. In that case a woman took up a post, after an interval of four months, which had been held by a man. She was paid a lower salary than he had been paid. She claimed to be entitled to the same salary as her predecessor. The European Court held that the crucial question was whether there was a difference in treatment between a man and a woman performing 'equal work' within art 119. The court said ([1981] 1 All ER 111 at 118-119, [1981] QB 180 at 198):

'11... The scope of that concept, which is entirely qualitative in character in that it is exclusively concerned with the nature of the services in question, may not be restricted by the introduction of a requirement of contemporaneity.'

12. It must be acknowledged, however, that, as the Employment Appeal Tribunal properly recognised, it cannot be ruled out that a difference in pay between two workers occupying the same post but at different periods in time may be explained by the operation of factors which are unconnected with any discrimination on grounds of sex. That is a question of fact which it is for the court or tribunal to decide.'

Thus 'equal work' involves a comparison between the work (the nature of the services) performed by the woman and the work done by the man, and in making that comparison it is not essential that the man is still doing that work or that he was ever doing it at the same time as the woman. Absence of contemporaneity does not prevent the comparison being made, although such absence is material when considering, as a question of fact, whether the reason for the difference in pay is discrimination on grounds of sex. I do not see how this interpretation of art 119 permits of the conclusion that none the less contemporaneity is of the essence in relation to work of equal value, in that a woman is entitled to equality of pay with a man whose work is of equal value but only so long as contemporaneously there is no man doing the same work as herself.

Community law: direct applicability

Before us, although he was not prepared to accept counsel for the applicants' interpretation of art 119 as correct, counsel for the employers concentrated most of his fire in a different direction. He submitted that, even if the applicants' interpretation of art 119 were correct, the applicants could still not succeed with their alternative claim under art 119, because in equal value cases art 119 is not directly applicable and enforceable in this country. In adopting this approach counsel for the employers was following the same course as the Employment Appeal Tribunal in the present proceedings, who applied the decision of this court in *O'Brien v Sim-Chem Ltd* [1980] 2 All ER 307, [1980] 1 WLR 734. So I turn next to the question of direct applicability.

It is now well established that, where art 119 of the EEC Treaty applies directly to the facts of a case, without the need for more detailed implementing measures on the part of member states or of the Community, the law enacted in that article is binding on the English court, and the individual has the right to apply to the English court for relief (see

for example *O'Brien v Sim-Chem Ltd* [1980] 2 All ER 307 at 316, [1980] 1 WLR 734 at 745 per Cumming-Bruce LJ).

Thus the question is: what are the circumstances in which art 119 does, or does not, apply directly? In *Defrenne v Sabena* [1981] 1 All ER 122 at 134-135, [1976] ECR 455 at 473-476 (paras 21-24, 40) the European Court held that art 119 was directly applicable in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private. That was in 1976.

Subsequently, in *O'Brien v Sim-Chem Ltd* this court held, in short, that equivalent work (in contrast to like work) was only brought within the scope of the equal pay principle in art 119 of the EEC Treaty by art 1 of the equal pay directive, and that, accordingly, art 119 itself had no direct effect in respect of equivalent work. Nor did art 1 of the equal pay directive have direct effect, for it was addressed to the national legislatures for them to implement the equal pay provisions where the work was 'equivalent' but not 'like'.

O'Brien's case came before the Court of Appeal in 1979. Since then Community jurisprudence has moved on. The European Court has authoritatively clarified the effect of art 1 of the equal pay directive, and also the position regarding direct enforceability of rights under art 119, and I conceive that on these points of Community law it is the duty of this court to give effect to those later decisions of the European Court. In March 1981, as already mentioned, the European Court held that art 1 of the equal pay directive did not alter the content or scope of the principle of equal pay outlined in art 119 (see *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] 1 WLR 972 at 984, [1981] ECR 911 at 927). Earlier in the same month, in *Worringham v Lloyds Bank Ltd* Case 69/80 [1981] 2 All ER 434, [1981] 1 WLR 950, the European Court had to consider whether art 119 or art 1 of the equal pay directive conferred enforceable Community rights on individuals where contributions were made by an employer bank to two staff retirement benefit schemes, there being one scheme for men and another for women. The court held that the contributions paid by the employer in the name of the employee were 'pay' within the meaning of art 119. Accordingly, no question arose regarding art 1 of the equal pay directive. On direct applicability the court said ([1981] 2 All ER 434 at 447, [1981] 1 WLR 950 at 969):

'23. As the court has stated in previous decisions (*Defrenne v Sabena* [1981] 1 All ER 122, [1976] ECR 455 and *Macarthy's Ltd v Smith* [1981] 1 All ER 111, [1981] QB 180) art 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application. Among the forms of discrimination which may be thus judicially identified, the court mentioned in particular, cases where men and women receive unequal pay for equal work carried out in the same establishment or service, public or private. In such a situation the court is in a position to establish all the facts enabling it to decide whether a woman receives less pay than a man engaged in the same work or work of equal value.' (My emphasis.)

The court concluded ([1981] 2 All ER 434 at 447, [1981] 1 WLR 950 at 970):

'27. In this case the fact that contributions are paid by the employer solely in the name of men and not in the name of women engaged in the same work or work of equal value leads to unequal pay for men and women which the national court may directly establish with the aid of the pay components in question and the criteria laid down in art 119 of the Treaty.

28. For those reasons, the reply to the third question should be that art 119 of the Treaty may be relied on before the national courts and that these courts have a duty

to ensure the protection of the rights which this provision vests in individuals . . .'
(My emphasis.)

In my view that decision covers the present case. The five applicants and Mr Phillips work in the same establishment, and I can see no relevant distinction between the banking employees in *Worringham's* case and the applicants in the present case with regard to the ability of the court to determine, without further national or Community measures, whether a woman was or was not engaged in work of equal value.

Counsel for the employers relied strongly on the decision of the European Court in July 1982 in *EC Commission v UK* [1982] ECR 2601. In deciding that the United Kingdom had failed to introduce into its legal system in implementation of the equal pay directive such measures as were necessary to enable employees to pursue a claim in respect of work of equal value where no job classification scheme existed, the court said (at 2616):

'... there is at present no means whereby a worker who considers that his post is of equal value to another may pursue his claims if the employer refuses to introduce a job classification system.'

Counsel for the employers submitted that that is inconsistent with equal value claims being directly enforceable by individuals. I agree that, read literally, this passage supports his submission, but I am not persuaded that the court's conclusion regarding the United Kingdom's breach of art 1 of the equal pay directive is inconsistent with the same court's decision in *Worringham* regarding the direct application of art 119. Even where the national legislation does no more than reproduce the Community right, explicit national legislation, with appropriate procedural rules and regulations, can have a practical usefulness for claimants and their advisers not possessed by a directly enforceable Community right which lacks that convenient clothing.

Conclusion on s 1(2)(c) of the Equal Pay Act 1970

I broke off from considering the construction of the exclusionary words in s 1(2)(c) ('not being work' etc) to look at Community law in order to identify the mischief which the introduction of para (c) into s 1(2) of the Equal Pay Act 1970 was intended to cure. The mischief was the omission (save for the cases covered by para (b)) of any provision in the 1970 Act for equal pay in cases of work of equal value. The European Court expressed its conclusion in *EC Commission v UK* [1982] ECR 2601 at 2617 as follows:

'14. Accordingly, by failing to introduce into its national legal system in implementation of the provisions of [the equal pay directive] such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay for men and women for work to which equal value is attributed and for which no system of job classification exists to obtain recognition of such equivalence, the United Kingdom has failed to fulfil its obligation under the Treaty.'

Paragraph (c) was added to s 1(2) as Parliament's legislative response to that decision. Moreover, the amendment to s 1(2) was made by means of a statutory instrument (the Equal Pay (Amendment) Regulations 1983, SI 1983/1794) under a statutory power enabling provision to be made for the purpose of implementing any Community obligation of the United Kingdom (s 2(2) of the European Communities Act 1972). Thus the link between s 1(2)(c) and art 119 of the EEC Treaty is indeed a close one.

If the view expressed above on the interpretation of art 119 is correct, and if the employers' argument on the construction of s 1(2)(c) is correct, two consequences would seem to follow inescapably. The first is that s 1(2)(c) of the 1970 Act would, in part, have failed to remedy the mischief which it must be taken to have been intended to cure, in

a that the Act still would not provide a remedy in all cases of work of equal value: it would provide a remedy only in those cases where currently no man is engaged on the same work. The second consequence, having regard to the reasoning of the European Court in *EC Commission v UK*, would be that in this respect the United Kingdom would, apparently, have still not wholly fulfilled its obligations under the EEC Treaty and the equal pay directive.

b Needless to say, I am extremely reluctant to construe s 1(2)(c) in a way that would have these consequences. None the less I have found the employers' arguments on the meaning of the exclusionary words in s 1(2)(c) cogent to the extent that, indeed, I have found myself driven to the conclusion that those words are not ambiguous and are not fairly capable of the meaning submitted by counsel for the applicants. It would be incompatible with the scheme of an equality clause introduced by s 1 for the exclusionary words in para (c) to have the meaning or effect submitted by counsel for the applicants. In my judgment, on the assumed facts, the applicants do not fall within s 1(2)(c).

c There is one further point I should add here. It concerns s 2(4) of the European Communities Act 1972, the material part of which provides that 'any enactment passed or to be passed . . . shall be construed and have effect subject to the foregoing provisions of this section'. The 'foregoing provisions' of s 2 include a provision, in s 2(1), that all such rights and obligations created or arising by or under the Treaties, and all such remedies provided for by or under the Treaties, as in accordance with the Treaties, are without further enactment to be given legal effect in the United Kingdom, shall be recognised and available in law, and be enforced accordingly.

d In *Garland v British Rail Engineering Ltd* [1982] 2 All ER 402 at 415, [1983] 2 AC 751 at 771 Lord Diplock mentioned, and left open, the possibility that—

e 'having regard to the express direction as to the construction of enactments "to be passed" which is contained in s 2(4) [of the European Communities Act 1972], anything short of an express positive statement in an Act of Parliament passed after 1 January 1973 that a particular provision is intended to be made in breach of an obligation assumed by the United Kingdom under a Community treaty would justify an English court in construing that provision in a manner inconsistent with f a Community treaty obligation of the United Kingdom however wide a departure from the prima facie meaning of the language of the provision might be needed in order to achieve consistency.'

g In the present case no argument was addressed to us on this point, it being common ground between counsel that Community law was material on the construction of s 1(2)(c) only if what I have called the exclusionary words in s 1(2)(c) are ambiguous.

h Had this s 2(4) point been likely to affect the outcome of the present appeal, I apprehend that it would have been necessary, before delivering judgment, to have invited the parties to consider whether they wished to return to the court to make submissions on this point. However, as at present advised, I do not think this point would assist either party. To construe the exclusionary words in s 1(2)(c) of the Equal Pay Act 1970 as having the meaning I have stated above does not encroach on any directly enforceable rights which women (or men) have under art 119 of the EEC Treaty. There is nothing in the Equal Pay Act 1970 which expressly or impliedly negatives, or purports to negative, any such Community rights. Those rights remain enforceable in the English court. In that respect this construction of s 1(2)(c) is not in conflict with art 119.

j Where, on this construction of s 1(2)(c) of the 1970 Act, there is a conflict is that the effect of the exclusionary words is to limit the ambit of s 1(2)(c) in such a way that the paragraph does not cover all the cases which, in accordance with art 119, it should cover. Section 1(2)(c) fails to confer a statutory right on all employees endowed with equal pay

rights under art 119. But, given that the exclusionary words are unambiguous and are not reasonably capable of the meaning which would carry out the United Kingdom's treaty obligations in this field, for my part, as at present advised, I have great difficulty in seeing how the effect of s 2(4) of the European Communities Act 1972 in such a case can be to require the English court, nevertheless, to ascribe some other, artificial meaning to those words. a

Overall conclusion b

It remains for me to note that counsel for the applicants submitted that if he was wrong on the construction of the 1970 Act, so that the appeal falls to be determined according to the meaning and effect of art 119 of the EEC Treaty, this court should seek rulings from the European Court on the relevant questions. In my view, in the exercise of its discretion this court should not accede to that submission. The position under Community law on both the material points is sufficiently clear for it to be appropriate for this court to deal with both these points (as it happens, in favour of the applicants) without any reference to the European Court. c

Accordingly, for the reasons given, for my part I would allow the appeal and direct that these applications proceed in front of the industrial tribunal on the footing that under art 119 (although not under s 1(2)(c) of the 1970 Act) a woman employed on work which is the same as that of one man but which is also of equal value with the work of another man is not debarred from claiming equal pay with that other man by reason of the fact that she is already being paid as much as the man engaged on the same work as herself. In determining whether the work of these applicants is of equal value to that of the checker warehouse operatives, and in determining whether (to adopt and adapt the language of the European Court in *Macarthy Ltd v Smith* [1981] 1 All ER 111 at 118–119, [1981] QB 180 at 198) the difference in pay between the warehouse operatives and the checker warehouse operatives is explicable by the operation of factors which are unconnected with any discrimination on grounds of sex, the industrial tribunal should give such weight to the factor that there is a man, or there are men, doing the same work as the applicants and being paid no more, as is appropriate having regard to all the circumstances. These are determinations of fact. d

PURCHAS LJ. The history of events against which this matter comes before the court and the relevant United Kingdom statutory provisions have been described in the judgment of Nicholls LJ and need not be repeated in this judgment except where necessary for ease of reference. The Equal Pay Act 1970 received the royal assent on 29 May 1970 but did not come into force until 29 December 1975, thus allowing a period of time for employers to bring their contractual arrangements into line. Section 1 was passed— e

‘with a view to securing that employers give equal treatment as regards terms and conditions of employment to men and to women that is to say that . . . (a) for men and women employed on like work the terms and conditions of one sex are not in any respect less favourable than those of the other; and (b) for men and women employed on work rated as equivalent . . . the terms and conditions of one sex are not less favourable than those of the other in any respect in which the terms and conditions of both are determined by the rating of their work.’ f

These provisions, as enacted, never came into force. The 1970 Act was amended by s 8 of and Pt I of Sch 1 to the Sex Discrimination Act 1975 and re-enacted in Pt II of that schedule; the terms of s 1 of the amended Act, so far as material, have already been set out in the judgment of Nicholls LJ. The 1970 Act from the outset envisaged two criteria: ‘like work’ and ‘equivalent work’. g

a There is no clue as to whether the rights in respect of 'like work' and 'equivalent work' were to be mutually exclusive or cumulative. This may have been because Parliament did not advert to the somewhat sophisticated mischief adumbrated by counsel for the applicants. I am not aware of any evidence of a compliant male actually having been put to 'low paid woman's work' to avoid for 'equal pay' for 'equivalent work'. However, the possibility cannot be ignored. The simple approach might well have been that the presence of a male doing the same or like work would provide the best means of comparison without the necessity of resorting to a more remote comparison with someone doing equivalent work. Nor is any further light thrown on this problem by the amendments to s 1 of the 1970 Act introduced by the 1975 Act. It was not until an amendment to s 1 of the 1970 Act effected by the Equal Pay (Amendment) Regulations 1983, SI 1983/1794, added a further paragraph (s 1(2)(c)) that the concept of mutual exclusivity appeared. I must return to this later.

b To complete the statutory history, the European Communities Act 1972 received the royal assent on 17 October 1972. Section 2, in its relevant parts, provides:

d '(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties... as... are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law...

e (2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision—(a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above; and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid...

f (4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section...

g Schedule 2 to the 1972 Act restricted the powers to make orders conferred by s 2(2) in respects which might well be thought to justify legislative treatment, such as imposing or increasing taxation, making orders with retrospective effect or creating by order new criminal offences. The power, therefore, to make statutory orders under s 2(2) was clearly defined and limited.

h The 1970 Act as originally amended by the 1975 Act contained only provisions (in relation to s 1(2)(a)) 'where the woman is employed on like work with a man in the same employment' and (in relation to s 1(2)(b)) 'where the woman is employed on work rated as equivalent with that of a man in the same employment'. Each paragraph of s 1(2) contained sub-paragraphs (sub-para (i) and (ii)) in precisely equivalent terms providing for the modification of the appropriate term in the woman's contract or the inclusion of a term otherwise omitted in the contract. It is significant, however, that para (b) did not include, and still does not include, any express restrictions on resorting to that provision if para (a) is also available (contrast para (c) below).

It is convenient at this stage to set out again the material parts of art 119 of the EEC Treaty:

'Each Member State shall . . . maintain the application of the principle that men and women should receive *equal pay for equal work*.

For the purpose of this Article, "pay" means the ordinary basic or minimum wage . . . and any other consideration, whether in cash or in kind . . . directly or indirectly . . .'

EC Council Directive 75/117 (the equal pay directive) which was adopted in 1975 by the Council of European Communities, who were anxious about the inertia being shown by some member countries in implementing art 119, states:

'... Whereas implementation of the principle that men and women should receive equal pay contained in Article 119 . . .

Article 1

The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination . . .'

It is now established that the equal pay directive merely 'explains and defines' art 119 and does not have any legislative force of its own (see *Jenkins v Kingsgate (Clothing Productions) Ltd* Case 96/80 [1981] 1 WLR 972, [1981] ECR 911).

In view of the failure (referred to below) of counsel for the applicants to demonstrate a viable alternative construction to the words 'not being work . . . applies' in s 1(2)(c) of the 1970 Act to support a submission of ambiguity, it is not necessary to consider art 119 as an aid to construction of the 1970 Act. The matter cannot, however, be concluded without recourse to Community law. It is necessary to consider the question of the direct enforceability of art 119 in the domestic courts of the United Kingdom in the following respects. (1) What is the statutory status of the amendment effected by the 1983 regulations? (2) Does art 119 recognise any distinction between equal pay for equal work as defined by the equal pay directive as meaning 'the same work' or 'work to which equal value is attributed' in the sense that the two concepts are mutually exclusive or are to be given an optional or cumulative effect? (3) Whether and to what extent art 119 is considered to give rise to personal rights enforceable in the courts of the United Kingdom?

Statutory status of s 1(2)(c) of the 1970 Act

As a result of the reference by the Commission of the European Communities to the European Court (see *EC Commission v UK* Case 61/81 [1982] ECR 2601 at 2617), it was held by the European Court that the 1970 Act, with s 1(2)(a) and (b) as substituted by the 1975 Act, did not comply with art 119, in the sense that it did not enable all employees who considered themselves wronged by failure to apply the principle of 'equal pay for men and women for work to which equal value is attributed and for which no system of job classification exists' to have recourse to the courts. The decision established (i) that under art 119 the words 'equal pay for equal work' meant equal pay 'for like work or for work to which equal value is attributed', and (ii) that s 1(2)(b) of the 1970 Act did not satisfy art 119 because a job evaluation scheme could only be put into effect if the employer chose to organise one. This did not comply with art 2 of the equal pay directive, which reads:

'Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process after possible recourse to other competent authorities.'

a In the submissions, questions and advice of the Advocate General, no consideration was given to the relationship between the two branches of the definition of equal pay for equal work identified in art 1 of the equal pay directive. Of course, s 1(2)(b) was not said to be mutually exclusive with s 1(2)(a) of the 1970 Act. To comply with the decision of the European Court the 1983 regulations were made under the powers granted by s 2(2) of the 1972 Act. In order to remedy the defect identified in s 1(2) of the 1970 Act a further paragraph, para (c), was added:

b 'where a woman is employed on work which, *not being work in relation to which paragraph (a) or (b) above applies*, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment . . .'

c Paragraph (c) was clearly modelled on paras (a) and (b) with the additional words specifically providing that the relief under the new paragraph and the relief afforded by paras (a) and (b) should be mutually exclusive. These words have, of course, been central to this appeal. The fact that Parliament saw fit to include them in para (c) but did not amend the existing para (b) by adding similar words of exclusion in line with the new para (c) must, I would have thought, raise a question to say the least. Moreover, one might be forgiven for wondering what would have been the attitude of the European Court if the words of exclusion had appeared in para (b) at the time of its decision in *EC Commission v UK* in July 1982.

d Counsel for the applicants has submitted that, notwithstanding the inclusion of para (c) under the statutory order, the United Kingdom legislation does not yet comply with art 119 and the equal pay directive. The critical words are 'not being work in relation to which paragraph (a) or (b) above applies'.

e I agree with Nicholls LJ that the primary submission of counsel for the applicants, namely that there is an ambiguity in the application and effect of these words, cannot succeed. I am firmly of the view that para (c), read in its ordinary sense, is plain and contains no ambiguity. The qualification 'not being work in relation to which paragraph (a) or (b) above applies' relates to the work on which the woman is employed and its relationship with work falling within para (a) or (b), and cannot relate, as counsel for the applicants submits, to the man with whom the woman at her election chooses to be compared. There is nothing which I would wish to add to what has fallen from Nicholls LJ on this aspect of the case. However, as has already been stated, the matter does not end there.

f If the expression 'equal work' in art 119, as elucidated by art 1 of the equal pay directive, is shown to embrace two separate comparisons, namely 'same work' and 'work of equivalent value', there are difficulties in the construction of s 1(2)(c) otherwise demanded by the plain language of the statute. The words excluding paras (a) and (b) included in para (c) would appear to go beyond the delegated powers under which the 1983 regulations were made. The powers are restricted generally to 'the implementation' of the EEC Treaty as set out in s 2(2) of the 1972 Act already cited. Moreover, on a strict interpretation, the question may well be asked why 'work of equivalent value' should not be available for the identification of discrimination merely because there exists the same or similar work available for comparison, when no such restriction applies to 'work rated as equivalent' under para (b).

g To date, so far as I know, consideration of s 1(2) of the 1970 Act by the European Court has been without any argument that the provisions relating to 'like work' and 'work rated as equivalent' are mutually exclusive rather than optional or cumulative. By the introduction of the limiting words included in para (c) and the possibility, however remote, of their incorporation by necessary inference in para (b), the minister in making the 1983 regulations may have failed to achieve compliance with art 119 as counsel for the applicants suggests. This submission has, in my judgment, considerable force and is

supported by the further possibility that the new para (c) is without the statutory powers granted by s 1(2) of the 1972 Act. However, as the latter point was not argued before us, I approach it with considerable reservation. a

Article 119

In considering the true construction of this article in the light of the judgment of the European Court, I bear in mind, on the one hand, the judgment of Lord Denning MR in *H P Bulmer Ltd v J Bollinger SA* [1974] 2 All ER 1226, [1974] Ch 401 to which counsel for the applicants drew our attention and, on the other hand, the discretionary power we have, where necessary, to resolve questions of doubt to refer the matter to the European Court under art 177 of the EEC Treaty and RSC Ord 114. Lord Denning MR emphasised the importance of avoiding overloading the European Court and gave guidelines to construction for the English courts. As I read the position, it is this. If it is possible to detect a clear general approach to a particular question of construction from the judgments of the European Court, then a domestic court, not being 'a final court' within art 177, should not exercise its discretion to refer to the European Court, but should attempt to construe the article in question, within the guidelines in *Bulmer's* case. b c

Article 119 has been considered in a number of cases by the European Court. A convenient starting point is *Defrenne v Sabena* Case 43/75 [1981] 1 All ER 122, [1976] ECR 455. The distinction between 'like work' and 'work of equivalent value' did not arise. The terms of service for the steward and stewardess were the same. The question of direct enforceability did arise, however, and it is convenient to refer to this at this stage. It was part of the United Kingdom case that art 119 was not directly enforceable ([1976] ECR 455 at 460): d

'(c) The need for legislative action on the part of the Member States appears from the formulation of the obligation imposed on them by Article 119 in the form of a general statement of principle. Directive No 75/117 acknowledged this need; in Article 8 it requires Member States to put into force the legislation necessary to comply with the directive within one year of its notification and thus to ensure the application of the general principle contained in Article 119. In the absence of such national implementing legislation an obligation of the kind contained in Article 119 is incomplete and cannot properly be completed by interpretative judicial decisions.' e f

In answer to questions posed by the court there is no suggestion of mutual exclusivity ([1976] ECR 455 at 468):

'In the private sector the Equal Pay Act 1970 provided for the abolition of all discrimination in collective agreements by the end of 1975. It gives the right to equal pay to women employed on work of the same or a broadly similar nature as men, as well as to women employed on work which, although different from that carried out by men, has been given an "equal value" under a system of classification of duties ("job evaluation").' g

In the judgment of the court the following paragraphs are relevant ([1981] 1 All ER 122 at 134-135, [1976] ECR 455 at 473-474, 746): h

'18. For the purposes of the implementation of these provisions a distinction must be drawn within the whole area of application of art 119 between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, second, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a Community or national character. i

19. It is impossible not to recognise that the complete implementation of the aim

a pursued by art 119, by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level . . .

b 21. Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by art 119 must be included in particular those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation.

22. This applies even more in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private.

c 23. As is shown by the very findings of the judgment making the reference, in such a situation the court is in a position to establish all the facts which enable it to decide whether a woman worker is receiving lower pay than a male worker performing the same tasks . . .

d 40. The reply to the first question must therefore be that the principle of equal pay contained in art 119 may be relied on before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.' (My emphasis.)

e I have set out *Defrenne v Sabena* at some length because the European Court referred back to this judgment in a number of subsequent judgments and because it is the fons et origo of the expression 'direct and overt discrimination' which formed a main plank of the submissions of counsel for the employers, to which I shall return subsequently.

f For my part I do not see that the reference to what has been compendiously referred to as 'indirect discrimination' in *Defrenne v Sabena* is a mandate for distinguishing cases in which it can clearly be established that 'unequal pay' is received for 'like work' from those cases in which 'unequal pay' is received for 'work of equivalent value', provided that the 'equivalence' of the work can be identified without reference to 'more explicit implementing provisions of a Community or national character'. Applying the decision in *Defrenne v Sabena* in the light of the submissions and answers given by the United Kingdom, I would be prepared to construe art 119, as explained by the equal pay directive, as affording relief to a person who is receiving 'unequal pay', either for the same work or for work of equivalent value, and that the two concepts are not mutually exclusive but are integral parts of the same concept.

Direct enforceability

h In general, therefore, I agree with the counsel for the applicants when he submits that art 119 of the EEC Treaty is directly enforceable. Counsel for the applicants further submits, however, that any distinction which had been based on the contention that art 1 of the equal pay directive was not so enforceable was misconceived because art 119 was not extended by the directive which merely explained it. On this basis he submitted that discrimination described as indirect or hidden was no less within art 119 and, therefore, directly enforceable.

i Counsel for the employers submitted, on the other hand, that if art 119 embraced claims based on work of equal value, as well as like work, then by enacting s 2(1) of the 1972 Act the United Kingdom would have complied with the article and that, therefore,

the decision in *EC Commission v UK* [1982] ECR 2601 should not have gone against the United Kingdom. The force of this argument is somewhat diluted because this was not the case proposed on behalf of the United Kingdom at that time. Counsel for the applicants said that the decision of the European Court on this aspect must be taken as *per incuriam* if there is any force in the submission of counsel for the employers.

It was the main submission of counsel for the employers that, in order to succeed on the direct enforceability point, counsel for the applicants had to allege that his claim fell within what has been described in some of the cases as the 'direct discrimination category'. Counsel for the employers relied on the decision in *Macarthys Ltd v Smith* Case 129/79 [1981] 1 All ER 111 at 118, [1981] QB 180 at 198:

'9. According to the first paragraph of art 119 the member states are obliged to ensure and maintain "the application of the principle that men and women should receive equal pay for equal work".

10. As the court indicated in *Defrenne v Sabena*, that provision applies directly, and without the need for more detailed implementing measures on the part of the Community or the member states, to all forms of direct and overt discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question. Among the forms of discrimination which may be thus judicially identified, the court mentioned in particular cases where men and women receive unequal pay for equal work carried out in the same establishment of service.'

Counsel for the employers also relied on *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] 1 WLR 972, [1981] ECR 911 and two paragraphs in the judgment delivered by the European Court in particular. The first passage reads ([1981] 1 WLR 972 at 977, [1981] ECR 911 at 917-918):

'Finally, as to the question of the direct effect of article 119 and article 1 of the Council Directive (75/117/E.E.C.), it may be recalled that, as the court held in its decision of April 8, 1976, in *Defrenne v. Sabena*, these provisions are directly applicable to all forms of direct and overt discrimination which may be identified solely with the aid of the criteria of equal work and equal pay, including unequal pay for equal work carried out in the same establishment or service. . . Although "adverse impact" is defined in the legislation of the United Kingdom as "indirect discrimination," it should not be confused with the "indirect and disguised discrimination" which has been described by the court as falling outside the scope of the direct application of article 119. Here, "indirect discrimination" is used in such a manner as to exclude any practice which, although not founded on any discriminatory motives, nevertheless has a discriminatory effect, and not as meaning discrimination which can only be suppressed by national or Community legislative measures more detailed than the provisions referred to above.'

The later passage reads ([1981] 1 WLR 972 at 983, [1981] ECR 911 at 926):

'Fourth question

16. In the fourth and last question, the national court asks whether the provisions of article 119 of the Treaty are directly applicable in the circumstances of this case.

17. As the court has stated in previous decisions (judgment of April 8, 1976, in *Defrenne v. Sabena*; judgment of March 27, 1980, in *Macarthys Ltd v. Smith* and judgment of March 11, 1981 in *Worringham v. Lloyds Bank Ltd.* (Case 69/80 [1981] 2 All ER 434, [1981] 1 WLR 950), article 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of criteria of equal work and equal pay referred to by the article in question, without national or

a Community measures being required to define them with greater precision in order to permit of their application. Among the forms of discrimination which may be thus judicially identified, the court mentioned in particular cases where men and women receive unequal pay for equal work carried out in the same establishment or service, public or private.'

b In particular, counsel for the employers relied on the decision of this court in *O'Brien v Sim-Chem Ltd* [1980] 2 All ER 307, [1980] 1 WLR 734. Here the court distinguished between equal work and equivalent work. Cumming-Bruce LJ stated ([1980] 2 All ER 307 at 318, [1980] 1 WLR 734 at 747-748)):

c 'I am satisfied that the directive is what it professes to be, ie a directive to governments to take national measures to approximate their laws in order to give effect to the new criteria expressed in art 1 of the directive. The discrimination identified by the application of the criterion in that article is not directly applicable in national courts until it is implemented in national legislation. Paragraph 68 of the judgment in *Defrenne (Gabrielle) v Société Anonyme Belge de Navigation Aérienne (SABENA)* [1981] 1 All ER 122 at 137, [1976] ECR 455 at 480 makes it necessary to make one qualification of that conclusion: "Even in the areas in which article 119 has no direct effect, that provision cannot be interpreted as reserving to the national legislature exclusive power to implement the principle of equal pay since, to the extent to which such implementation is necessary, it may be relieved by a combination of community and national measures." In my view this paragraph contemplates the combination of Community and national measures and affirms the jurisdiction to decide whether national measures comply with the EEC Treaty and with relevant directives, even if such directives are not directly applicable.'

e The judgments in *O'Brien v Sim-Chem Ltd* were, of course, delivered before the ruling of the European Court in *Jenkins v Kingsgate (Clothing Productions) Ltd*. In so far as the court's attention in *O'Brien's* case was paid to the direct enforceability of art 1 of the equal pay directive, the judgments have been overtaken by the subsequent decisions of the European Court in 1981 in *Jenkins's* case and *Worringham v Lloyds Bank Ltd* [1981] 2 All ER 434, [1981] 1 WLR 950. In the latter case the female applicants contended, inter alia, f (a) that the exclusion of retirement benefit schemes from the 1970 and 1975 Acts was incompatible with Community law, (b) that the deficiencies in the treatment by the bank of men and women in the bank's retirement benefit scheme was 'a form of direct and overt discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to in article 119' (see [1981] 1 WLR 950 at 956, [1981] g ECR 767 at 774). The bank's reply emphasised that the benefits were not consideration paid directly or indirectly by the employer, but were received from the trustees of the pension fund and that the assessment of terms in such a scheme to achieve fairness between men and women was an extremely complex one. On this basis it was submitted that, if there was discrimination, it could not be described as 'direct or overt'. This argument was repeated by the United Kingdom (see [1981] 1 WLR 950 at 963, [1981] h ECR 767 at 782-783). The judgment of the court included the following ([1981] 2 All ER 434 at 447, [1981] 1 WLR 950 at 969):

j '21. Moreover, Directive 75/117, whose objective is, as follows from the first recital of the preamble thereto, to lay down the conditions necessary for the implementation of the principle that men and women should receive equal pay, is based on the concept of "pay" as defined in the second paragraph of art 119 of the Treaty. Although art 1 of the directive explains that the concept of "same work" contained in the first paragraph of art 119 of the Treaty includes cases of "work to which equal value is attributed", it in no way affects the concept of "pay" contained in the second paragraph of art 119 but refers by implication to that concept.

The third question

22. The national court asks further in its third question whether, if the answer to question 1 is in the affirmative, "art 119 of the EEC Treaty . . . [has] direct effect in the member states so as to confer enforceable Community rights on individuals in the circumstances of the present case". a

23. As the court has stated in previous decisions (*Defrenne v Sabena* [1981] 1 All ER 122, [1976] ECR 455 and *Macarthys Ltd v Smith* [1981] 1 All ER 111, [1980] 3 WLR 929) art 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application. Among the forms of discrimination which may be thus judicially identified, the court mentioned in particular, cases where men and women receive unequal pay for equal work carried out in the same establishment or service, public or private. In such a situation the court is in a position to establish all the facts enabling it to decide whether a woman receives less pay than a man engaged in the same work or work of equal value.' b

Finally, I wish to refer to *Garland v British Rail Engineering Ltd* [1982] 2 All ER 402, [1983] 1 AC 751. This case involved post-retirement travel concessions, which were non-contractual, given to railway employees. The concession given to men included their spouses and children. Those given to the women were personal to them only. The following questions were asked of the European Court. Was there discrimination contrary to— c

'1. . . (a) Article 119 of the EEC Treaty? (b) Article 1 of Council Directive 75/117/EEC? (c) Article 1 of Council Directive 76/207/EEC? 2. If [any answer] is affirmative, is Article 119 or either of the said directives directly applicable . . . so as to confer enforceable . . . rights . . . ?' d

(See [1982] 2 All ER 402 at 404, [1983] 2 AC 751 at 760.)

The United Kingdom denied that art 119 would be directly enforceable asserting that national or Community measures would be required to achieve precision and relied on the judgment in *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] 1 WLR 972 at 983, [1981] ECR 911 at 926 (para 17). This contention was not supported by the Advocate General (see [1982] 2 All ER 402 at 410–411, [1983] 2 AC 751 at 758–759. The court's judgment reads ([1982] 2 All ER 402 at 412, [1983] 2 AC 751 at 767–768): e

'Question 2

13. Since question 1(a) has been answered in the affirmative the question arises of the direct applicability of art 119 in the member states and of the rights which individuals may invoke on that basis before national courts. f

14. In para 17 of its judgment [in] *Jenkins v Kingsgate (Clothing Productions) Ltd* Case 96/80 the court stated that art 119 of the treaty applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application. g

15. Where a national court is able, using the criteria of equal work and equal pay, without the operation of Community or national measures, to establish that the grant of special transport facilities solely to retired male employees represents discrimination based on difference of sex, the provisions of art 119 of the treaty apply directly to such a situation.' h

Some assistance in deciding the approach to be adopted by the domestic court in the presence of an apparent conflict between domestic and Community law is to be found in j

a the speech of Lord Diplock in *Garland's* case after it had returned from the European Court ([1982] 2 All ER 402 at 415, [1983] 2 AC 751 at 771):

b 'The instant appeal does not present an appropriate occasion to consider whether, having regard to the express direction as to the construction of enactments "to be passed" which is contained in s 2(4), anything short of an express positive statement in an Act of Parliament passed after 1 January 1973 that a particular provision is intended to be made in breach of an obligation assumed by the United Kingdom under a Community treaty would justify an English court in construing that provision in a manner inconsistent with a Community treaty obligation of the United Kingdom however wide a departure from the prima facie meaning of the language of the provision might be needed in order to achieve consistency. For, in the instant case the words of s 6(4) of the Sex Discrimination Act 1975 that fall to be construed, "provision in relation to . . . retirement", without any undue straining of the ordinary meaning of the language used, are capable of bearing either the narrow meaning accepted by the Employment Appeal Tribunal or the wider meaning preferred by the Court of Appeal but acknowledged by that court to be largely a matter of first impression. Had the attention of the court been drawn to art 119 of the EEC Treaty and the judgment of the European Court in *Defrenne v Sabena* Case 43/75 (1976) [1981] 1 All ER 122, [1976] ECR 455, I have no doubt that, consistently with statements made by Lord Denning MR in previous cases, they would have construed s 6(4) so as not to make it inconsistent with art 119.'

In my judgment the decisions of the European Court demonstrate a clear pattern of development as regards the direct enforceability of art 119 of the EEC Treaty as follows.

e (1) The expression 'equal pay for equal work' is to receive a broad interpretation. 'Pay' is given a very wide definition in art 119 itself. It would be inconsistent if work were not treated similarly.

(2) Article 1 of the equal pay directive merely confirms that the expression 'equal work' shall have an equally wide interpretation, that is not only 'same work' but also 'work to which equal value is attributed'.

f (3) The sense of (1) and (2) cannot be said to support the contention that 'same work' must always exclude 'work to which equal value is attributed' in choosing the most appropriate route by which to arrive at 'equal work'.

g (4) The expression in *Defrenne v Sabena* [1981] 1 All ER 122 at 134, [1976] ECR 455 at 473 'direct and overt discrimination which may be identified solely with the aid of . . . criteria based on equal work and equal pay' has been followed through the cases and remains the touchstone of direct enforceability. Attempts to limit its range by equating 'equal work and equal pay' to 'same work and equal pay' have invariably been rejected and in any event ignore the effect of art 1 of the equal pay directive in defining 'equal work and equal pay'.

h (5) That the words used to describe the second type of discrimination 'indirect and disguised' mean what they say, namely that without reference to more explicit implementing provisions the discrimination cannot be identified. The judgment in *Defrenne v Sabena* [1981] 1 All ER 122 at 134, [1976] ECR 455 at 473 (para 19) instances the sort of situation envisaged.

j (6) That a discrimination which appears on the face of a direct comparison to demonstrate unequal pay for one type of work and another type of work to which equal value is attributed at the same place of employment must fall within the first rather than the second type of discrimination and would, therefore, be directly enforceable.

Conclusion

Regrettably, in my judgment the submission of counsel for the applicants that s 1(2)(c), whilst it contains unqualified words excluding s 1(2)(a) and (b), is inconsistent with rights

that are directly enforceable in the United Kingdom courts under Community law is made out. There is clear authority that in a case of conflict Community law must prevail. Two courses are open to the court: (1) to refer two questions to the European Court asking (a) does s 1(2)(c) comply with art 119? (b) is art 119 directly enforceable in the United Kingdom courts in cases where the discrimination arises in cases of unequal pay for work to which an equivalent value is attributed? (2) to construe s 1(2) of the 1970 Act so as to conform with the principles of art 119 by inserting the words necessary to achieve a result that is not inconsistent with Community law as I understand it. This involves an otherwise unjustifiable qualification of what are in fact clear words. As I understand the effect of Community law, it embraces the requirement that, in order to identify discrimination, the domestic court must be able to call on the best method of arriving at a standard of 'equal work', whether by comparing the work under review with 'the same work' or 'work to which equal value is attributed'. This must be at the election of the domestic court, in this case the industrial tribunal. The choice of method of determining 'equal work' within the meaning of art 119 cannot, in my judgment, be either at the hands of the employer or the employee since that would encourage 'comparison shopping' by either or both. This cannot have been the intention of the article. Although this course has obvious advantages, both from a social and also an industrial point of view, it is more difficult to find a satisfactory statutory justification. There is a possible approach. This is to assume (a) that the draftsman of the 1983 regulations did not exceed the powers under which the regulations were drawn under s 2(2)(a) of the 1972 Act and (b) to construe and give effect to the regulations in accordance with s 2(4) of that Act and art 119. This could be achieved by amending the relevant part of s 1(2)(c) to read: '... not being work which can more fairly be compared under paragraphs (a) or (b) above ...'

Since under art 177 of the EEC Treaty reference to the European Court is discretionary so far as this court is concerned, and in view of the firm conclusion I have reached with regard to the state of Community law, I would favour the second of the two courses. Therefore I agree with the order proposed by Nicholls LJ.

SIR ROUALEYN CUMMING-BRUCE. I have had the advantage of reading in draft the judgments now delivered by Purchas and Nicholls LJ and can state my own views very concisely.

As a matter of construction, I reject the submission of counsel for the applicants that the words of s 1(2)(c) of the Equal Pay Act 1970 are ambiguous. On their ordinary meaning the words 'not being work in relation to which paragraph (a) or (b) above applies' are plain and unambiguous, even though for the reasons stated by Purchas LJ they may appear to go beyond the delegated powers under which the Equal Pay (Amendment) Regulations 1983, SI 1983/1794, were made. So the applicants' case fails on the construction of the English legislation.

Article 119 of the EEC Treaty, as explained by EC Council Directive 75/117, gives an applicant the right to claim that he or she is entitled to equal pay when engaged under a contract of employment which imposes on the employee the obligation to do work of equal value to the work of any other employee of the opposite sex in the same establishment. It is for the industrial tribunal to decide the questions of fact relevant to the applicant's claim. Article 119 does not exclude such comparison on the ground that an employee of the opposite sex is engaged on the same or like work on the same remuneration as the applicant. An equal value claim and comparison are not dependent on the situation relevant to persons doing the same or like work, though the facts regarding same work or like work cases may be material evidence for consideration by the industrial tribunal, subject to the usual factors relevant to the weight of such evidence.

a The judgments of the European Court to which Purchas and Nicholls LJ have referred point clearly enough to the conclusion that the equal pay rights established by art 119 as explained in the directive are directly enforceable in a national court in a case where the national legislation is such as to restrict the rights conferred on employees by art 119. This is sufficiently clear to justify this court so holding even though the particular issue of comparison of s 1(2)(c) of the 1970 Act with the rights conferred by art 119 has not yet been resolved by the European Court.

b The conclusion, which in my view is likely to involve formidable problems of industrial and commercial convenience, must be that the European remedy is available to the applicant to the industrial tribunal even though there can be no remedy available under national legislation.

For those reasons the appeal should be allowed, and the case sent back for determination by the industrial tribunal in the light of this judgment.

c *Appeal allowed; matter remitted to industrial tribunal for further determination. Leave to appeal to the House of Lords granted.*

Solicitors: *W Douglas Clark Brookes & Co*, West Bromwich (for the applicants); *Slaughter & May* (for the employers).

Vivian Horvath Barrister.

e Ferguson v Welsh and others

HOUSE OF LORDS

LORD KEITH OF KINKEL, LORD BRANDON OF OAKBROOK, LORD GRIFFITHS, LORD OLIVER OF AYMERTON AND LORD GOFF OF CHIEVELEY

6, 7 JULY, 29 OCTOBER 1987

f *Occupier's liability – Duty to independent contractor – Duty to contractor's employees – Safe system of work – Occupier entering into contract for demolition of building – Contractor sub-contracting demolition without occupier's authority – Sub-contractor using unsafe system of work – Sub-contractor's employee injured – Whether occupier owing duty to employee to see that safe system of work used – Occupiers' Liability Act 1957, s 2(2).*

g A council which was engaged in a housing scheme put out invitations to tender for the demolition of a building on the site of the scheme. A contractor, S, put in a tender for £330 which was accepted. Despite an express condition of the tender being that the work was not to be sub-contracted without the council's authority, S arranged for the W brothers to carry out the actual demolition. The W brothers offered the appellant a job on the demolition. In the course of carrying out the demolition work, the W brothers employed an unsafe system of work which caused a wall to collapse, with the result that the appellant was seriously injured. He brought an action against the W brothers, S and the council. The appellant's damages were agreed at £150,000 but neither the W brothers nor S had public liability insurance. The judge held that the W brothers were liable to the appellant but S and the council were not. As regards the council, the judge held that although both it and S were occupiers of the premises for the purposes of the Occupier's Liability Act 1957 the council had not invited the appellant onto the premises and had not delegated to S the right to invite him, so that the appellant was not a lawful visitor of the council. The appellant appealed to the Court of Appeal seeking a new trial against

both S and the council. The Court of Appeal ordered a new trial against S but not against the council. The appellant appealed to the House of Lords seeking a new trial against the council. He contended that by putting S into occupation for the purposes of demolition the council had given him ostensible authority to invite sub-contractors and their employees onto the premises and therefore, despite the limitation on S's actual authority, the appellant was a visitor and not a trespasser vis-à-vis the council. a

Held – (1) An occupier would not usually be liable to an employee of a contractor employed to carry out work on the occupier's premises if the employee was injured as a result of any unsafe system of work used by his employer, the contractor, since ordinarily it would not be reasonable to expect the occupier to supervise the contractor to ensure that he would carry out the duty he owed to his employees to use a safe system of work. However, in special circumstances where the occupier knew or had reason to suspect that the contractor was using an unsafe system of work, it might well be reasonable for the occupier to require that a safe system be used but (per Lord Oliver and Lord Goff) any liability on the part of the occupier in such circumstances arising from a failure to use a safe system of work could only be as a joint tortfeasor with the contractor and not qua occupier (see p 783 *b c g h*, p 784 *j* to p 785 *c* and p 786 *d* to *f*, post). b c

(2) Although there was evidence capable of establishing that S had ostensible authority from the council to invite the W brothers and their employees onto the site, the appellant's injury arose out of the unsafe system of work adopted by the W brothers rather than any 'use' of the premises by him which gave rise to a common duty of care on the part of the council under s 2(2)^a of the 1957 Act, and the appellant had not shown that the council or its officers knew or ought to have known that S would sub-contract the demolition work without authority to persons who would employ an unsafe system of work. Accordingly, the council, as occupier, could not be liable to the appellant under the 1957 Act and his appeal would therefore be dismissed (see p 782 *g h*, p 783 *b j*, p 784 *b* to *d g j* to p 785 *c h* to p 786 *c f g*, post). d e

Per Lord Goff. Where two persons are in occupation of the same land it is possible for a third party to be a lawful visitor in relation to one occupier and a trespasser in relation to the other, depending on whether the occupier who authorised him to enter had actual or ostensible authority from the other occupier to allow the third party onto the land (see p 785 *e* to *g*, post). f

Notes

For duty of an occupier of premises to visitors and liability for independent contractors, see 34 Halsbury's Laws (4th edn) paras 18–27, and for cases on the subject, see 36(1) Digest (Reissue) 75–118, 299–457. g

For the Occupiers' Liability Act 1957, s 2, see 31 Halsbury's Statutes (4th edn) 189.

Case referred to in opinions

Ladd v Marshall [1954] 3 All ER 745, [1954] 1 WLR 1489, CA.

Appeal

Joseph Ferguson appealed with leave of the Appeal Committee of the House of Lords given on 11 December 1986 against that part of the judgment and order of the Court of Appeal (Lawton, Slade and Mustill LJ) on 16 September 1986 dismissing an appeal by Mr Ferguson against the judgment and order of Staughton J on 25 May 1984 whereby he ordered that judgment be entered for the respondents, Sedgefield District Council, against Mr Ferguson in action brought by Mr Ferguson against James Welsh, Derek h j

^a Section 2(2) is set out at p 782 *h j*, post

a Welsh, John George Spence and the council claiming damages for personal injuries. The facts are set out in the opinion of Lord Keith.

David Robson QC and Philip Kramer for Mr Ferguson.
Simon Hawkesworth QC and Esmond Faulks for the council.

Their Lordships took time for consideration.

b 29 October. The following opinions were delivered.

LORD KEITH OF KINKEL. My Lords, on 16 July 1976 the appellant (Mr Ferguson) sustained an accident, which left him paralysed from the waist downwards as a result of a broken back, while he was engaged on demolition work on a building at West Cornforth in the county of Durham. The building was on a site owned by the respondents, Sedgefield District Council, who were engaged in carrying out, through their direct labour force, a scheme for providing sheltered housing for the elderly. Work was well advanced on certain parts of the scheme, and in order to make further progress it was necessary to demolish the building in question. The council issued invitations to tender for the demolition work to a number of contractors on their approved list including the third defendant (Mr Spence).

The invitation to tender included the following condition:

e 'Prior approval must be obtained from the Engineer for the time being of the Council before the employment of a sub-contractor upon site. Any approved sub-contractor shall secure Public Liability Insurance Cover to the satisfaction of the Council before being engaged on site.'

The specification of the works to be carried out included the following clauses:

'2. All demolition works are to be carried out in accordance with "THE BRITISH STANDARDS INSTITUTION"—"CODE OF PRACTISE FOR DEMOLITION" CP.94.

f 3. Pulling down shall be carried out in such a manner as to cause as little inconvenience as possible to adjoining owners or the public and the contractor will be held responsible for any claims which may arise from the disregard of this clause. The rubbish is to be sprinkled with water to prevent dust arising and all proper screens and protection provided to the satisfaction of the Engineer.

g 10. Possession of the site will be given to the contractor immediately on signing the contract and he shall proceed with the demolition and complete same as soon as possible. It is essential that the whole of this work be completed at the earliest possible moment.

17. Every contractor (other than an individual contractor, i.e. a person who performs personally the demolition operations without employing any workmen) must appoint a competent person experienced in demolition operations to supervise the work.

h 18. All practicable steps are to be taken, both before and during demolition works, to prevent danger to persons employed from fire, or explosion through leakage or accumulation of gas or vapour or flooding. Adjoining parts of the building or structure being demolished must not be overloaded with debris. Precautions against premature collapse must be taken and supervised by competent person, with adequate experience in the operation specified:—(a) The actual demolition of a building or structure or part thereof unless there is no reasonably foreseeable risk of collapse so as to endanger persons employed. (b) The actual demolition of any part of a building or structure where there is a special risk of collapse so as to endanger persons employed.

24. The following materials arising from the demolition are to remain the property of the employer and are to be cleaned and stacked as noted where directed on the site or otherwise disposed of as specifically stated. The remainder of the materials arising from the demolition is to become the property of the contractor and is to be carted away from the site to a place provided by the contractor and the contractor is to make due allowance in his tender for the value of any sound materials so acquired or residual scrap value arising.' a

Mr Spence put in a tender for the sum of £330, which was accepted. On 7 July 1976 the council wrote to him confirming that work should begin on 12 July. On 11 July Mr Spence made certain arrangements by telephone with the first and second defendants (the Welsh brothers), who regularly undertook demolition work. There was a conflict of evidence about the nature of these arrangements, which will be discussed later. On 13 July 1976 one of the Welsh brothers met Mr Ferguson in a public house and offered him a job on demolition work, starting next day. Mr Ferguson accepted, and next morning the Welsh brothers collected him in a van and took him to the building in West Cornforth which was the subject of Mr Spence's demolition contract with the council. One of the Welsh brothers, Mr Ferguson, and another man taken on by the Welsh brothers spent that day and the next day removing some valuable articles from the building and then dismantling its interior, removing partition walls, pushing down ceilings and sawing through and removing joists, and later, having been joined by others, in taking off slates and dismantling the roof. Work continued on Friday, 16 July, and by early afternoon the building was an empty shell except for some joists across the top of the first floor rooms. Mr Ferguson and one of the Welsh brothers were standing on a wall preparing to remove joists when a collapse occurred and both men fell to the ground, Mr Ferguson suffering the injuries in respect of which he sues. b

On 6 July 1979 Mr Ferguson issued a writ in the Queen's Bench Division claiming damages against the Welsh brothers, Mr Spence and the council. The writ was served on 8 August 1980 and defences were served by all the defendants. Trial of the action took place before Staughton J at Newcastle upon Tyne early in May 1984. Damages, if any should be awarded, had previously been agreed at £150,000. Staughton J held that the Welsh brothers were liable in damages to Mr Ferguson but that Mr Spence and the council were not. He found that the system adopted by the Welsh brothers for demolition of the building was highly dangerous and in breach of various of the Construction (Working Places) Regulations 1966, SI 1966/94, and of the Construction (General Provisions) Regulations 1961, SI 1961/1580. For these breaches they were liable to Mr Ferguson as their employee. As regards the case against Mr Spence, Staughton J had to deal with a conflict of evidence between him and the Welsh brothers. According to the latter, it was agreed with Mr Spence that they should strip any valuable materials from the building and level the chimneys and gables to ceiling height. Their reward was to be the value of the materials which they salvaged. Mr Spence, on the other hand, gave evidence that the agreement was to the effect that the Welsh brothers should take away the rubbish when he himself had accomplished the demolition of the building and that they should have the benefit of any saleable salvaged material, that demolition could not start on 12 July because of restrictions imposed by the water authority which inhibited him from using water to damp down dust and that since the Welsh brothers had no other work on hand they should, in the mean time, start by taking away rubbish in the back yard and any loose materials inside the building. Staughton J rejected the account given by the Welsh brothers and accepted that of Mr Spence, who he said in general impressed him as an honest and truthful witness, whereas he could not regard the evidence of the Welsh brothers as reliable. In that state of affairs he found that Mr Spence was not carrying out any demolition work himself, nor was he doing so vicariously through the Welsh brothers, whom he had not engaged or authorised to demolish the building. He therefore held that Mr Spence was not liable for breach of any of the 1961 regulations because he c

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was not performing any operation to which these regulations applied. Staughton J went on to consider a case levelled against Mr Spence on the ground that he owed to Mr Ferguson the common duty of care under the Occupiers' Liability Act 1957. He held that Mr Spence was an occupier of the premises, but found that the purposes for which Mr Ferguson had, through the Welsh brothers, been invited to be there did not include the demolition of the building, in particular the removal of joists at roof level. He expressed his finding in the alternative fashion that, whereas Mr Ferguson was a lawful visitor to the premises on Wednesday, 14 July for the purpose of removing rubbish, he was not a lawful visitor on Friday, 16 July for the purpose of demolition.

As to the case against the council, Staughton J found that the council were not a contractor in relation to the building nor were they an employer of workmen, and accordingly held that Mr Ferguson had no valid claim against them under the 1966 regulations nor under those of 1961. He held that although the council were an occupier of the premises along with Mr Spence, the claim against them under the 1957 Act failed because they had issued no invitation to Mr Ferguson to be on the premises and had not delegated to Mr Spence the right to invite him. If Mr Ferguson was not a lawful visitor of Mr Spence, he was not a lawful visitor of the council.

Mr Ferguson appealed to the Court of Appeal. Before the appeal came on for hearing he discovered a number of things which he considered would have had an important influence on the result of the action if they had been in evidence at the trial. In the first place, he obtained affidavits from four persons to the effect that on various occasions before Mr Ferguson's accident they had acted as or worked for sub-contractors to Mr Spence for demolition work, the work being carried out according to the same dangerous system as that adopted in the present case. The precise locations of the work carried out were not stated in the affidavits, but in one case at least it seemed likely that Mr Spence's demolition contract must have been with the council or their predecessors, Spennymoor Urban District Council. In the second place, he obtained information from the Northumbrian Water Authority that at the time of the accident there were no restrictions at all on the use of water for industrial purposes such as damping down dust in the course of demolition work. In the third place, Mr Spence was on 29 January 1985 convicted of conspiracy to steal in the Crown Court at Teesside and sentenced to four months' imprisonment, the evidence indicating that his dishonest activities had been carried on over a period which spanned the dates of the trial before Staughton J. The first of these matters was important because at the trial Mr Spence had given evidence that he had never sub-contracted any demolition work for which he had contracted with the council. The second was important because of Mr Spence's evidence that he could not begin the demolition work on 12 July because of the shortage of water for damping down. The third tended to cast doubt on Mr Spence's general honesty and credibility.

Before the Court of Appeal Mr Ferguson conducted his own case. He sought leave to adduce further evidence about the three matters mentioned above, with a view to a new trial being ordered against both Mr Spence and the council. On 16 September 1986 the Court of Appeal (Lawton, Slade and Mustill LJ) gave judgment allowing a new trial as against Mr Spence but not as against the council. The leading judgment was given by Lawton LJ. He expressed doubts whether the evidence about Mr Spence's conviction should be admitted, but found it unnecessary to decide that because in his view the evidence about water shortage and about Mr Spence's practice of employing sub-contractors appeared credible and likely to have an important effect on the result of the action against Mr Spence and could not with reasonable diligence have been obtained for use at the original trial: see *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489. Its importance was, of course, that it tended to indicate that Mr Spence's evidence about the terms of his arrangement with the Welsh brothers was untrue and the evidence of the latter was true. In that situation Mr Spence would be liable to Mr Ferguson for breaches of the 1961 regulations. As regards the position of the council, Lawton LJ expressed the opinion that, contrary to the submission by their counsel, Staughton J was right to hold

that they were occupiers of the building along with Mr Spence. In his view, however, Mr Ferguson could not be said to have been a lawful visitor of the council on the premises within the meaning of the 1957 Act. They did not want him there and he was there against their wishes. Accordingly, even on the new evidence, Mr Ferguson would have no prospect of establishing a case against them under the 1957 Act. a

Mr Ferguson now appeals to your Lordships' House, with leave given here, against that part of the order of the Court of Appeal which refused a new trial as against the council. The importance to him of success is manifest. The Welsh brothers are men of straw, and the prospects of Mr Spence (who had no relevant insurance at the time of the accident) being able to satisfy an award of damages against him to the tune of £150,000 are probably remote. b

The principal argument for Mr Ferguson was related to the application of the Occupiers' Liability Act 1957. It was accepted on behalf of the council that, for the purposes of the Act, they were occupiers of the building along with Mr Spence. Section 1(1) of the 1957 Act provides: c

'The rules enacted by the two next following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.' d

Subsection (2) provides, inter alia, that for the purposes of the rules so enacted the persons who are to be treated as an occupier's visitors are the same (subject to an immaterial exception) as the persons who would at common law be his invitees or licensees. So the first matter for consideration is whether in relation to the council Mr Ferguson was their visitor. It is to be considered in the light of the prospect that at a new trial it would be established that Mr Spence sub-contracted the demolition to the Welsh brothers, so that he invited the latter to come onto the premises with persons employed by them such as Mr Ferguson, so as to make Mr Ferguson his visitor. The contract between the council and Mr Spence prohibited sub-contracting without the consent of the council. No consent for the sub-contract to the Welsh brothers was asked for or given, and counsel for Mr Ferguson did not suggest that the council knew that Mr Spence had unlawfully sub-contracted. It was maintained, however, that by putting Mr Spence into occupation of the building for purposes of demolition the council had clothed him with apparent or ostensible authority to invite other persons onto the premises, including sub-contractors and their employees. Such persons would know nothing of the limitation on Mr Spence's actual authority, and were not reasonably to be treated as trespassers in a question with the council. In my opinion, there is evidence capable of establishing that Mr Spence had ostensible authority from the council to invite the Welsh brothers and their employees onto the site. Mr Spence was placed in control of the site for demolition purposes, and to one who had no knowledge of the council's policy of prohibiting sub-contracts this would indicate that he was entitled to invite whomsoever he pleased onto the site for the purpose of carrying out demolition. e

The next question is whether the council were in breach of the common duty of care owed to visitors under the 1957 Act, which is thus expressed in s 2(2): f

'The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.' g

The safety referred to is safety not only from dangers due to the state of the premises but also known dangers due to things done or omitted to be done on them. h

A problem at once arises as to the purposes for which the council are to be taken as having invited Mr Ferguson to be on the premises, and whether in taking part in the demolition of the building he was using the premises for these purposes. I consider that i

a the council, having put Mr Spence into occupation of the premises and thus put him into a position to invite the Welsh brothers and their employees onto them for the purpose of demolishing the building, must be taken to have invited Mr Ferguson in for that purpose. It is more difficult to hold that Mr Ferguson was, within the meaning of the subsection, using the premises for the purpose of demolishing the building, but, assuming that he was, the question remains whether the absence of reasonable safety which resulted in the accident arose out of his use of the premises. The absence of safety
b arose directly out of the system of work adopted by the Welsh brothers, and the nature of the instructions given by them to Mr Ferguson as to how he should go about performing his work for them. It would be going a very long way to hold that an occupier of premises is liable to the employee of an independent contractor engaged to do work on the premises in respect of dangers arising not from the physical state of the premises but from an unsafe system of work adopted by the contractor. In this
c connection, however, it is necessary to consider s 2(4)(b) of the 1957 Act, which provides:

‘where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in
d entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.’

The enactment is designed to afford some protection from liability to an occupier who has engaged an independent contractor who has executed the work in a faulty manner. It is to be observed that it does not specifically refer to demolition, but a broad and
e purposive interpretation may properly lead to the conclusion that demolition is embraced by the word ‘construction’. Further the pluperfect tense employed in the last words of the paragraph, ‘the work had been properly done’, might suggest that there is in contemplation only the situation where the work has been completed, but has been done in such a way that there exists a danger related to the state of the premises. That would,
f however, in my opinion, be an unduly strict construction, and there is no good reason for narrowing the protection afforded so as not to cover liability from dangers created by a negligent act or omission by the contractor in the course of his work on the premises. It cannot have been intended not to cover, for example, dangers to visitors from falling masonry or other objects brought about by the negligence of the contractor. It may therefore be inferred that an occupier might, in certain circumstances, be liable for
g something done or omitted to be done on his premises by an independent contractor if he did not take reasonable steps to satisfy himself that the contractor was competent and that the work was being properly done.

It would not ordinarily be reasonable to expect an occupier of premises having engaged a contractor whom he has reasonable grounds for regarding as competent, to supervise the contractor’s activities in order to ensure that he was discharging his duty to his
h employees to observe a safe system of work. In special circumstances, on the other hand, where the occupier knows or has reason to suspect that the contractor is using an unsafe system of work, it might well be reasonable for the occupier to take steps to see that the system was made safe.

The crux of the present case therefore, is whether the council knew or had reason to suspect that Mr Spence, in contravention of the terms of his contract, was bringing in
j cowboy operators who would proceed to demolish the building in a thoroughly unsafe way. The thrust of the affidavit evidence admitted by the Court of Appeal was that Mr Spence had long been in the habit of sub-contracting his demolition work to persons who proceeded to execute it by the unsafe method of working from the bottom up. If the evidence went the length of indicating that the council knew or ought to have known that this was Mr Spence’s usual practice, there would be much to be said for the view that

they should be liable to Mr Ferguson. No responsible council should countenance the unsafe working methods of cowboy operators. It should be clearly foreseeable that such methods exposed the employees of such operators to very serious dangers. It is entirely reasonable that a council occupying premises where demolition work is to be executed should take steps to see that the work is carried out by reputable and careful contractors. Here, however, the council did contract with Mr Spence subject to the condition that sub-contracting without their consent was prohibited. The fresh evidence sought to be adduced by Mr Ferguson does not go the length of supporting any inference that the council or their responsible officers knew or ought to have known that Mr Spence was likely to contravene this prohibition. The evidence related largely to the late 1960s and early 1970s, before the respondent council came into existence. It is common knowledge that the local authorities which came into existence as a result of the reorganisation of 1974 did not by any means correspond precisely to those which existed previously, and also that there were far-reaching transfers of personnel and considerable confusion. While some of Mr Spence's earlier demolition activities may have been carried out for Spennymoor Urban District Council, it does not follow that the present council had any reason to suspect his competence or honesty at the material time. I conclude that the evidence in question would not be likely to have an important effect on the result of the action so far as directed against the council.

Counsel for Mr Ferguson relied also on certain documents which after the hearing before the Court of Appeal became available from the office of the council's architects. At the trial there was evidence that on the second day of the demolition activity two persons, who it was suggested were officials of the council, appeared on the site and complained about the raising of dust which was damaging new paintwork in adjoining houses under construction. This evidence was sought to be used for the purpose of establishing knowledge on the part of the council of the manner in which the building was being demolished. The documents in question consisted of two works progress reports by a clerk of works employed by the architects, one of which made reference to nuisance from dust caused by the demolition, and a letter from the architects to the council, dated 23 July 1976, complaining about the same matter. The documents tend to identify the clerk of works and one of the architects as being the persons who visited the site and complained about dust, but do not otherwise carry matters further. The architects were independent contractors and there is no evidence that they or anyone in their employment informed the council, before the accident, about anything which they observed in the course of the site visit.

In my opinion, Mr Ferguson has not demonstrated sufficient grounds for reopening the case against the council so far as based on the 1957 Act. His alternative case, based on the ordinary common law duty of care does not raise any considerations of a different nature to those applicable to the statutory case.

It was argued for the council that the fresh evidence about Mr Spence's earlier demolition activities could with reasonable diligence have been discovered before the trial, and should have been because it was directly relevant to Mr Ferguson's pleaded case that the council negligently employed an incompetent contractor, a case which was dropped at the conclusion of the trial. Accordingly, the evidence should on that ground not be admitted as against the council. I consider that there is much force in that submission, but the Court of Appeal having in the exercise of its discretion decided to admit the evidence as against Mr Spence, on the basis that there had been no lack of due diligence in discovering it, I would not be disposed to take a different view in relation to the case against the council.

My Lords, for these reasons I would dismiss the appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Keith. I agree with it, and for the reasons which he gives I would dismiss the appeal.

LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Keith. I agree that the appeal should be dismissed for the reasons which he has given.

LORD OLIVER OF AYLMEYTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Keith. It is possible to envisage circumstances in which an occupier of property engaging the services of an independent contractor to carry out work on his premises may, as a result of his state of knowledge and opportunities of supervision, render himself liable to an employee of the contractor who is injured as a result of the defective system of work adopted by the employer. But I incline to think that his liability in such case would be rather that of joint tortfeasor than of an occupier. Whether or not that is so, however, the additional evidence in the instant case is quite insufficient to lead to the conclusion that such a claim against the respondent council could be supported. I agree, therefore, that the appeal should be dismissed for the reasons which my noble and learned friend has given.

LORD GOFF OF CHIEVELEY. My Lords, the question on this appeal is whether, in the light of the fresh evidence now available which persuaded the Court of Appeal to order a new trial as against Mr Spence, a new trial should likewise be ordered as against the respondent council. The principal submission advanced on behalf of Mr Ferguson was that such a new trial should be ordered, on the basis that the council might be held liable under the Occupiers' Liability Act 1957. Like my noble and learned friend Lord Keith, I am unable to accept this submission, though I have reached that conclusion by a rather different route.

I, for myself, can see no difficulty in law in reaching a conclusion that Mr Ferguson may have been a lawful visitor in relation to Mr Spence but a trespasser in relation to the council. Once it is accepted that two persons may be in occupation of the same land, it seems to me inevitable that on certain facts such a conclusion may have to be reached. If it be the case that one only of such occupiers authorises a third person to come onto the land, then plainly the third person is, vis-à-vis that occupier, a lawful visitor. But he may not be a lawful visitor vis-à-vis the other occupier. Whether he is so or not must, in my opinion, depend on the question whether the occupier who authorised him to enter had authority, actual (express or implied) or ostensible, from the other occupier to allow the third party onto the land. If he had, then the third party will be, vis-à-vis that other occupier, a lawful visitor; if he had not, then the third party will be, vis-à-vis that other occupier, a trespasser. No doubt, in the ordinary circumstances of life, the occupier who allows the third party to come onto the land will frequently have implied or ostensible authority so to do on behalf of the other occupier, as will, I think, usually be the case when the first occupier is a builder, in occupation of a building site with the authority of the building owner, who authorises a servant or independent contractor to come onto the site. But this may not always be so, as for example where the third party is aware that the building owner has expressly forbidden the builder to allow him on the site. These problems have, as I see it, to be solved by the application of the ordinary principles of agency law.

I am content to assume, for the purposes of the present appeal, that there is evidence capable of establishing that Mr Spence did have the ostensible authority of the council to allow the Welsh brothers (and, through them, Mr Ferguson) onto the land. Even so, in my judgment Mr Ferguson's action against the council must fail because I cannot see how the council could be held liable to him, in particular under the 1957 Act.

On the assumption that Mr Ferguson was the lawful visitor of the council on the land, the council owed to him the common duty of care, ie a duty 'to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there': see s 2(2) of the 1957 Act. I have emphasised the words 'in using the premises'

because it seems to me that the key to the problem in the present case lies in those words. I can see no basis, even on the evidence now available, for holding that Mr Ferguson's injury arose from any breach by the council of that duty. There can, no doubt, be cases in which an independent contractor does work on premises which result in such premises becoming unsafe for a lawful visitor coming on them, as when a brick falls from a building under repair onto the head of a postman delivering the mail. In such circumstances the occupier may be held liable to the postman, though in considering whether he is in breach of the common duty of care there would have to be considered, *inter alia*, the circumstances specified in s 2(4)(b) of the 1957 Act. But if I ask myself, in relation to the facts of the present case, whether it can be said that Mr Ferguson's injury arose from a failure by the council to take reasonable care to see that persons in his position would be reasonably safe *in using the premises* for the relevant purposes, the answer must, I think, be No. There is no question as, I see it, of Mr Ferguson's injury arising from any such failure; for it arose not from his use of the premises but from the manner in which he carried out his work on the premises. For this simple reason, I do not consider that the 1957 Act has anything to do with the present case.

I wish to add that I do not, with all respect, subscribe to the opinion that the mere fact that an occupier may know or have reason to suspect that the contractor carrying out work on his building may be using an unsafe system of work can of itself be enough to impose on him a liability under the 1957 Act, or, indeed, in negligence at common law, to an employee of the contractor who is thereby injured, even if the effect of using that unsafe system is to render the premises unsafe and thereby to cause the injury to the employee. I have only to think of the ordinary householder who calls in an electrician; and the electrician sends in a man who, using an unsafe system established by his employer, creates a danger in the premises which results in his suffering injury from burns. I cannot see that, in ordinary circumstances, the householder should be held liable under the 1957 Act, or even in negligence, for failing to tell the man how he should be doing his work. I recognise that there may be special circumstances which may render another person liable to the injured man together with his employer, as when they are, for some reason, joint tortfeasors; but such a situation appears to me to be quite different.

On the evidence in the present case, I can see no special circumstances by reason of which the council, as occupier, might be held liable to Mr Ferguson under the 1957 Act. Nor can I see any other basis on which the council might be held liable to him. In these circumstances, though I feel great sympathy for Mr Ferguson, I agree that his appeal must be dismissed.

Appeal dismissed.

Solicitors: *Dibb & Clegg Beynon & Co*, agents for *V Bradley Stephens & McDonald*, Blaydon on Tyne (for Mr Ferguson); *Berrymans*, agents for *Crutes*, Newcastle upon Tyne (for the council).

Mary Rose Plummer Barrister.

a MacLaine Watson & Co Ltd v International Tin Council

CHANCERY DIVISION

MILLETT J

28, 29, 30 APRIL, 1, 13 MAY 1987

b *Execution – Equitable execution – Receiver – Appointment of receiver to enforce judgment against debtor – International organisation set up by treaty – International Tin Council – Default by council – Arbitration award made against council – Judgment entered against council – Whether court having jurisdiction to appoint receiver to enforce award and judgment against council – Supreme Court Act 1981, s 37(1) – RSC Ord 51, r 1.*

c The International Tin Council (the ITC) was an international organisation which was established by treaty between a number of sovereign states, including the United Kingdom, and which had its headquarters in London. Its main functions were to provide for adjustment between world production and consumption of tin, to alleviate surpluses or shortages of tin and to prevent excessive fluctuations in the price of tin. The applicants, **d** who were ring-dealing members of the London Metal Exchange, entered into contracts with the ITC for the sale and purchase of tin. When the ITC defaulted on those contracts the applicants obtained an arbitration award against the ITC, and when the award remained unsatisfied the applicants obtained leave to enforce the award and judgment for over £6m was eventually entered against the ITC. By notice of motion the applicants sought the appointment of a receiver under 37(1)^a of the Supreme Court Act 1981 and **e** RSC Ord 51, r 1^b by way of equitable execution over the assets of the ITC, which was said to consist of the right of the ITC to be indemnified by, or demand contribution from, the states comprising its membership in order to satisfy its liabilities to the applicants. The applicants also sought an order that any receiver appointed be empowered in the name of the ITC to make formal demands on its members and to enforce payment, if **f** necessary by litigation in the English courts. The ITC applied to have the motions struck out on the ground that the court had no jurisdiction to determine the existence or otherwise of the alleged assets of the ITC since that would involve the interpretation and construction of a treaty between sovereign states.

g **Held** – Although there was no technical objection to the appointment of a receiver by way of equitable execution to enforce the applicants' judgment, the right of the ITC to be indemnified by its members was derived solely from the treaty by which it had been established. Since it was accepted by all parties that a cause of action founded on the treaty was not justiciable in the English courts, it followed that the application for the appointment of the receiver would be dismissed (see p 792 g h, p 795 c to e, p 796 c d j, p 797 b and p 798 e f, post).

h Notes

For the appointment of a receiver by the court, see 17 Halsbury's Laws (4th edn) para

a Section 37(1) provides: 'The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.'

j **b** Rule 1 provides: 'Where an application is made for the appointment of a receiver by way of equitable execution, the Court in determining whether it is just or convenient that the appointment should be made shall have regard to the amount claimed by the judgment creditor, to the amount likely to be obtained by the receiver and to the probable costs of his appointment and may direct an inquiry on any of these matters or any other matter before making the appointment.'

577, 39 *ibid* paras 812–813, and for cases on the subject, see 21 Digest (Reissue) 510–512, 4142–4158, 39(1) *ibid* 7–10, 3–31.

For equitable execution against property other than land or interests in land, see 17 Halsbury's Laws (4th edn) para 576, and for cases on the subject, see 21 Digest (Reissue) 514–515, 4175–4187.

For the Supreme Court Act 1981, s 37, see 11 Halsbury's Statutes (4th edn) 792.

Cases referred to in judgment

Anglo-Italian Bank v Davies (1878) 9 Ch D 275, CA.

Bonsor v Musicians' Union [1955] 3 All ER 518, [1956] AC 104, [1955] 3 WLR 788, HL.

Bourne v Colodense Ltd [1985] ICR 291, CA.

Edwards & Co v Picard [1909] 2 KB 903, CA.

Goldschmidt v Oberrheinische Metallwerke [1906] 1 KB 373, CA.

Harris v Beauchamp Bros [1894] 1 QB 801, CA.

Holmes v Millage [1893] 1 QB 551, CA.

International Tin Council, Re [1987] 1 All ER 890, [1987] 2 WLR 1229.

Johnson v Diamond (1855) 11 Exch 73, 156 ER 750.

Manchester and Liverpool District Banking Co Ltd v Parkinson (1888) 22 QBD 173, CA.

Maspons y Hermano v Mildred, Goyeneche & Co (1882) 9 QBD 530, CA.

Morgan v Hart [1914] 2 KB 183, CA.

Royal Bank of Australia, Re, Robinson's Exor's Case (1856) 6 De GM & G 572, 43 ER 1356, LC and LJJ.

Sea Fire and Life Assurance Co, Re, Greenwood's Case (1854) 3 De GM & G 459, 43 ER 180, LC and LJJ.

Shephard, Re, Atkins v Shephard (1889) 43 Ch D 131, CA.

Westhead v Riley (1883) 25 Ch D 413.

Cases also cited

Adams v Adams (A-G intervening) [1970] 3 All ER 572, [1971] P 188.

A-G v Nissan [1969] 1 All ER 629, [1970] AC 179, HL.

Alcom Ltd v Republic of Columbia (Barclays Bank plc and ors, garnishees) [1984] 2 All ER 6, [1984] AC 580, HL.

Birmingham and District Land Co v London and North Western Rly Co (1888) 40 Ch D 268, [1886–90] All ER Rep 620, CA.

Blackman v Fysh [1892] 3 Ch 209, CA.

Bull (Henry) & Co v Murphy (1900) 21 LR (NSW) Eq 1, NSW Sup Ct.

Buttes Gas and Oil Co v Hammer (Nos 2 & 3) [1981] 3 All ER 616, [1982] AC 888, HL.

Cadogan v Lyric Theatre Ltd [1894] 3 Ch 338, CA.

Central Bank v Ellis (1896) 27 OR 583.

Douglas Heron & Co v Hair (1778) Mor 14605, Ct of Sess.

Dreyfus v ICR (1929) 14 TC 560, CA.

Forsyth (William) & Co v John Hare & Co (1834) 13 S 42, Ct of Sess.

Godmam v Winterton (1940) 2 Ann Dig & Rep Pub IL Cas 205.

Hart v Emelkirk Ltd [1983] 3 All ER 15, [1983] 1 WLR 1289.

I Congreso del Partido [1981] 2 All ER 1064, [1983] 1 AC 244, HL.

Imperial Bank of Canada v Motton (1897) 29 NSR 368.

Joachimson (N) (a firm) v Swiss Bank Corp [1921] 3 KB 110, [1921] All ER Rep 92, CA.

Levermore v Levermore [1980] 1 All ER 1, [1979] 1 WLR 1277.

National Bank of Greece and Athens SA v Metliss [1957] 3 All ER 608, [1958] AC 509, HL.

Pooley v Driver (1877) 5 Ch D 458.

Potts, Re, ex p Taylor [1893] 1 QB 648, CA.

Salomon v Salomon & Co Ltd [1897] AC 22, [1895–9] All ER Rep 33, HL.

Sheffield Corp v Barclay [1905] AC 392, [1904–7] All ER Rep 747, HL.

Telfair Shipping Corp v Inersea Carriers SA, The Caroline P [1985] 1 All ER 243, [1985] 1 WLR 553.

Trendtex Trading Corp v Central Bank of Nigeria [1977] 1 All ER 881, [1977] QB 529, CA.

a *von Hellfeld v Rechnitzer and Mayer Frères & Co* [1914] 1 Ch 748, CA.

Walker v Baird [1892] AC 491, PC.

Willows v Ball (1806) 2 Bos & PNR 376, 127 ER 673.

Motions

- b By notice of motion dated 9 December 1986 the applicants, Maclaine Watson & Co Ltd, sought as against the respondent, the International Tin Council (the ITC), (i) an order that Michael Anthony Jordan of Shelley House, 3 Noble Street, London EC2 or some other fit and proper person might be appointed receiver by way of equitable execution over those assets of the ITC comprising the right of the ITC to be indemnified by or demand contributions from member governments for its liabilities incurred to the applicants for
- c the purpose of satisfying the amounts due to the applicants under the judgment entered in the Queen's Bench Division (Commercial Court) on 13 November 1986, (ii) an order that the receiver be empowered in the name of the ITC to make formal demand on the member states of the ITC to demand contributions from and/or to indemnify it for the liabilities incurred to the applicants, (iii) an order that the receiver be granted liberty to apply for such further or other directions and orders, including directions as to the
- d hearing of the applications for the above-mentioned orders and of any application by the ITC for orders that the motion be struck out. By a notice of motion dated 12 February 1987, as amended, the ITC applied to the court for an order that the applicants' notice of motion of 9 December 1986 be struck out or dismissed on the grounds (i) that it required
- e determination of issues that were non-justiciable in that the court had no jurisdiction to determine the existence or otherwise of the alleged assets over which receivership was sought, namely an alleged right or rights of action against member states of the ITC, which determination would involve interpretation and construction of an unincorporated
- f treaty made between sovereign states, (ii) that the ITC was immune from suit and legal process and, on the true construction of art 6(1) of the International Tin Council (Immunities and Privileges) Order 1972, SI 1972/120, not subject to the receivership jurisdiction of the court, (iii) that the appointment of a receiver of any such assets as
- g alleged in the applicants' notice of motion would involve interference with the rights, privileges and functions of the ITC, whose status was that of an international organisation established by sovereign states and recognised under international law, (iv) that the appointment of a receiver in accordance with the applicants' notice of motion would involve interference with and/or the interpretation of and/or adjudication on international
- h treaty-based transactions between, and the rights and obligations of, independent sovereign states, that the court had no jurisdiction in any event to appoint a receiver either for the purpose of creating an asset (as by making a demand for contribution or indemnity) or in respect of an alleged right to exercise a power to make such a demand and that in any event the court had no jurisdiction to appoint a receiver by way of equitable relief except where the interest of the judgment debtor in the alleged asset was an equitable interest only, which if it had been a legal interest could have been reached
- i by execution at law, (v) that the relief sought was in respect of money alleged to be due or accruing due from the Crown and accordingly, by virtue of the provisions of RSC Ord 77, r 16, no order for the appointment of a receiver under Ord 30 or Ord 51 could be made and (vi) that in the circumstances the relief sought would never be granted by the court in any event. By a notice of motion dated 24 March 1987 the applicants sought an
- j order pursuant to RSC Ord 77, r 16 restraining the ITC from receiving the amount of the debt due or accruing due from the Department of Trade and Industry to the ITC or so much thereof as would satisfy the debt due under the judgment entered in the Queen's Bench Division (Commercial Court) on 25 November 1986 for £6,024,376.40 and costs in the action in which the judgment was in favour of the applicants, and directing payment thereof and of the costs of the application by the Department of Trade and

Industry to the applicants. The motions were heard together. The facts are set out in the judgment. a

Mark Littman QC, Richard Aikens QC, Richard McCombe and Adrian Hughes for the applicants.

Robert Alexander QC, Richard Sykes QC, Nicholas Chambers QC, Rosalyn Higgins QC, Peter Irvin and Leslie Kosmin for the ITC.

Sir Maurice Bathurst QC, Anthony Grabiner QC, John Mummery, Nicolas Bratza and David A S Richards for the Attorney General. b

Cur adv vult

13 May. The following judgment was delivered.

MILLETT J. This is another application resulting from the failure of the International Tin Council (the ITC) to meet its obligations. For the factual background and for the relevant provisions of the Sixth International Tin Agreement (ITA) under which the ITC is presently constituted and of the International Tin Council (Immunities and Privileges) Order 1972, SI 1972/120, reference may be made to the previous application reported as *Re International Tin Council* [1987] 1 All ER 890, [1987] 2 WLR 1229. c

The present applicants, Maclaine Watson & Co Ltd, are ring-dealing members of the London Metal Exchange. Between 29 August and 23 October 1985 they entered into contracts with the ITC for the purchase and sale of tin. The ITC defaulted on those contracts. The applicants' claims were referred to arbitration. The ITC submitted to the jurisdiction of the arbitrators in all respects and participated fully in the arbitration. On 6 November 1986 the applicants obtained an award in their favour of £6m together with the costs of the award which were taxed and settled in the sum of £7,116·25. d

The award was not satisfied. On 13 November 1986 the applicants obtained leave, pursuant to s 26 of the Arbitration Act 1950, to enforce the award in the same manner as a judgment or order to the same effect. On 25 November the applicants entered judgment against the ITC for a total amount, inclusive of interest, of £6,024,376·40. The judgment remains unsatisfied. e

The total debts of the ITC to unsatisfied creditors amount to several hundred million pounds. It has assets in the United Kingdom, but its only substantial assets appear to consist of such rights, if any, as it may have to be indemnified by or demand contributions from its member states. It has to date made no demand on them. In an endeavour to discover what other assets the ITC may have against which their judgment could be enforced, the applicants have made an application under RSC Ord 48, r 1. That application was refused by the master, whose decision is under appeal. f

On 9 December the applicants made the application which is now before me for the appointment of a receiver by way of equitable execution over those assets of the ITC which consist of the right which it is said to have to be indemnified by or demand contributions from its members for the purpose of satisfying the judgment. The applicants seek orders authorising the receiver in the name of the ITC to make formal demands on the member states and to enforce payment if necessary by litigation in the English courts. One of the members is Her Majesty's government in the United Kingdom, and in the case of any claim of the ITC to be indemnified by or demand contributions from the Crown the applicants seek an appropriate form of relief under Ord 77, r 16. g

Meanwhile on 3 December the applicants, trying a different approach, issued a writ directly against the Department of Trade and Industry as representing Her Majesty's government in the United Kingdom, and claiming payment of the sum due. I shall call that action 'the direct action'. On 10 April 1987 the defendant served a notice of motion to strike out the writ in the direct action. That motion is due to be heard before me on h

i

a 20 July. In the mean time, I understand that other creditors with arbitration awards in their favour have brought similar direct claims against the member states, and these claims are being heard in the Commercial Court now.

In the direct action, as in all the direct claims, the status of the ITC in English law is likely to be of crucial importance. The commercial contracts for the sale and purchase of tin entered into by the ITC were governed by English law, and the identity of the persons who can sue and be sued on such contracts must also be determined by that law (see b *Maspons y Hermano v Mildred, Goyeneche & Co* (1882) 9 QBD 530 at 539). The ITC was able to enter into the contracts in question, incur liabilities and suffer the arbitration award against it because art 5 of the 1972 order provides that it shall have the legal capacities of a body corporate. If, however, as a matter of English law it has no sufficient legal personality of its own distinct from that of its members, then the liabilities which have resulted from those contracts must be the liabilities of its members enforceable c directly against them. If, on the other hand, the ITC has a sufficient legal personality of its own distinct from that of its members, not merely in international law but in English domestic law also, then the contracts in question were entered into by the ITC and not by its members, and the resulting liabilities were the liabilities of the ITC and not of its members. It is, of course, at least theoretically possible that even in these circumstances the members may be liable for the debts of the ITC, but that is another question.

d It is common ground in the present application that, as I said in the previous application (see *Re International Tin Council* [1987] 1 All ER 890 at 896–897, [1987] 2 WLR 1229 at 1237–1238), the ITC is an international organisation created by treaty with legal personality in international law on which the 1972 order has conferred the legal capacities of a body corporate; but it is not incorporated by the 1972 order, is not a statutory body and is not incorporated in the United Kingdom or anywhere else. At this point, however, e the two sides part company. The applicants contend that the ITC's status in English law is exhaustively defined by the 1972 order, under which it is an unincorporated organisation or association of member states with the legal capacities, but not the legal status, of a body corporate, and with no separate legal existence of its own. Counsel for the ITC contended that the existence of the ITC with its own separate legal personality in f international law is recognised by the 1972 order and that the English court must give effect to this. Since this would not be sufficient to avoid the liability of the members, counsel presumably meant, although he did not in terms say, that the English court must give effect to the 1972 order, not merely by recognising that the ITC has legal personality in international law, but by according it similar personality in English domestic law. One obvious difficulty in the way of such an argument, of course, is that it would seem to be inconsistent with the express conferment on the ITC of the legal g capacities of a body corporate, a provision which would be unnecessary if it already had separate legal existence of its own.

I did not find it necessary to decide this question on the previous application, and I deliberately left it open (see [1987] 1 All ER 890 at 898, [1987] 2 WLR 1229 at 1239–1240). It is no more necessary now. Since it is likely to be crucial in the direct action and h in the other direct claims, and has not been fully argued before me, I propose to say no more about it. I shall approach the present application simply on the basis of what is expressly stated in paras 4 and 5 of the 1972 order, namely that the ITC is an organisation (which may or may not have its own separate legal personality in English law) of which Her Majesty's government in the United Kingdom and the governments of foreign sovereign powers are members and that it has the legal capacities of a body corporate.

i To succeed in the present application the applicants must satisfy four conditions. They must show, firstly, that the court has jurisdiction to appoint a receiver by way of equitable execution over the relevant assets of the ITC, secondly, that if a receiver were appointed he could be given power in the name of the ITC to bring proceedings in the English courts against member states, thirdly, that there is at least an arguable case that the ITC has an identifiable cause of action against its members and, fourthly, that the relevant

cause of action is justiciable by these courts. The argument in fact has centred largely on the first and third of these requirements. a

1 Jurisdiction to appoint a receiver by way of equitable execution

It was conceded before me that in a proper case the appointment of a receiver by way of equitable execution would represent a process for the enforcement of an arbitration award and thus fall within one of the exceptions from the immunity of the ITC conferred by art 6 of the 1972 order. A number of technical grounds were put forward in the pleadings for contending that, even in the absence of the special features which the nature of the ITC presents, this would not be a proper case for the appointment of a receiver, but in the end only two were relied on before me. It was submitted that the court has no jurisdiction to appoint a receiver by way of equitable execution except where the interest of the judgment debtor in the alleged asset is an equitable interest only which, if it had been a legal interest, could have been reached by execution at law. Alternatively, it was said that there must be some other difficulty, arising from the nature of the property, which precludes execution at law but which can be overcome by the appointment of a receiver. For the reasons which will appear, I reject the first but accept the second of these submissions. b

The court's jurisdiction to appoint a receiver by way of equitable execution derives from s 37(1) of the Supreme Court Act 1981, which gives the court power to appoint a receiver 'in all cases in which it appears to the court to be just and convenient to do so'. That subsection re-enacts in virtually identical terms s 45 of the Supreme Court of Judicature (Consolidation) Act 1925, which in turn replaced s 25(8) of the Supreme Court of Judicature Act 1873, but it is well established that despite the width of the language used these statutory provisions did not confer on the court power to appoint a receiver by way of equitable execution in a case where prior to the Judicature Acts no court could have granted such relief. c

In *Bourne v Colodense Ltd* [1985] ICR 291 the plaintiff brought a test case against the defendants. After a hearing which lasted for 42 days, the trial judge dismissed the action with costs. The judge understood that the litigation was financed by the plaintiff's union. The union refused to pay the costs, and the plaintiff refused to ask it to do so. The Court of Appeal held that there was an arguable case that the plaintiff was entitled to an indemnity from his union against his liability to pay the defendants' costs and that defendants were entitled to have a receiver appointed by way of equitable execution in order to make the necessary demand and take over the plaintiff's rights of action against the union. d

In my judgment, on the present question that case is on all fours with the present. There, as here, the debtor's asset was a legal chose in action, namely, a claim to be indemnified on demand. The debtor refused to make the necessary demand or to enforce his claim. Execution at law was not available, for a claim to be indemnified is not an attachable debt and cannot be made the subject of a garnishee (see *Johnson v Diamond* (1855) 11 Exch 73, 156 ER 750). This difficulty was overcome by the appointment of a receiver. e

In the course of his judgment, Dillon LJ said ([1985] ICR 291 at 302): f

'The appointment of a receiver by way, as it is traditionally called, of equitable execution is a form of equitable relief to enforce payment of a judgment debt which the court may grant in the special circumstances of a particular case if, as in the present case, the recovery of the judgment debt by the more usual processes of execution or attachment of debts is not practicable. The remedy is, however, discretionary and it is plain that the court would not appoint a receiver if the court were satisfied that the appointment would be fruitless because there was nothing for the receiver to get in.' g

Counsel for the ITC submitted that this passage states the law too widely. There is h

certainly abundant Court of Appeal authority for the propositions (i) that the court has no jurisdiction to appoint a receiver by way of equitable execution merely because in all the circumstances it would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution (see *Re Shephard*, *Atkins v Shephard* (1889) 43 Ch D 131, *Harris v Beauchamp Bros* [1894] 1 QB 801 at 806–807) and (ii) that the special circumstances which would justify the making of an order must be such circumstances as would have enabled the Court of Chancery before the Judicature Acts to have intervened by way of injunction or receiver at the suit of the judgment creditor (see *Holmes v Millage* [1893] 1 QB 551, *Harris v Beauchamp Bros* [1894] 1 QB 801 at 810, *Edwards & Co v Picard* [1909] 2 KB 903 and *Morgan v Hart* [1914] 2 KB 183). These authorities show that what is required is that there should be some hindrance arising from the nature of the property which prevents the judgment creditor from obtaining execution at law but which the appointment of a receiver can overcome. In *Re Shephard*, *Atkins v Shephard* 43 Ch D 131 at 135 Cotton LJ said:

‘But what he gets by the appointment of a receiver is not execution but equitable relief, which is granted on the ground that there is no remedy by execution at law; it is a taking out of the way a hindrance which prevents execution at common law.’

Citing this passage with approval in *Morgan v Hart* [1914] 2 KB 183 at 188 Buckley LJ added:

‘Perhaps the expression “hindrance” requires some explanation. The learned judge meant, I think, hindrance arising from the nature of the property.’

In *Edwards & Co v Picard* [1909] 2 KB 903 at 910 Buckley LJ said:

‘Equitable execution is relief given on the ground that there is no remedy by execution at law: it operates by removing a hindrance which prevents execution at law.’

The principle was stated somewhat more widely by Vaughan Williams LJ in *Goldschmidt v Oberrheinische Metallwerke* [1906] 1 KB 373 at 375:

‘... he must now shew that the circumstances are such as to render it practically very difficult, if not impossible, to obtain any fruit of his judgment, unless what has been called equitable execution be granted to him.’

It is not necessary for me to express any view whether this more liberal formulation is correct, since I am not concerned with a case where execution at law is merely difficult or impractical. It is impossible. A claim by a judgment debtor to be indemnified by a third party is not susceptible to any process of legal execution.

Is it susceptible to equitable execution? The contention of counsel for the ITC that a receiver by way of equitable execution cannot be obtained over property in which the judgment debtor has a legal, and not merely an equitable, interest was based almost entirely on a passage in the judgment of Lindley LJ in *Holmes v Millage* [1893] 1 QB 551 at 555, where giving the judgment of the court he said:

‘We have simply to deal with a case in which an ordinary judgment creditor sought the aid of a Court of Equity to enforce his judgment against property not capable of being reached by any common law process. The only cases of this kind in which Courts of Equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law, if he had had the legal interest in it, instead of an equitable interest only.’

This was said to be supported by a passage in the judgment of Buckley LJ in *Edwards & Co v Picard* to which I will come later.

In *Holmes v Millage* the plaintiff sought the appointment of a receiver over the future salary of the judgment debtor. The application was refused, not on the ground that the

judgment debtor was entitled to his salary at law, but because a man's future salary is not attachable at law or in equity. The ratio of the case is to be found in the following passages ([1893] 1 QB 551 at 555): a

'... the existence of a legal right is essential to the exercise of this jurisdiction. The judgment creditor here has a legal right to be paid his debt, but not out of the future earnings of his debtor; and the Court of Chancery had no jurisdiction to prevent him from earning his living or from receiving his earnings, unless he had himself assigned or charged them.' b

And (at 557):

'In the last-mentioned case [*Manchester and Liverpool District Banking Co v Parkinson* (1888) 22 QBD 173] an order for a receiver was discharged, because there was no difficulty in enforcing payment of a judgment by the ordinary legal methods. In this case there is such a difficulty; but it does not arise from any impediment which the old Court of Chancery had jurisdiction to remove. The difficulty arises from the fact that future earnings are not by law attachable by any process of execution direct or indirect'. c

In my judgment, the passage on which counsel for the ITC relied forms no part of the ratio of the case, and as a historical exposition is too narrowly stated. As Davey LJ pointed out in *Harris v Beauchamp Bros* [1894] 1 QB 801 at 808, the most common case for the appointment of a receiver by way of equitable execution before the Judicature Acts was that described by Jessel MR in *Anglo-Italian Bank v Davies* (1878) 9 Ch D 275, but it was not the only case. d

In *Edwards & Co v Picard* the plaintiffs sought the appointment of a receiver by way of equitable execution over a patent, but there was no evidence that the patent was being exploited or that the judgment debtor was in receipt of any royalties. The application was dismissed on the ground that there was no property of the judgment debtor for the receiver to receive. Buckley LJ said ([1909] 2 KB 903 at 910): e

'I fail to grasp what is meant' by a receiver of a patent or of the profits of a patent which is not being worked. There is nothing receivable: A receiver could not sue for infringement, nor could he, I think, bring an action to enforce any right to use the patentee's name to sue for infringement, nor could he work the patent and thus produce profits.' f

A little earlier in his judgment, speaking of the patent, Buckley LJ said (at 910):

'It creates in him a right of action to prevent anyone else manufacturing. It creates in him a right to bring an action for infringement with resultant remedy by way of injunction, or damages, or both. This right is a legal right. There is no question of equity in the matter. This right must either be amenable to execution at law, or not at all. Equitable execution is relief given on the ground that there is no remedy by execution at law: it operates by removing a hindrance which prevents execution at law. There is here no hindrance for equity to remove. It is not a case in which the debtor has an equitable interest only in property which could have been reached at law if he had had the legal interest in it. The property is property in which he has the legal interest.' g
h

Counsel for the ITC relied on that passage, but, in my judgment, it provides no support for the thesis for which he was contending. Buckley LJ was speaking of the right to bring an action for infringement. As he pointed out in the later passage which I have quoted from his judgment, a receiver could not sue for infringement. It was for that reason that the right in question 'must either be amenable to execution at law or not at all' (at 910). It was, perhaps, not so much a case where there was no hindrance for equity to remove, but rather a case where there was a hindrance which even equity could not remove. In j

this context, it is clear that the last two sentences of the passage merely deal by way of contrast with the typical case; they are not intended to describe the only possible one.

The test stated by Chitty J in *Westhead v Riley* (1883) 25 Ch D 413 is that there should be no way of getting at the fund except by the appointment of a receiver.

No case has been cited to me in which a receiver has been refused on the ground that the judgment debtor had a legal interest in the property sought to be attached; and two cases (*Goldschmidt v Oberrheinische Metallwerke* [1906] 1 KB 373 and *Bourne v Colodense Ltd* [1985] ICR 291) have been cited in which a receiver was appointed over property in which the debtor had such an interest. In every case where the appointment has been refused, it has been either on the ground that there was no legal impediment to execution at law (see *Manchester and Liverpool District Banking Co Ltd v Parkinson* (1888) 22 QBD 173 and *Morgan v Hart* [1914] 2 KB 183) or on the ground that the nature of the property was such that it could not be reached by either law or equity (see *Holmes v Millage* [1893] 1 QB 55 and *Edwards & Co v Picard* [1909] 2 KB 903).

In the present case the property in question cannot be reached by any process of legal execution for three reasons: firstly, because with the exception of Her Majesty's government in the United Kingdom, all the indemnifying parties are out of the jurisdiction; secondly, because the ITC has not made, and it is reasonable to infer that it does not intend to make, any formal demand on its members; and, thirdly, because a claim to be indemnified by a third party is not amenable to garnishee. I have the authority of the decision of the Court of Appeal in *Bourne v Colodense* for holding that the second and third of these impediments can be overcome by the appointment of a receiver by way of equitable execution with power to make the demand and to bring proceedings if necessary; and the first obviously can. In my judgment, therefore, there is no technical objection to the appointment which is sought.

2. The power of the ITC to sue its own members

It is common ground between the parties, though for different reasons, that, if a justiciable cause of action exists, the ITC can maintain an action against its members in the English courts. The ITC says that this is because it is a juristic person. The applicants say that it is because, although the ITC is not a juristic person but merely a collective name for its members, the 1972 order has conferred on it the capacities of a body corporate. These include the power to contract with its members, to demand performance from them and to maintain proceedings and obtain judgments against them. This is not an empty process since, even if the ITC is not a legal person distinct from its members, it has the capacity to hold property, with the result that such property is distinct from that of its members, so that a judgment obtained against it in its own name is recoverable only from its own funds (see *Bonsor v Musicians' Union* [1955] 3 All ER 518, [1956] AC 104). The purpose of the present application is to compel payment by the member states into the funds of the ITC, against which alone the applicants' existing judgment is recoverable.

3. The existence of a cause of action

It is at this stage that the applicants' real difficulties arise. They must show that the ITC has an arguable cause of action against the member states capable of being taken over by the receiver and which the court can entertain. Counsel for the applicants accepted that for the reasons stated in the previous application (see *Re International Tin Council* [1987] 1 All ER 890 at 900, [1987] 2 WLR 1229 at 1241-1242) a cause of action based on an alleged breach of the ITA would not be justiciable in these courts. Accordingly, he embarked on a quest for an arguable cause of action which does not depend on the ITA and does not require the court to interpret the terms of an international treaty or enforce the obligations arising thereunder. In my judgment, the quest was hopeless.

Counsel for the applicants put the case in various ways. Firstly he submitted that as a matter of English law the ITC is simply an unincorporated association of member states

engaged in trade, with the legal capacities of a body corporate but without any separate existence of its own, in other words, a partnership, that every member of such a partnership is liable as principal for the debts and liabilities of the firm, and is entitled to contribution from his co-partners, for the debts and liabilities of the firm are as much theirs as they are his, and that this right of contribution can be enforced by the ITC, or by the receiver in its name. Alternatively, he submitted that, even if the ITC falls to be treated as having its own legal personality distinct from that of its members, nevertheless it is not incorporated and is still a trading partnership, like a Scottish partnership, with a right, like that of a Scottish partnership, to call on the members to put it in funds to meet its liabilities. As a further alternative, he submitted that, even if the ITC is not a partnership of any kind, nevertheless the contracts which give rise to the liability were entered into by the ITC as agent for its members or alternatively at their request, and on either footing the ITC is entitled to be indemnified by them. a
b

In my judgment, all these alternative ways of putting the case involve the same three fallacies: (i) that, because the contracts which the ITC entered into with the applicants were governed by English law, therefore the mutual rights and obligations of the ITC and its members, including the right of the ITC to be indemnified by or demand contributions from its members, must be governed by the same law; (ii) that, because the liability of the members to third parties cannot be excluded or cut down by any private agreement between the members, such an agreement cannot be the source of the mutual rights and obligations of the ITC and its members; and (iii) that, because no relevant rights of indemnity or contribution can in fact be found in the ITA, or would be enforceable in the English courts if they could be found, such rights must derive from some other source. c
d

It may readily be allowed that there is an arguable case for saying that, in English law, the relationship between the member states is that of partners, and that the relationship between each of the member states and the ITC is that of principal and agent. If so, then the member states are directly liable as principals on any contracts entered into by the ITC and governed by English law, and their liability cannot be excluded or cut down by any agreement among themselves, for the rights of the creditors are extrinsic to any such agreement (see *Re Sea Fire and Life Assurance Co, Greenwood's Case* (1854) 3 De GM & G 459 at 475-476, 43 ER 180 at 186-187). But the receiver would not be enforcing the liability of the member states to the applicants, but their liability to the ITC; and while the liability of the principal to the third party is governed by the proper law of the contract into which his agent has entered, the mutual rights and obligations of the principal and agent, and any liability of the principal to indemnify his agent, arise from the contract between them and must be governed by the proper law of that contract. e
f

Accordingly, to succeed in his claim against the member states, the receiver would have to establish the existence of some agreement, express or implied, between the member states under which the right of indemnity or contribution could be said to arise and which is justiciable in these courts. Since the ITC was established to trade in England and has done so, some agreement by the members to this effect may readily be inferred. Unfortunately for the applicants, there is no room for inference: the existence of the relevant agreement can be proved as a fact. It was the ITA. That is the agreement by the member states which established the ITC, conferred international legal personality on it and authorised it to trade in England. That is the agreement under which the mutual rights and obligations of the member states and the ITC arise; there is not a scrap of evidence to suggest that there was any other agreement, and no conceivable reason to infer one. The fact that the ITA is not enforceable by the English courts does not entitle the courts to pretend that it does not exist, or to cast around for some other and fanciful source of the ITC's rights against its members. Its rights derive from the treaty and nowhere else, and, as the 1972 order acknowledges, the treaty is not a contract of partnership or agency but of membership. The relationship it creates are not those of partners or of principal and agent but of an organisation and its members. g
h
j

a Counsel for the applicants submitted that, given the existence of 33 principals each with its own system of law, the proper law of the contract of agency must in the absence of some other agreement be the law of the country where the agent is to transact his principals' business. That would no doubt be so if the principals were ordinary individuals or trading companies who are bound to subject their agreement with each other to some national system of law. But here the members are independent sovereign states with the power to enter into an international treaty which is governed by the law, and enforceable
b by the national courts, of no single country. That is what they have done and, on the evidence before me, all that they have done.

Counsel for the applicants submitted that the ITC's rights of indemnity or contribution from its members cannot derive from the ITA, because the ITC is not a party to the treaty, and because in fact no such rights can be found in it. The ITA is, of course, not only the agreement between the members which established the ITC, but also the ITC's
c constitutional instrument. Whether it creates rights between the members only, or whether it creates rights also between the ITC and the members, and if so whether its express provisions need to be augmented by further implied terms, are questions on which, as a judge of the national courts of one of the member states only, I have no authority to pronounce. But let it be assumed that, for whatever reason, no right of indemnity or contribution, express or implied, is given to the ITC by the treaty. What
d follows? What follows is not that the right must derive from some other source, but that there is no such right.

The reliance of counsel for the applicants on the Scottish law of partnership was equally unproductive. A Scottish firm is not a body corporate, but, as is well known, it possesses a separate legal personality of its own distinct from that of its members. Any liabilities which it incurs are the liabilities of the firm and not of the members, but the members
e are liable as guarantors of the firm, and in some circumstances (such as winding up) can apparently be sued not only by the creditors of the firm but by the firm itself. As I understood his argument, counsel contended that this is a feature which is inherent in the very nature of any non-corporate trading organisation which has its own legal personality. That may be so, for all I know, at least under some systems of law; but it is
f still necessary to identify the source of the members' obligation, not to pay the creditors but to indemnify the organisation. In my judgment, that can only be the agreement between the members or the law under which the organisation is established. Once again, the applicants are driven back to the treaty.

Counsel for the applicants submitted that, in demanding payment from the members, the receiver would not be enforcing the claims of the ITC, but setting in motion
g machinery to enforce the claims of the applicants. For this proposition he relied on *Re Royal Bank of Australia, Robinson's Exor's Case* (1856) 6 De GM & G 572, 43 ER 1356. That was a case of an unregistered company which was being wound up under the Joint Stock Companies Winding-up Acts 1848 and 1849, at a time when even the shareholders of registered companies did not enjoy the benefit of limited liability. The question for decision was whether a call made on the contributories by the master gave rise to a
h speciality or a simple contract debt. In the course of his judgment Lord Cranworth LC said (6 De GM & G 572 at 587, 43 ER 1356 at 1362):

'Every shareholder, as a partner, is liable to every creditor to the full amount of his demand, and the sum raised by the Master represents not any demand of the shareholders *inter se*, but the aggregate demand of all the creditors on the whole
j partnership.'

But the case was one in which the contract with the creditor, the constitution of the company and the winding up were all governed by English law, and the power of the master to make the call arose under an express statutory provision, in the Joint Stock Companies Winding-up Act 1848, s 83, the distant ancestor of s 74 of the Insolvency Act 1986, which authorised the master to levy calls on the members, not for what they had

agreed inter se to pay into the common pool, but for such amount as might be necessary to pay the debts and liabilities of the company and the costs and expenses of the winding up. That power was exercisable only in a winding up, and the result of the previous application is that the modern statutory counterpart is not available. So the essential machinery is missing. Counsel for the applicants submitted that the appointment of a receiver, coupled with the 1972 order, would supply alternative machinery. But this alternative machinery works on a different principle, and is defective. It works on a different principle by vesting in the receiver not the statutory right of a liquidator, and not the claims of the applicants against the members, but those of the ITC. It is defective, because the appointment does no more than vest in the receiver whatever rights the ITC may have, while the 1972 order does no more than give the ITC the capacity to enter into arrangements to obtain the necessary rights. Unlike the Joint Stock Companies Winding-up Acts 1848 and 1849, neither of them actually creates the rights themselves. The source, and the only source, of those rights remains the treaty.

Finally, it was submitted that, if necessary, the receiver would contend that the trading activities carried out at the material time by the buffer stock manager of the ITC, including the contracts giving rise to the judgment debt, although carried out with the full knowledge, authority and at the request of the member states, were outside the scope of the ITA. I entirely fail to understand how the contention, even if true, could help the receiver. As between the ITC and the member states, the scope, extent and meaning of the ITA are not justiciable in the English courts, which could not make the necessary findings. But, even if they could, what would follow? The implied agreement to indemnify the ITC which is said to follow would be an agreement between independent sovereign states in augmentation of the treaty, and would still be governed by international law and not enforceable in these courts.

4 Conclusion

In my judgment, the applicants have failed to show any arguable case for contending that the ITC has a cause of action against its members which is not derived from the treaty. It is rightly conceded that these courts cannot entertain a cause of action which is so derived, and accordingly I must dismiss the application.

Motions dismissed.

Solicitors: *Elborne Mitchell* (for the applicants); *Cameron Markby* (for the ITC); *Treasury Solicitor*.

Jacqueline Metcalfe Barrister.

Practice Note

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

HIRST J

23 OCTOBER 1987

- b** *Commercial Court – Practice – Interlocutory proceedings – Estimate of length of hearing – Written outlines of submissions to be submitted in advance – Documents – Summons for directions – Experts' reports – RSC Ord 14, Ord 38, r 2A.*

HIRST J gave the following direction at the sitting of the court. Last term Staughton J consulted the City of London Law Society and the London Common Law and Commercial Bar Association concerning proposals for limitation of time for interlocutory hearings, which form such an important part of the Commercial Court's work.

- c** These were supported by the solicitors, but the Bar expressed misgivings. After further consideration the Commercial Court judges have decided to prescribe stricter control of time limits for a trial period of 12 months encompassing the legal year 1987 to 1988.

- d** Progress will be monitored meantime and any representations will be carefully considered when it comes under review in the summer of 1988.

The efficient working of the system depends on accurate estimates of the time needed for a summons. It is therefore incumbent on counsel and solicitors to take special care in this respect. In future any summons which overruns its estimate will probably be adjourned.

- e** Subject only to the exception specified below, the Clerk to the Commercial Court will not accept estimates exceeding the following:

1. Summons to set aside service etc	4 hours
2. RSC Ord 14	4 hours
3. Set aside judgment in default	2 hours
4. Set aside or vary injunction	2 hours
f 5. Amendment of pleadings	1 hour
6. Further discovery (including interrogatories)	1 hour
7. Further and better particulars	$\frac{1}{2}$ hour
8. Security for costs	$\frac{1}{2}$ hour

- g** These are maxima, not guidelines. Proper estimates in each category will often be much shorter, and overestimating is wasteful, not only of the court's time, but also of the opportunity for other litigants to get their summonses heard.

A longer time will only be allocated on application in writing by counsel to the judge in charge of the commercial list, or such other judge as he may nominate, specifying the extra time required and the reasons why.

- h** In all cases, whatever their duration, written outlines of submissions (which can be in note form) should be submitted by both parties in advance. In cases estimated for two hours or more, the additional documents specified in the Guide to Commercial Court Practice (see *The Supreme Court Practice 1988* vol 1, paras 72/A1–72/A21) will also be required.

All estimates should be made on the assumption that the judge will have read in advance the affidavits and all written submissions, but not the exhibits.

- i** Although a departure from previous practice, this is only a further small step towards reducing the present unacceptable delays in the Commercial Court. However it signifies a determination to continue to enhance our efficiency, though the scope for improvement, particularly in cutting waiting time for the longer trials, is limited by our present resources.

Other recent measures to improve efficiency are set out in the guide, and particular attention is drawn to section X and Annex B, dealing with the requirements for the summons for directions. Their purpose is to focus the attention both of practitioners and of the court at an early stage of the proceedings on steps designed to curtail the duration and expense of the trial, especially through mutual exchanges in advance of information between the parties. This also tends to promote settlements. In future the court will be unwilling to hear summonses for directions which do not comply with these requirements, and may also impose costs penalties. a

It is not always appreciated that this new regime requires not only the exchanges of experts' reports, but also, in the normal run of case, the exchange of written statements of the oral evidence of intended witnesses of fact, subject of course to all proper objections, such as in fraud cases. With this innovation, made possible under the recent enactment of RSC Ord 38, r 2A, the Commercial Court, together with the Chancery Division and the official referees' court, are breaking new ground in a procedure which should curtail the amount of oral evidence (particularly evidence-in-chief) and also reduce the number of witnesses who eventually need to be called. b
c

N P Metcalfe Esq Barrister.

Cracknell v Willis

HOUSE OF LORDS

LORD KEITH OF KINKEL, LORD BRANDON OF OAKBROOK, LORD GRIFFITHS, LORD OLIVER OF AYLMEYTON AND LORD GOFF OF CHIEVELEY

8 JULY, 5 NOVEMBER 1987

- a**
- b** Road traffic – Driving while unfit to drive through drink or drugs – Specimens of breath – Specimens for analysis on approved device – Failure to provide second specimen – Whether evidence of single specimen admissible on charge of driving with excess alcohol – Whether person can be convicted of driving with excess alcohol on evidence of only one specimen of breath – Road Traffic Act 1972, ss 6(1), 10(2).
- c** Road traffic – Breath test – Failure to provide specimen – Specimens for analysis on approved device – Failure to provide second specimen – Whether person can be convicted of failing to provide specimen if after providing one specimen he refuses to provide second specimen – Whether evidence of result of analysis of one specimen admissible for purposes of assessing penalty for failing to provide second specimen – Road Traffic Act 1972, ss 8(7), 10(2).
- d** Road traffic – Breath test – Device – Evidence of malfunctioning of device – What evidence admissible – Whether admissible evidence restricted to direct evidence of malfunctioning of device – Whether evidence of amount of alcohol consumed prior to taking test admissible for purposes of attacking reliability of device.
- e** The appellant was stopped by a police constable while driving a motor car at speed and was breathalysed at the roadside. The breath test proved positive and he was arrested and taken to a police station where he was requested to provide a specimen of breath on a Lion Intoximeter for analysis. He provided a specimen which showed that the amount of alcohol in his breath was well above the prescribed limit. He was then asked to provide a second specimen but his four attempts to do so failed because he did not blow into the machine properly. The appellant then refused to provide a further specimen. He was charged with driving a motor vehicle after consuming excess alcohol, contrary to s 6(1)^a of the Road Traffic Act 1972, and failing without reasonable excuse to provide a specimen of breath, contrary to s 8(7)^b of that Act. At the hearing of the charges the magistrates refused to allow the appellant to adduce evidence of the amount of alcohol he had consumed with a view to showing that the machine was defective and convicted him of both offences. The appellant appealed, contending that he should to have been allowed to adduce evidence of the amount of alcohol he had consumed prior to his arrest to show that the machine was defective and should not have been convicted of both offences since ss 6(1) and 8(7) created alternative offences. The Divisional Court upheld the convictions, holding that, if the first specimen of breath was taken in accordance with the statutory procedure laid down in s 8 of the 1972 Act, it then became admissible in order to establish the s 6 offence, by virtue of the provisions of s 10(2)^c which provided that 'Evidence of the proportion of alcohol . . . in a specimen of breath provided by the accused shall, in all cases, be taken into account . . .' The appellant appealed to the House of Lords.
- h**
- j** **Held** – (1) If a driver provided one specimen of breath which showed that he had consumed excess alcohol but failed to provide a second specimen he could not be

a Section 6(1), so far as material provides: 'If a person—(a) drives or attempts to drive a motor vehicle on a road . . . after consuming so much alcohol that the proportion of it in his breath . . . exceeds the prescribed limit he shall be guilty of an offence'

b Section 8(7) is set out at p 805 g, post

c Section 10(2) is set out at p 806 c to e, post

convicted, on the evidence of the one specimen alone, of the offence of driving with excess alcohol, contrary to s 6(1) of the 1972 Act, because the specimen of breath which magistrates were entitled to take into account under s 10(2) for the purpose of determining the proportion of alcohol in the driver's breath was the lower of the two specimens required to be taken under s 8 and if two specimens were not provided there was not a proper specimen which the magistrates could take into account under s 10(2). However, although a driver could not be convicted under s 6(1) of driving with excess alcohol if he only provided one specimen he might nevertheless be convicted of failing to provide a specimen, contrary to s 8(7) (see p 803 d to f, p 806 f to h, p 807 d to f and p 813 e f, post); *Duddy v Gallagher* [1985] RTR 401 and *Burridge v East* [1986] RTR 328 overruled.

(2) A driver who wished to challenge the reliability of a breath-testing device, such as the Lion Intoximeter, was not restricted to adducing direct evidence of malfunctioning on the part of the device but was instead entitled, for the purpose of attacking the device's reliability, to adduce evidence of his consumption of alcohol prior to his arrest. Accordingly, the magistrates had erred in refusing to admit the evidence which the appellant had sought to adduce. That was not, however, a ground for quashing the appellant's conviction under s 8(7) of the 1972 Act for failing to provide a specimen of breath, because the failure of the machine had been due solely to the appellant's persistent refusal to supply enough breath for a specimen to be taken (see p 803 d to f, p 811 j, p 812 d e h to p 813 f j, p 814 a f g and p 815 c d, post); *Hughes v McConnell* [1985] RTR 244 and *Price v Nicholls* [1986] RTR 155 overruled.

(3) Since the appellant had provided only one specimen of breath he should not have been convicted under s 6(1) of the 1972 Act and his conviction under that section would therefore be quashed, but his appeal against his conviction under s 8(7) would be dismissed (see p 803 d to f, p 807 f and p 813 e f, post).

Per Lord Griffiths. In assessing the penalty to be imposed for failing to provide a specimen of breath, contrary to s 8(7) of the 1972 Act, account may be taken of any evidence that indicates the motorist's consumption of alcohol, including the result of the analysis of the first specimen of breath where he unreasonably refuses to provide a second specimen (see p 807 g, post).

Notes

For failure to provide a specimen of breath, see 40 Halsbury's Laws (4th edn) para 493, and for cases on the subject, see 39(1) Digest (Reissue) 498-503, 3701-3720.

For evidence of the proportion of alcohol in a specimen of breath, see 40 Halsbury's Laws (4th edn) para 496.

For the Road Traffic Act 1972, ss 6, 8, 10 (as substituted by the Transport Act 1981, s 25(3), Sch 8), see 51 Halsbury's Statutes (3rd edn) 1427, 1432, 1434.

Cases referred to in opinions

Burridge v East [1986] RTR 328, DC.

Duddy v Gallagher [1985] RTR 401, DC.

Fox v Chief Constable of Gwent [1985] 3 All ER 392, [1986] AC 281, [1985] 1 WLR 1126, HL.

Howard v Hallett [1984] RTR 353, DC.

Hughes v McConnell [1985] RTR 244, DC.

Lucking v Forbes [1986] RTR 97, DC.

McGrath v Field (1986) Times, 20 November, DC.

Newton v Woods [1987] RTR 41, DC.

Price v Nicholls [1986] RTR 155, DC.

Appeal

Robert Peter Cracknell appealed with leave of the Appeal Committee of the House of Lords given on 11 December 1986 against the decision of the Divisional Court of the Queen's Bench Division (Ralph Gibson LJ and McNeill J) on 20 October 1986 dismissing his appeal by way of case stated by the justices for the South East Area acting in and for

- a the petty sessions area of Bromley in respect of their adjudication as a magistrates' court on 7 April 1986 whereby they convicted the appellant on informations preferred by the respondent, Pc Ronald Willis, of failing without reasonable cause to provide a specimen of breath for analysis contrary to s 8(7) of the Road Traffic Act 1972 as substituted by s 25(3) of and Sch 8 to the Transport Act 1981 and of driving a motor vehicle on a road after consuming alcohol in excess of the prescribed limit contrary to s 6(1) of the 1972 Act as so substituted. The Divisional Court had certified, under s 1(2) of the Administration of Justice Act 1960, that a point of law of general public importance (set out at pp 803–804, post) was involved in the decision to dismiss the appeal but had refused the appellant leave to appeal to the House of Lords. The facts are set out in the opinion of Lord Griffiths.
- b

Keith Knight for the appellant.

- c *Ann Goddard QC* and *Hilton Harrop-Griffiths* for the respondent.

Their Lordships took time for consideration.

5 November. The following opinions were delivered.

- d **LORD KEITH OF KINKEL.** My Lords, I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend Lord Griffiths. I agree with it, and for the reasons he gives would allow the appeal to the extent which he proposes and dismiss it as regards the conviction under the substituted s 8(7) of the Road Traffic Act 1972.
- e **LORD BRANDON OF OAKBROOK.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Griffiths. I agree with it, and for the reasons which he gives I would allow the appeal to the extent proposed by him.
- f **LORD GRIFFITHS.** My Lords, on 13 February 1986 the appellant was followed by the police because of the speed at which he was driving. When he stopped outside his house he was asked by the police to take a roadside breath test. The test proved positive, he was arrested and taken to Orpington Police Station. At the police station he was asked to provide a specimen of breath on a Lion Intoximeter. He provided a specimen which gave a reading of 78 µg of alcohol in 100 ml of breath, a reading well above the permitted maximum. When he was asked to give a further specimen the appellant did not blow properly into the machine, which aborted the test. The police sergeant conducting the test explained to the appellant that he should blow continuously into the mouthpiece and asked for a further specimen. The appellant did not follow this instruction at the next and subsequent attempts, he blew so that some of his breath went into the machine and some escaped through his hands. Four such attempts to obtain a specimen were aborted by the machine. The appellant then refused to provide a further specimen.
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On these facts he was convicted on 7 April 1986 by the Bromley magistrates of the offence of driving a motor vehicle on a road with excess alcohol in his breath contrary to s 6(1) of the Road Traffic Act 1972, as substituted by the Transport Act 1981, for which he was fined £150 and disqualified from driving for 18 months and of the offence of failing to provide a specimen of breath contrary to s 8(7) of the Road Traffic Act 1972, as substituted by the Transport Act 1981, for which he was also fined £150 and disqualified for driving for 18 months.

At the request of the appellant the magistrates stated a case for the opinion of the High Court on the following two questions:

1. Whether we were correct in following the case of *Hughes-v-McConnell* ([1985] RTR 244) in prohibiting the Appellant from adducing evidence of the

amount of alcohol which he had consumed, in order to show that the Lion intoximeter machine was defective, and 2. Whether we were correct in following the case of *Duddy-v-Gallagher* ([1985] RTR 401) in convicting the Appellant of both the offence of failing to supply a specimen of breath and actually supplying a specimen of breath which exceeded the prescribed limit.’ a

The Divisional Court upheld the decision of the magistrates and answered both questions in the affirmative. In so doing they followed the previous decisions of the Divisional Court in *Hughes v McConnell* and *Duddy v Gallagher*. The appellant now appeals to your Lordships’ House and submits that both these previous decisions were wrongly decided. b

It will be convenient to deal first with the second question. It is common knowledge that in times past juries were very reluctant to convict motorists of the offence of driving a motor vehicle on a road when unfit to drive through drink or drugs. Why this should have been so I do not know; perhaps the public conscience had not yet fully awoken to the menace of the drink-affected driver, perhaps too many jurors in those days thought that they might one day be in the same predicament as the defendant and were over-confident of their own ability to drink and drive, perhaps the public did not yet realise that relatively small quantities of alcohol seriously affect the reaction times of most people. Whatever the reasons, those with experience of such cases know that they were invariably bitterly contested and it was unlikely that a conviction would be secured unless the defendant was very drunk. As the law was clearly failing to provide an adequate deterrent to drinking and driving, Parliament decided to introduce in the Road Safety Act 1967 an absolute standard and to provide that it would in future be an offence to drive with more than a permitted proportion of alcohol in the blood, and to make provision for laboratory tests of blood or urine to establish the proportion of alcohol in the blood. The level of alcohol consumption which corresponded to the level at which Parliament set the limit, although no doubt justifying the view that anyone exceeding the limit should not be driving, was undoubtedly much lower than that required to secure a conviction of the old offence and much easier to prove. When the 1967 Act was replaced by the Road Traffic Act 1972 the old offence remained as s 5 and the new offence became s 6 of the Act. In practice from that time onward nearly all cases of drunken driving have been prosecuted under s 6 rather than s 5 of the 1972 Act. For some years the offence was proved by producing an analysis of a blood or urine sample provided by the motorist, but then a new device was invented that enabled the proportion of alcohol in the breath to be determined by immediate analysis. Provided that such a machine is reliable it has obvious advantages over the use of urine or blood samples. It can be operated by a trained police officer and prints out an immediate analysis of the breath, cutting out the delay involved in the laboratory analysis of urine and blood samples and the attendance of a doctor in the case of a blood sample. But the motorist is at the mercy of the machine in the sense that he has no means of checking its performance, whereas in the case of a urine or blood sample the statutory provisions require that the sample is divided into two, and one half given to the motorist who can, if he wishes, have it analysed himself to check the accuracy of the analysis provided by the prosecution. It was no doubt with these considerations in mind that Parliament provided certain safeguards to protect the motorist when it introduced the use of breath-testing devices by the Transport Act 1981. c
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Section 25(3) of the Transport Act 1981 substituted the sections set out in Sch 8 to that Act for ss 6 to 12 of the 1972 Act.

Section 6 now makes it an offence to drive with more than the prescribed limit of alcohol in breath, blood or urine. It is no longer necessary for an analyst to equate the percentage of alcohol in the urine to the alcohol in the blood. Section 12 provides that the prescribed limits are 35 µg of alcohol in 100 ml of breath, 80 mg of alcohol in 100 ml of blood and 107 mg of alcohol in 100 ml of urine. i

The substituted s 8 I must set out in full:

(1) In the course of an investigation whether a person has committed an offence under section 5 or section 6 of this Act a constable may, subject to the following provisions of this section and section 9 below, require him—(a) to provide two specimens of breath for analysis by means of a device of a type approved by the Secretary of State; or (b) to provide a specimen of blood or urine for a laboratory test.

(2) A requirement under this section to provide specimens of breath can only be made at a police station.

(3) A requirement under this section to provide a specimen of blood or urine can only be made at a police station or at a hospital; and it cannot be made at a police station unless—(a) the constable making the requirement has reasonable cause to believe that for medical reasons a specimen of breath cannot be provided or should not be required; or (b) at the time the requirement is made a device or a reliable device of the type mentioned in subsection (1)(a) is not available at the police station or it is then for any other reason not practicable to use such a device there; or (c) the suspected offence is one under section 5 of this Act and the constable making the requirement has been advised by a medical practitioner that the condition of the person required to provide the specimen might be due to some drug; but may then be made notwithstanding that the person required to provide the specimen has already provided or been required to provide two specimens of breath.

(4) If the provision of a specimen other than a specimen of breath may be required in pursuance of this section the question whether it is to be a specimen of blood or a specimen of urine shall be decided by the constable making the requirement, except that if a medical practitioner is of the opinion that for medical reasons a specimen of blood cannot or should not be taken the specimen shall be a specimen of urine.

(5) A specimen of urine shall be provided within one hour of the requirement for its provision being made and after the provision of a previous specimen of urine.

(6) Of any two specimens of breath provided by any person in pursuance of this section that with the lower proportion of alcohol in the breath shall be used and the other shall be disregarded; but if the specimen with the lower proportion of alcohol contains no more than 50 microgrammes of alcohol in 100 millilitres of breath the person who provided it may claim that it should be replaced by such a specimen as may be required under subsection (4), and if he then provides such a specimen neither specimen of breath shall be used.

(7) A person who, without reasonable excuse, fails to provide a specimen when required to do so in pursuance of this section shall be guilty of an offence.

(8) On requiring any person to provide a specimen in pursuance of this section a constable shall warn him that a failure to provide it may render him liable to prosecution.

(9) The Secretary of State may by regulations substitute another proportion of alcohol in the breath for that specified in subsection (6).'

The terms of sub-s (3) make it clear that henceforth the breath specimen is to be the principal means of establishing the quantity of alcohol that the motorist had consumed for the purpose of a prosecution under s 6. It is only if a reliable machine is not available for use at the police station or there are medical reasons why the motorist cannot supply a specimen of breath that the police can demand a specimen of urine or blood. But there are the following safeguards introduced for the protection of the motorist. (1) The device must be of a type approved by the Secretary of State (sub-s (1)). (2) Two specimens of breath must be taken and the specimen with the lower proportion of alcohol in the breath used and the other disregarded (sub-s (6)). This is a precaution obviously introduced to give the motorist the benefit of the doubt in the case of any variation in the performance of the machine; and in my view it must follow that it was not intended that a motorist should be convicted on the evidence of only one specimen of breath. (3) If the machine indicates that the motorist is over the prescribed limit, but not excessively

so, then the motorist can opt to give a specimen of blood or urine which replaces the breath specimens and neither breath specimen shall be used (sub-ss (6) and (4)). This provision coupled with the provision that only the lower specimen should be used appear to indicate a recognition of the fact that 'trial by machine' is an entirely novel concept and should be introduced with a degree of caution. (4) That the particular machine used should be reliable, which I take to be implicit in the wording of sub-s (3)(b) and which must, in any event, be read into the section for it would be unthinkable that it could be intended that anyone should be convicted by an unreliable machine: see the decision of the Divisional Court in *Newton v Woods* [1987] RTR 41 to this effect.

The other relevant section is s 10:

'(1) The following provisions apply with respect to proceedings for an offence under section 5 or section 6 of this Act.

(2) Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by the accused shall, in all cases, be taken into account, and it shall be assumed that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged offence was not less than in the specimen; but if the proceedings are for an offence under section 6 of this Act, or for an offence under section 5 of this Act in a case where the accused is alleged to have been unfit through drink, the assumption shall not be made if the accused proves—(a) that he consumed alcohol after he had ceased to drive, attempt to drive or be in charge of a motor vehicle on a road or other public place and before he provided the specimen; and (b) that had he not done so the proportion of alcohol in his breath, blood or urine would not have exceeded the prescribed limit and, if the proceedings are for an offence under section 5 of this Act, would not have been such as to impair his ability to drive properly . . .'

The object of the legislation is to provide a relatively simple way of establishing whether a motorist is driving after drinking too much, and if he is doing so to punish him. The motorist can of course frustrate the procedures by refusing to provide the necessary specimen. But if he does so without reasonable excuse he commits an offence under s 8(7) and is in effect treated as though he had driven when exceeding the prescribed limit, being subject to the same penalties as if he had committed an offence under s 6.

The appellant submits that the two offences were intended to be alternatives and that the Act should be construed so as to provide that they are mutually exclusive. Otherwise, as the appellant points out, the man who refuses to give a specimen because he knows he has drunk far too much is better off than the man who has drunk much less and to his surprise finds he is over the limit on the first breath specimen and then panics and refuses the second specimen. The first man can only be prosecuted and convicted for a s 8(7) offence but if the present decision is right the second man can be convicted and punished under both ss 6 and 8(7). I am unwilling to think that such a result can have been intended when the 1981 Act was passed. I must, therefore, consider whether *Duddy v Gallagher* [1985] RTR 401 was correctly decided.

The facts of that case were that the defendant was stopped when he was driving the wrong way down a one-way street. His breath smelt strongly of alcohol. Despite three attempts he failed to provide a sample of breath for a roadside breath test. He was arrested and taken to the police station. He gave a specimen of breath on the Lion Intoximeter 3000 which displayed a reading of 55 µg the significance of which was explained to the defendant. The defendant then failed to provide a second specimen of breath. He was convicted of failing to provide a specimen of breath for the roadside breath test contrary to s 7 of the 1972 Act as amended, of driving when the proportion of alcohol in his breath exceeded the prescribed limit in breach of s 6(1) and of failing to provide a specimen of breath contrary to s 8(7). The Divisional Court upheld these convictions, accepting the submission of the prosecution that, provided the first specimen of breath was taken in accordance with the statutory procedure laid down in s 8 of the 1972 Act, it

then became admissible to establish the s 6 offence by virtue of the provisions of s 10(2).

- a My Lords, I am unable to accept this construction of the Act. As Lord Bridge pointed out in *Fox v Chief Constable of Gwent* [1985] 3 All ER 392 at 400, [1986] AC 281 at 297, s 10(2) was introduced by the 1981 Act in order to deal with what had become known as the 'hip flask defence'. A motorist fearing that he was about to be breathalysed would drink from a flask after he had stopped driving and then claim that the subsequent analysis of blood or urine reflected this intake of alcohol and was not a reliable guide to the alcohol in this system at the time he was driving. In many cases the prosecution had difficulty in satisfying the magistrates that they had discharged the burden that lay on them to show that despite this extra drink the accused nevertheless must have already been over the limit when he was driving. The effect of s 10(2) is to reverse the burden of proof if an accused raises this form of defence. The magistrates must first determine the proportion of alcohol in the relevant specimen, and having done this they are to assume that at the time of the offence, i.e. when he was driving or in charge of a motor vehicle, he had not less than that proportion of alcohol in his breath, blood or urine. This assumption can, however, be displaced if the motorist proves that but for the extra alcohol he had drunk after the alleged offence he would not have been over the prescribed limit or unfit to drive. The specimen which the magistrates take into account for the purpose of determining the proportion of alcohol in his breath, blood or urine must be a specimen which it was intended should be relied on by the court pursuant to the provisions of s 8. I have already pointed to the safeguards in s 8 which are designed to give protection to the motorist against possible malfunction of the machine. One of these is that two specimens of breath should be taken and only the lower specimen should be used. The specimen which the magistrates are entitled to rely on for the purposes of determining the proportion of alcohol in the breath under s 10(2) is the lower of the two specimens. If only one specimen of breath has been taken it is not to be relied on for the purposes of a conviction, and is not a specimen which the magistrates are entitled to take into account under s 10(2).
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- f I therefore consider that *Duddy v Gallagher* [1985] RTR 401 was wrongly decided and that *Burridge v East* [1986] RTR 328 which also held that a motorist could be convicted of an offence under s 6(1) on the evidence of one specimen of breath was also wrongly decided.

- g I would therefore hold that the appellant ought not to have been convicted under s 6(1) in the present case. I would add, however, that in assessing the penalty to be imposed for refusing to provide a specimen of breath the magistrates are entitled to take into account any evidence that indicates the motorist's consumption of alcohol and this would include the result of the analysis of the first breath specimen if he unreasonably refuses to provide a second specimen.

- h I turn now to the first question in the case, which to my mind raises far greater difficulties and may have disturbing consequences. The question is: how far, if at all, and by what evidence, is a motorist entitled to challenge the reliability of the machine which analysed his breath? In the present case the appellant wished to give evidence of his consumption of alcohol prior to his arrest for the purpose of attacking the reliability of the machine. Presumably he was going to submit that as he had drunk so little the magistrates should draw the inference that the machine which, on the first specimen had shown his breath to contain over double the prescribed limit of alcohol, must have been unreliable and inaccurate. In his printed case the appellant puts it thus:

- i 'Such evidence would have tended to show that the reading given in respect of the single breath sample was suspect and that the machine was defective, thereby providing support for the Defendant's case that the malfunctioning of the machine was the cause of his supplying only one specimen of breath.'

The magistrates who had heard no technical evidence to suggest that the machine was not working correctly held themselves bound by *Hughes v McConnell* [1985] RTR 244 and refused to allow the appellant to give evidence of the alcohol he had consumed.

In *Hughes v McConnell* the magistrates had acquitted the defendant of a charge of driving with more than the prescribed limit of alcohol in his breath contrary to s 6(1). It was a remarkable decision in the light of the facts set out in the stated case (at 245), which were as follows:

The justices heard the information on 18 April 1984 and found the following facts. (a) On 16 September 1983 the defendant went to the Dun Cow, Trench where he consumed a number of coca colas (non-alcoholic drink), and then three pints of bitter shandy in the company of his wife and another couple, Mr & Mrs Allen. (b) The defendant left the public house with his wife between 10.34 pm and 10.50 pm and drove his car home. (c) At 11.05 pm a police constable on mobile patrol duty, together with a special constable noticed the defendant's car, a blue Avenger, several times swerve across the white lines in the middle of the road then swerve back and clip the kerb. The constable stopped the defendant's car and on speaking to the driver noticed that the defendant's breath smelt of intoxicating liquor and that his speech was slurred. The constable requested the defendant to get out of the car and asked him to provide a specimen of breath for a breath test. The device used by the constable was an Alcotest (R) 80, tube and plastic bag. (d) The defendant's breath test was found to be positive and he was cautioned then conveyed to Wellington police station to provide a specimen of breath for analysis. The arresting officers considered he was drunk, one saying he was very drunk. (e) At the police station at 12.03 am the defendant provided two specimens of breath in the Lion Intoximeter 3000 device and the following readings were produced:

First calibration check:	34
BLANK	0
First reading:	125
BLANK	0
Second reading:	120
BLANK	0
Second calibration check:	35

The station sergeant operating the device considered that the defendant was very drunk; he particularly remembered him as he was so drunk. (f) The defendant was then placed in a police cell and was reported and released from the police station at 03.40 am having at that time provided a negative breath test on the Alcotest (R) 80 device. (g) The defendant had only drunk cocoa-cola and three pints of bitter shandy. (h) The defendant was sober when he called at his father's house in Brookhill Crescent, Ketley, in the early hours of the morning after his release from the police station. (i) The defendant's driving was normal when he drove from his father's house back to his home in Haybridge Avenue, Hadley, and on the subsequent journey to Anglesey the defendant was awake and talking. (j) Having heard expert evidence on behalf of the prosecutor, the justices found the following facts: (i) that to attain a reading of 120 microgrammes on the Lion Intoximeter 3000 the subject would have had to consume between four and five pints of beer beyond the 1½ apparently consumed; (ii) that, based on the information received in this particular case, that the defendant had only had three pints of bitter shandy—1½ pints of beer—then in the expert's opinion the defendant could not be over the legal limit of 35 microgrammes; (iii) that a subject who gave a reading of 120 on the Lion Intoximeter 3000 device would be so under the influence of alcohol as to be in a stupor, and at the earliest would be sober at 9.00 am, but more likely not until 1.00 pm . . . Upon hearing the evidence of the defendant and his witnesses the justices could not be satisfied that the reading produced by the Lion Intoximeter 3000 device was accurate and therefore, were not satisfied beyond all reasonable doubt that the defendant had consumed so much alcohol as to exceed the prescribed limit; they, therefore, dismissed the information . . . The question for the opinion of the court was: 1 Where a defendant is charged with driving a motor vehicle on a

- a road after consuming so much alcohol that the proportion of it in his breath exceeds the prescribed limit contrary to section 6 of the Road Traffic Act 1972, as substituted by section 25 of, and Schedule 8 to, the Transport Act 1981, may he challenge the validity of a statement automatically produced by an authorised device, by which the proportion of alcohol in a specimen of this breath was measured, by inferentially suggesting that it could not have been possible for the defendant to have consumed so much alcohol as would have been required to produce this figure by reason of:
- b (i) evidence of the amount of alcohol he had consumed prior to providing the specimen; (ii) evidence that he provided a negative specimen of breath for a breath test within a few hours of providing a positive specimen; (iii) evidence that he appeared sober within a few hours of providing the positive specimen; and (iv) expert evidence that if the matters set out at (i) to (iii) were correct, it was impossible that the measurement was correct? 2 On the facts as found in the case
- c was the court entitled to conclude that the validity of the statement of the proportion of alcohol in the defendant's blood was put in doubt?

- It is not surprising that the Divisional Court was disturbed by this decision of the justices. The findings of fact based on the one hand on the prosecution evidence and on the other on the defence evidence appear to be quite irreconcilable. For example, the
- d finding of a positive roadside breath test, the erratic driving, the opinion of all the police that the defendant was drunk and the expert evidence showing a consumption of 5½ to 6½ pints of beer, contrasted with a finding that the defendant had only drunk 1½ pints of beer. The prosecution did not, however, attack the decision of the magistrates on the ground of perversity but on the ground that the defence evidence was inadmissible to challenge the accuracy of the analysis of the specimen of breath. In upholding this
- e submission Watkins LJ said (at 249–250):

- ‘With great respect to [counsel for the defendant], who has stoutly endeavoured to support the justices in the manner in which they permitted this case to be conducted, I perceive very considerable danger arising from a failure to recognise that a device of this kind, which is properly approved, can only be shown to be
- f defective by evidence which goes directly to the defective nature of the instrument itself. Proof of defect cannot be produced by means of an inference drawn from such facts as I have been describing. True it is, of course, that it may be difficult for a defendant to produce evidence of an acceptable kind, the more so when he is denied access to the record of maintenance of the machine on which a defendant has taken a test. However, nowadays a defendant is otherwise not left without a defence for he is enabled to have a blood or a urine test immediately following a test
- g upon such a machine as a Lion Intoximeter 3000. My answer therefore to the question asked by the justices in this case is that the validity and accuracy of the printout from the Lion Intoximeter 3000 cannot be challenged by reason of (1) evidence of the amount of alcohol consumed prior to arrest, (2) a defendant's appearance before arrest (3) the fact that the test taken on an Alcotest (R) 80 just before release from a police station is negative, that (4) a defendant apparently was, according to witnesses, sober within a few hours of the test on the Lion Intoximeter 3000 and (5) the kind of expert evidence given in this case. As I have indicated, the only way in which the effectiveness of the Lion Intoximeter 3000 could have been
- h attacked here was by direct evidence of imperfection. As to the second of the questions, namely, on the facts as found in the instant case was the court entitled to conclude that the validity of the statement of the proportion of alcohol in the defendant's blood was put in doubt, it must follow, from what I have already said, that the answer to that is the validity of the printout could not be put in doubt in the manner in which the justices sought to do. Accordingly I would allow this
- j appeal and remit this case to the justices with a direction to convict.’

Shortly thereafter the Divisional Court again reconsidered the same question in *Price v*

Nicholls [1986] RTR 155. The facts were that the defendant was arrested after a positive roadside breath test. At the police station he provided—

'specimens of breath for analysis by a Lion Intoximeter 3000 device. The printout revealed that self-calibration was properly achieved and readings of 170 and 171 microgrammes of alcohol in 100 millilitres of breath were recorded. He was tried on a charge of driving contrary to section 6(1)(a) of the Road Traffic Act 1972 as substituted. The defendant gave evidence that he had had a course of treatment for alcohol addiction two years previously, that he had not taken alcohol for some months and that, before driving, he had consumed three glasses of barley wine and a glass of wine in the course of 3½ hours. He adduced a letter from the Home Office Forensic Science Laboratory that that amount of drink would have been likely to result in a breath-alcohol level below the prescribed limit and that the printout readings would require minimum rapid consumption of three-quarters of a bottle of spirits or equivalent. The justices, in view of the defendant's evidence and the letter, were not satisfied that he had more than the prescribed limit of alcohol in his breath, rejected the printout evidence and dismissed the information.'

The Divisional Court allowed the prosecutor's appeal, relying both on *Hughes v McConnell* and on the wording of s 10(2). Watkins LJ said (at 160–161):

'[Counsel for the defendant], never lacking in courage, has endeavoured in effect to cause this court to reconsider its decision in *Hughes v McConnell*. He very stoutly maintains that there are good reasons why we should not follow that decision. Broadly speaking, he contends that the evidence which comes from the Lion Intoximeter 3000 in the form of a printout is merely evidence which is capable of being rebutted by evidence from a defendant of the amount of drink which he had taken, the more so if his account of the matter is supported by other persons or by some such information as is contained, for example, in the letter from the forensic scientist to whom I have already referred. It is evidence which the court is enjoined, he reminds us, to take account of by section 10 of the Act of 1972, as amended. It is not bound to accept the evidence of the printout, it merely takes account of it as it takes account of any other admissible form of evidence which comes before it. There is, in my view, an obvious flaw in that argument. Parliament has not simply enjoined a court to take account of that evidence, it has gone further and stated that "it shall be assumed that the proportion of alcohol in the accused's breath . . . at the time of the alleged offence was not less than in the specimen". So there is a direct assumption to be made by the court that the specimen shall be the indication of the amount of alcohol which was on the breath of the defendant at the time when he was driving. However, the highest hurdle in the way of [counsel for the defendant] is the decision in *Hughes v McConnell*. It is abundantly clear that the attempt being made in this case, as was made in *Hughes v McConnell*, is to take this court and courts below back to former days when there were long drawn out battles between on the one hand the prosecutor and on the other the defence as to the amount of drink taken by a defendant as compared with an analysis, usually produced as a result of the taking of a sample of urine. Parliament has by the legislation of more recent times set its face against contests of that kind and has, in my estimation, clearly indicated that when a device of the nature of the Lion Intoximeter 3000 shows on its face that its self-calibrating exercise has properly been gone through and has produced readings of the amount of alcohol in the breath those readings, unless there is a direct evidence of some malfunction in the machine itself, are to be regarded as conclusive of the amount of alcohol on a defendant's breath at the relevant time. For those reasons, I would allow this appeal and send this case back to the justices for them to convict the defendant.'

In *Lucking v Forbes* [1986] RTR 97 the facts were as follows:

'The defendant, a motorist, provided two breath specimens in compliance with a

a requirement under section 8(1) of the Road Traffic Act 1972 as substituted. They were analysed by a Lion Intoximeter 3000 device and the printout revealed breath-alcohol of 54 and 58 microgrammes in 100 millilitres. Some 10 minutes thereafter he was charged with driving after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to section 6(1). He accepted a proffered opportunity to provide a blood sample for analysis, it was taken some 80 minutes after he had been charged and one half was given to him. At the hearing of the information the prosecutor produced the printout and a statement by a forensic scientist that the analysis of the defendant's blood found it to contain not less than 87 milligrammes of alcohol in 100 millilitres of blood. The defendant adduced the evidence of an analytical chemist who used a chromatograph to analyse the defendant's part sample of blood for four readings, which varied between 79.17 to not more than 81.2 milligrammes of alcohol in 100 millilitres of blood. The defendant challenged the accuracy of the Lion Intoximeter 3000 device's breath analysis. The justices were of opinion that, since they could not reconcile the various readings of the printout and the blood analyses in the light of the evidence of the analytical chemist called by the defendant, the reliability of the device was impugned and they dismissed the information.'

d On appeal by the prosecutor, on the question whether the justices could have found the defendant not guilty of driving after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, the Divisional Court upheld the finding of the justices on the ground that the defence was entitled to impugn the Lion Intoximeter 3000 by reference to a blood or urine test carried out immediately. In giving judgment Lloyd LJ took into account a Home Office circular (32/1984) which had advised the police that during the introductory period of operation of the Lion Intoximeter they should offer a motorist the option of giving a blood or urine sample even though the reading exceeded the figure of 50 µg per 100 ml of breath. It will be remembered that if there is a reading between 35 and 50 µg the police are under a statutory obligation to offer a blood or urine specimen and, if accepted, this replaces the breath specimen (s 8(6)). The material part of the circular reads as follows (para 6):

f 'It is expected that in these cases the prosecution will proceed on the basis of the breath test printout as happens at present in cases over 50 microgrammes. The difference will be that the defendant will have available to him the certificate of analysis of the blood/urine sample and he will be free to apply to introduce this as evidence at his trial if he wishes to do so. The police have been advised that where this option is exercised a decision as to whether to proceed with prosecution should take account of the results of both tests . . .'

g In *McGrath v Field* (1986) Times, 20 November the Divisional Court held that a failure by the police to provide a defendant with this non-statutory option to provide a blood or urine sample did not prevent the justices relying on a breath specimen when the reading was over 50 µg.

h My Lords, I share the dismay of Watkins LJ at the prospect of putting the clock back to the days when every drink and driving charge turned on voluminous conflicting evidence as to the activities and alcoholic consumption of the defendant before he was stopped by the police and as to his condition after arrest. But I have the greatest difficulty in seeing any indication in the statutory provisions that point to only one type of evidence being admissible to challenge the reliability of the breath testing device used in a particular case. As matters now stand in the light of the decision of the Divisional Court only 'direct' evidence of the malfunction of the machine is admissible, although as the Divisional Court has pointed out such evidence will rarely be available to a motorist. However, a specimen of urine or blood which indicates a lower level of alcohol than the reading in the breath-testing machine is treated as 'direct' evidence. It is not of course 'direct' evidence of malfunction but merely evidence from which it is reasonable to draw the inference that the machine is not working properly. Whether or not the motorist has

such evidence available to him will in any case when the reading is over 50 µg depend on whether or not the police chose to offer him the opportunity of providing a blood or urine specimen. a

I am unable to agree with the Divisional Court that the wording of s 10(2) gives any support for the view that Parliament intended any challenge to the reliability of a device to be limited to a particular type of evidence. The assumption in s 10(2) is not an assumption that the device is working correctly but an assumption that the proportion of alcohol in the relevant specimen was not less than the proportion of alcohol at the time of the offence. The specimen may be of breath, urine or blood. Before making the 'assumption' for the purposes of s 10(2) the magistrates will have to be satisfied, in the case of a urine or blood specimen, that they can rely on the analysis of the specimen, and they may have to choose between the analysis supplied by the prosecution and that supplied by the defence. In such a case they obviously cannot 'assume' that the prosecution specimen is the reliable one because such an assumption would render nugatory the statutory requirement that the motorist should be provided with half the specimen so that he can have his own analysis carried out. In the case of a breath specimen there is of course a presumption that the machine is reliable but if that presumption is challenged by relevant evidence the magistrates will have to be satisfied that the machine has provided a reading on which they can rely before making the 'assumption'. b c

We all know that no machine is infallible, and if despite this knowledge Parliament had intended that breath-testing devices should be treated as virtually infallible I would have expected such an intention to be expressed in clear and direct language. I say virtually infallible because that is the effect of limiting a challenge to 'direct evidence of malfunction' which the motorist cannot, in practice, obtain, or a blood or urine test which the police are entitled to refuse unless the reading is below 50 µg. Nowhere in the legislation can I find any indication that Parliament intended such a result. d e

Suppose that a teetotaler after dining with people of the highest repute, two bishops if you will, forgets to turn on his lights and is stopped by the police. He is asked to take a roadside breath test and indignantly but inadvisedly refuses. He is arrested and taken to the police station. There he thinks better of his refusal. He agrees to supply two specimens of breath and the machine to his astonishment shows very high readings. He asks to be allowed to prove the machine wrong by supplying a blood or urine specimen. The police agree and he gives a blood specimen. An analysis shows no alcohol in the specimen. It is virtually certain that the police would accept the analysis and he would not be prosecuted. But if he were prosecuted it is equally certain that the magistrates would prefer the analysis and he would be acquitted. But now suppose that the police refused his request to supply a blood or urine specimen because the reading on the machine was over 50 µg. Is he to be convicted without the opportunity of calling the two bishops as witnesses to the fact that he had drunk nothing that evening and inviting the magistrates to draw the inference that the machine must have been unreliable. If he can invite the magistrates to draw such an inference from the work of the analyst, why should he not invite them to draw the inference from the word of the bishops. f g

In my view it would require the clearest possible wording to show that Parliament intended such an unjust result. If Parliament wishes to provide that either there is to be an irrebuttable presumption that the breath-testing machine is reliable or that the presumption can only be challenged by a particular type of evidence then Parliament must take the responsibility of so deciding and spell out its intention in clear language. h

Until then I would hold that evidence which, if believed, provides material from which the inference can reasonably be drawn that the machine was unreliable is admissible. I am myself hopeful that the good sense of the magistrates and the realisation by the motoring public that approved breath-testing machines are proving reliable will combine to ensure that few defendants will seek to challenge a breath analysis by spurious evidence of their consumption of alcohol. The magistrates will remember that the presumption of law is that the machine is reliable and they will no doubt look with a j

a critical eye on evidence such as was produced by *Hughes v McConnell* [1985] RTR 244 before being persuaded that it is not safe to rely on the reading that it produces.

My Lords, for these reasons I feel compelled to hold that *Hughes v McConnell* and *Price v Nicholls* [1985] RTR 155 were wrongly decided, they should not have been followed in the present case and the Divisional Court should have answered the first question in the negative and held that the magistrates were wrong in refusing to allow the appellant to adduce evidence of the amount of alcohol he had consumed.

b However, although the magistrates erred in refusing to admit this evidence, it provides no ground for quashing the appellant's conviction for refusing, without reasonable excuse, to provide a specimen of breath contrary to s 8(7). The fact that a motorist does not believe that he has drunk more than the prescribed limit does not provide a reasonable excuse entitling him to refuse to provide a specimen of breath. The appellant in the present case himself proved that the machine would provide a reading by blowing c into it properly for the first specimen. Thereafter the machine aborted because the appellant did not blow into it properly but allowed his breath to escape from his hands. There was no evidence either given or offered to suggest that his failure was in any way connected with the amount of alcohol in his breath: it was due solely to the appellant's persistent refusal to supply enough breath for a specimen to be taken. If evidence had been given of the amount of alcohol the appellant had consumed it could have provided d no excuse for his behaviour when asked to give the second specimen and his ultimate refusal to give it.

For these reasons I would allow this appeal to the extent of quashing the appellant's conviction under s 6(1)(a) of the 1972 Act but the conviction under s 8(7) must stand.

e **LORD OLIVER OF AYLMEYTON.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Griffiths. I agree that, for the reasons which he has given, the appeal should be allowed to the extent which he has indicated.

f **LORD GOFF OF CHIEVELEY.** My Lords, I add a few words to the speech of my noble and learned friend Lord Griffiths, if only because your Lordships' House is deciding, in my opinion rightly, to overrule a decision, *Duddy v Gallagher* [1985] RTR 401, to which I myself was party and, indeed, in which I delivered the leading judgment of the court. The question in that case was whether the defendant, having provided one specimen of breath which showed a reading over the prescribed limit but having failed to provide a second specimen, could be convicted not only of an offence under s 8(7) of the Road Traffic Act 1972 of failing without reasonable excuse to provide a specimen of breath, but also of an offence under s 6(1) of having driven a motor vehicle on a road g having consumed alcohol in such a quantity that the proportion of alcohol in his breath exceeded the prescribed limit. The Divisional Court held that the defendant could properly be convicted of both offences. Section 10(2) of the Act provides that 'evidence of the proportion of alcohol . . . in a specimen of breath . . . provided by the accused shall, h in all cases, be taken into account . . .' Such a specimen must have been provided pursuant to the provisions of the 1972 Act: see *Howard v Hallett* [1984] RTR 353. We were satisfied that the first specimen of breath had been provided pursuant to the provisions of the Act, and further that, since two specimens of breath had not been provided, no question arose of disregarding the specimen with the higher proportion of alcohol in it as required in such circumstances by s 8(6). However, I have now been persuaded by counsel for the j appellant that this approach involves too narrow a construction of the Act. I accept his submission that the broad intention of the Act is that evidence of a specimen of breath shall only be given where two specimens of breath have been provided and the one with the higher proportion of alcohol has been disregarded, it being sufficient where the defendant has without reasonable excuse failed to provide more than one specimen that he should be convicted of the offence under s 8(7).

On the second and more fundamental question in the case, I too can see no escape from the conclusion reached by my noble and learned friend Lord Griffiths. The crucial provision in the Act, as I see it, is s 10(2), to which I have already referred. The opening sentence provides:

'Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by the accused shall, in all cases, be taken into account, and it shall be assumed that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged offence was not less than in the specimen . . .'

The function of that provision, as I see it, is that, where a specimen has been taken in accordance with the provision of the Act, evidence of such a specimen (given in accordance with the provisions of the Act) shall be admissible in evidence, and furthermore shall be evidence not only of the proportion of alcohol in the defendant's breath, blood or urine (as the case may be) at the time when such specimen was taken, but also of such proportion at the time when the defendant was driving, attempting to drive or in charge of a motor vehicle. That of course is why the statutory assumption is required to be made; and that is also why the exception relating to the so called 'hip flask' defence is here relevant. Such evidence, being so admissible, has, if tendered, to be considered by the court in all cases under s 5 or s 6 of the Act; it has, as the statute provides, to be 'taken into account'. But it is one thing for evidence to have to be taken into account, and it is another thing for such evidence to be conclusive. For a court may take evidence into account, and yet reject it as unreliable. This may plainly occur in cases under the statute where the defendant has provided a specimen of blood or urine. In such cases, it is expressly provided by s 10(6) that one part of the specimen shall be provided to the defendant. This must be to enable him to obtain an independent analysis of his part of the specimen, thereby avoiding any possibility of a conviction on the basis of a mistaken analysis presented in evidence by the prosecution. But, if conflicting analyses are in such a case put in evidence before the court, the court has to decide whether to reject that presented by the prosecution, and, if it does so, then, although it will have complied with its duty under s 10(2) to take such evidence into account, it will also have acted properly in rejecting it.

It must follow that, since s 10(2) provides equally for evidence relating to specimens of breath, blood or urine, evidence relating to a specimen of breath may likewise be rejected if the court comes to the conclusion that the print-out from the particular machine is unreliable. I have considered carefully whether any distinction can properly be drawn between specimens of breath on the one hand and specimens of blood or urine on the other, having regard to the many safeguards built into the Act in relation to specimens of breath. These safeguards are as follows. First, specimens of breath have to be analysed by means of a machine. Second, such a machine has to be a device of a type approved by the Secretary of State. Third, as is well known, the relevant approved device has built into it a mechanism by which it tests itself, and prints out the results of such a test on the statement automatically produced by it, each time it analyses a person's specimen of breath. Fourth, a requirement to provide a specimen of breath can only be made at a police station. Fifth, two specimens have to be given, and that with the higher reading has to be disregarded. Sixth, if the specimen with the lower reading contains less than a specified quantity of alcohol, the defendant may ask that it be replaced with a specimen of blood or urine, in which event, if he provides such a specimen, no specimen of breath shall be used. This is a formidable list of protections for the motorist. Having so provided, it was open to Parliament to consider whether a specimen of breath so provided should constitute conclusive evidence of the quantity of alcohol in the defendant's breath at the time of driving, attempting to drive or being in charge of a motor vehicle, or whether it should be conclusive subject to certain specified limited defences (such as the 'hip flask' defence), possibly coupled with the safeguard that the motorist should in every case be given the opportunity of providing a specimen of blood or urine in substitution for his

a specimen of breath. Parliament might have decided so to provide on the ground that the public interest in securing convictions in the case of an offence which is known to cause so much suffering to other citizens was so great that a defence founded, for example, on an allegation that the defendant had drunk so little that the print-out from the particular device could not be accepted as reliable should not be permitted. But in my opinion, on a true construction of the present Act, no such provision has been enacted. It has been enacted only that evidence of the proportion of alcohol in a specimen of breath taken in accordance with the statute shall be taken into account; and the exception to the statutory assumption relating to the 'hip flask' defence is not expressed to be the only defence and is only here referred to because it relates to drinking during the period between driving, attempting to drive or being in charge of a motor vehicle and providing the specimen, and is concerned to place the burden of proof on the defendant who raises the 'hip flask' defence. Once it is accepted, as in my opinion it must be, that evidence of the proportion of alcohol in a specimen of breath, blood or urine is not conclusive but can be rejected by the court as unreliable, I can, like my noble and learned friend, see no basis in the statute for limiting the ground on which the court may reject the evidence as unreliable in the manner decided by the Divisional Court in *Hughes v McConnell* [1985] RTR 244. Take the following example. Suppose that a specimen of breath is provided by the defendant which is shown by the print-out to contain just over 50 µg of alcohol in 100 ml of breath. The defendant asks that it should be replaced by a specimen of blood or urine. He has no right to this under s 8(6) of the Act. The police officer, however, causes a urine specimen to be taken and provides the defendant with part of the specimen. The defendant has his part of the urine specimen analysed; the analysis shows that he was not over the limit. Under the Act, evidence of the proportion of alcohol in the specimen of breath is nevertheless admissible. Like my noble and learned friend Lord Griffiths, I find it difficult to believe that, on the defendant tendering in evidence the analysis of his part of the urine specimen, it should not be open to the magistrates to reject the print-out relating to the specimen of breath as unreliable.

I fear that I do not share the optimism of my noble and learned friend that motorists will desist from seeking to persuade magistrates to reject evidence from print-outs as unreliable on the ground that they have drunk so little that the reading cannot be right. It is notorious that there is an industry devoted to assisting motorists in defeating charges brought under s 6 of the Act; and, once the decision in the present case is reported, attention will rapidly be drawn to this new possibility. Furthermore, the consequences of a conviction can be so serious for many motorists that there is a great temptation to grasp at any straw which may assist them in their defence. I have little doubt that the point will be taken time and time again. I place greater faith in the good sense of magistrates who, with their attention drawn to the safeguards for defendants built into the Act to which I have referred earlier in this opinion, will no doubt give proper scrutiny to such defences, and will be fully aware of the strength of the evidence provided by a print-out, taken from an approved device, of a specimen of breath provided in accordance with the statutory procedure. Even so, I anticipate that the responsible authorities will be keeping the situation arising from the decision of your Lordships' House under very careful review, in order to consider whether the provisions of the Act require to be strengthened in the public interest.

Appeal allowed in part. Conviction under s 6(1)(a) of the 1972 Act quashed.

Solicitors: *Lee Bolton & Lee*, agents for *J W Saunders & Co*, Erith (for the appellant); *Crown Prosecution Service*.

Mary Rose Plummer Barrister.

Harmsworth v Harmsworth

COURT OF APPEAL, CIVIL DIVISION

WOOLF AND NICHOLLS LJJ

30 JUNE, 1 JULY 1987

Contempt of court – Committal – Application – Notice – Breach of undertaking – Application supported by affidavit – Notice required to specify contempt with particularity – Whether reference to supporting affidavit sufficient.

Contempt of court – Committal – Application – Notice – Form of notice – Particulars – Whether particulars required to be set out like counts or particulars in indictment.

Contempt of court – Committal – Appeal against committal – Court of Appeal – Powers of Court of Appeal – Defect in application to commit – Whether Court of Appeal should substitute new order – Administration of Justice Act 1960, s 13(3).

Following the breakdown of the parties' marriage a non-molestation order was made on 6 May 1987 against the husband on the application of the wife. The husband continued to molest the wife and on one occasion committed a serious assault on her. On 22 June the wife issued a committal application, in the form of a notice to the husband to show cause why he should not be committed to prison for breaches of the non-molestation order. The application was supported by an affidavit sworn by the wife which was in the usual narrative form, but the affidavit was not attached to the notice. Most of the molestation incidents were referred to in the notice but the allegations made in the notice were generalised and details of dates and places were not given. Furthermore, the notice made no reference to the serious assault. The notice did, however, refer to the wife's affidavit which did give details of the molestation allegations and did describe the serious assault. At the hearing of the application the husband contended that the notice was invalid because it did not specify the charges against him with sufficient particularity. The judge, while accepting that the notice by itself did not give sufficient details and particulars, held that the notice and affidavit were to be read together and that the affidavit provided sufficient particulars. The judge found the breaches of the non-molestation order proved and ordered the husband to be committed to prison for one month. The committal order when drawn up made specific reference to the assault. The husband appealed against the order.

Held – A notice initiating a committal application was required, within the four corners of the notice itself, to give the person alleged to be in contempt enough information to enable him to meet the charge against him. If lengthy particulars were required it was permissible to include them in a schedule or addendum to the notice provided they formed part of the notice itself but it was not permissible to refer in the notice to a completely separate document for particulars that ought to be in the notice. Since, on the facts, there was no allegation of assault in the committal application, since that deficiency was not cured by the reference in the notice to the wife's supporting affidavit and since it was apparent from the committal order that the assault had been taken into account by the judge when deciding to issue the committal order, the order would be set aside as a nullity. The court would instead, in the exercise of its discretion, substitute an order committing the husband to prison for 14 days, suspended for six months, and to that extent his appeal would be allowed (see p 821 c to f, p 822 g to j and p 823 b d e h j, post).

Chiltern DC v Keane [1985] 2 All ER 118 applied.

Per Woolf LJ. (1) The particulars in a committal application do not have to be set out as though they were separate counts or particulars in an indictment (see p 823 j, post).

(2) Where there is a defect in the committal application rather than the committal order the court should be cautious before exercising its power under s 13(3)^a of the Administration of Justice Act 1960 to substitute a new order, since a defect in the application can materially affect the fairness of the proceedings and render it unjust for the court to use its power under s 13(3) (see p 824 *b* to *d*, post); dictum of Lawton LJ in *Linnett v Coles* [1986] 3 All ER at 656–657 considered.

b Notes

For applications to commit for civil contempt, see 9 Halsbury's Laws (4th edn) para 93.

For the powers of a court on appeal from a committal order, see *ibid* para 112.

For the Administration of Justice Act 1960 s 13, see 11 Halsbury's Statutes (4th edn) 176.

c Cases referred to in judgments

Chiltern DC v Keane [1985] 2 All ER 118, [1985] 1 WLR 619, CA.

Dorrell v Dorrell [1985] FLR 1089, CA.

Jelson (Estates) Ltd v Harvey [1984] 1 All ER 12, [1983] 1 WLR 1401, Ch D and CA.

Linkleter v Linkleter (1987) Times, 13 June, [1987] CA Transcript 580.

Linnett v Coles [1986] 3 All ER 652, [1987] QB 555, [1986] 3 WLR 843, CA.

d Woolley v Woolley (1974) Times, 17 July.

Cases also cited

Chakravorty v Braganza (1983) Times, 12 October.

Chanel Ltd v FGM Cosmetics [1981] FSR 471.

Tabone v Seguna [1986] 1 FLR 591, CA.

e Williams v Fawcett [1985] 1 All ER 787, [1986] QB 604, CA.

Appeal

The respondent, Victor Kevin Harmsworth (the husband), appealed against the order of his Honour Judge Cook made on 26 June 1987 in the Epsom County Court sentencing him to one month's imprisonment for contempt of court for committing breaches of an injunction made by his Honour Judge Lermont QC on 6 May 1987 restraining the husband from assaulting, molesting or otherwise interfering or communicating with the applicant, Lesley Diane Harmsworth (the wife), and from going to the wife's place of work. The facts are set out in the judgment of Nicholls LJ.

g Michael Curtis for the husband.

Karen Birch for the wife.

NICHOLLS LJ (delivering the first judgment at the invitation of Woolf LJ). This appeal concerns a committal order. It is an appeal by the respondent in the proceedings from an order made last Friday, 26 June 1987, by his Honour Judge Cook sitting at the Epsom County Court, whereby, having found the respondent to the proceedings guilty of contempt of court by committing breaches of an injunction, he ordered him to be committed to prison for one month.

The parties to the proceedings are a husband and wife. The petitioner is Mrs Lesley Harmsworth, and the respondent is Mr Victor Harmsworth. I shall refer to them respectively as 'the wife' and 'the husband'.

The brief background to this matter is as follows. The parties were married on 16 July

^a Section 13(3), so far as material, provides: 'The court to which an appeal [from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court] is brought under this section may reverse or vary the order or decision of the court below, and make such other order as may be just . . .'

1983. There were no children of the marriage and the parties are presently living apart and have done so since 10 April 1987. A divorce petition was presented by the wife on 27 April on the ground of unreasonable behaviour by the husband, and violence and threats of violence were alleged by the wife. a

On 30 April 1987 a temporary non-molestation order was made by his Honour Judge Lermont QC on the application of the wife. The matter came back before the same judge on 6 May. On that occasion the wife was represented by counsel and the husband appeared in person. The judge then made an order whereby the husband was restrained from assaulting, molesting or otherwise interfering or communicating with the wife save through the wife's solicitors, and he was further restrained from going to the wife's place of work which was identified in the order. b

Some six weeks or so later, on 22 June 1987, a committal application in the form of a notice to show cause why the husband should not be committed to prison for breaches of the order of 6 May was issued. We were told that an earlier committal application in respect of breaches of the same order came before the court on 5 June, but some confusion surrounds this occasion. Although both parties attended the hearing, it seems that it may be that no notice to show cause had ever formally been issued. In the event the application or purported application did not proceed. For the purposes of this appeal nothing turns on that previous abortive application. c

The committal application, issued on 22 June, was supported by an affidavit by the wife, and the husband put forward an affidavit in answer. The application came before Judge Cook on 26 June. Both parties were represented by counsel. For the husband a point was taken at the outset on the form of the notice. The judge ruled against the husband. The note that we have of the judge's judgment on this part of the application reads as follows: d

'I am faced with an objection in two ways. First is a technicality. All breaches should be fully particularised and set out seriatim in the notice. The respondent must have full and reasonable notice: reasonable means not just temporal, but also of the charge. Here the notice was accompanied by affidavits. [Counsel for the husband] submits it is not sufficient because it must be in the notice. I agree that the notice does not have sufficient details and particulars; that is clear on the face of the notice. I found [counsel for the husband's] submission surprising. I was referred to *Dorrell v Dorrell* [1985] FLR 1089 and the note in *The County Court Practice* 1987 p 415. I cannot find anything in that report justifying the dogmatism set out. *Dorrell v Dorrell* says the nature of the acts must be set out. I take the view that the notice by setting out the categories is sufficient and that the particulars are in the affidavit. Second is a matter of substance. It is submitted that even if one reads the notice and the affidavit, the [husband] still does not have sufficient detail. I have been referred to one affidavit. I do not accept that contention. The affidavit is sufficient.' e

Following that ruling the facts were then gone into and oral evidence was given by both parties who were cross-examined on their affidavits. Having heard the evidence and submissions, the judge found contempt proved and made the order I have mentioned. f

On this appeal the points taken for the husband are what his counsel himself described to the court as technical. No point is taken on the facts nor, technicalities apart, on the sentence. The primary point taken is, in short, that the notice issued on 22 June did not specify the breaches of the order of 6 May with sufficient particularity to enable the husband to know from the notice itself what were the alleged breaches so as to enable him to see the case being made against him. The point is a technical one if, from the information supplied to the husband, he knew the case he had to meet, even though that knowledge was acquired not wholly from what was set out on the face of the notice. It was accepted before us that, having regard to the contents of the wife's affidavits, the husband and his advisers did know in advance what case he had to meet, and that the g

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husband was not embarrassed save as to one point to which I shall come later. But

a technicality or not, is the point well founded?

I should refer next to the material parts of the notice issued on 22 June. The notice is addressed to the husband and the material parts read as follows:

‘TAKE NOTICE that the Petitioner will apply to this Court at [then details of the place and the date and the time are given] for an order for your committal to prison for having disobeyed the order of this Court made on the 6th May 1987 restraining you from 1. Assaulting, molesting or otherwise communicating with the Petitioner save through the Petitioner’s solicitors 2. Restraining you from going to the Petitioner’s place of work [which was then stated] by the following behaviour: (1) Constantly telephoning the Petitioner at work and threatening her life as set out in the Affidavit attached hereto (2) Following her on numerous occasions as set out in the Affidavit accompanying this application (3) Meeting the Petitioner and using threatening behaviour (4) Following the Petitioner on Saturday 16th May when she was required to drive to Sutton police station for her protection (5) Writing to the Petitioner on numerous occasions following the grant of the injunction (6) Hiring a private detective to track her down at home (7) Slashing the tyres of the Petitioner’s car And FURTHER TAKE NOTICE that you are required to attend the court on the first mentioned date to show cause why any order for your committal should not be made.’

The supporting affidavit by the wife which I have mentioned was served on the husband along with this notice, although not actually attached to it. The affidavit of the wife ran to some six pages with two exhibits. It was in the usual narrative form. Counsel

e for the husband submitted that recourse may not be had to the wife’s affidavit to supplement any deficiencies in the notice itself. He further submitted that without recourse to the wife’s affidavit, the particulars of the alleged breaches were insufficient. In particular no dates were given under para 1 with regard to the constant telephoning and making of threats. He pointed out that para 1 did not even state that the telephoning had occurred between specified dates. As to para 2, regarding the charge that the husband

f had followed the wife on numerous occasions, he pointed out that no dates were given; no places were identified; nor was the manner stated, for example whether the husband had followed the wife on foot or in the car. As to para 3, where the allegation was that the husband had met the wife and there was threatening behaviour, no date or place, or dates or places were stated. With regard to para 4 concerning writing to the wife on numerous occasions, again no dates were given. With regard to para 6 concerning hiring

g a private detective, it was submitted that it was not clear whether the charge was that the act of hiring was a breach or whether the breach lay in the detective successfully tracking down the wife at her home. Finally, as to para 7, no details are given as to when or where the husband is said to have slashed the tyres of the wife’s car. Indeed, counsel for the husband went further and submitted that regarding some of the breaches, there were inadequate particulars even if regard were had to the contents of the wife’s affidavit. It

h was submitted overall that a committal application is a quasi-criminal matter and the notice should contain details of the alleged breaches in a manner equivalent to counts in an indictment or charges in a summons.

We were referred to several authorities, but it will be sufficient for me to mention only two, both decisions of this court. The first is *Dorrell v Dorrell* [1985] FLR 1089. This decision is also referred to in the notes to Ord 29, r 1 in *The County Court Practice* 1987.

j There the court was considering an appeal from the county court against a judge’s dismissal of a committal application. Sir John Arnold P said this with regard to the form and content of the application to commit ([1985] FLR 1089 at 1090–1091):

‘All that appears in the application to commit is this: “... an order that the respondent be committed to prison for breach of the order dated 26 June 1984

restraining him from molesting the petitioner and from entering or attempting to enter 234 Davidson Road, East Croydon, Surrey." There is no allegation whatsoever as to the nature of the action which it is said amounts to a breach of that order upon which the committal application is based. This matter is not without authority. In a case called *Woolley v Woolley* ((1974) 124 NLJ 768) . . . the brief note of the matter in the *New Law Journal* reads thus . . . "In *Woolley v Woolley* an application was made to commit a former husband to prison for writing letters to his former wife in breach of an undertaking given to the court not to speak to her in the street or on the telephone and to communicate with her only through solicitors. A question arose as to what matters should be pleaded to support such an application. It was held that pleaders should set out *seriatim* the acts alleged to be in breach of the undertaking. A person whose liberty was in jeopardy was entitled to know the precise charges made against him. It should be apparent on the face of the summons whether or not there were breaches of the undertaking."

Sir John Arnold P continued: 'It seems to me that that correctly states the law and that that aspect of the law was quite fatal, and always was quite fatal, to the success of this application.' On that basis he dismissed the appeal. Booth J agreed. That was a case where the application contained no particulars at all of the alleged breach.

The matter was taken further by this court in *Chiltern DC v Keane* [1985] 2 All ER 118, [1985] 1 WLR 619. There the court had to consider the degree of detail required in the statement of the alleged breaches in the notice initiating the committal proceedings. In *Chiltern DC v Keane* there was an allegation of a breach, but only, so it seems, in general terms. That case concerned an appeal against a committal order made in the High Court, but I do not think that the degree of particularity which the notice to show cause in the county court should display, is any different from that required in a notice of motion for committal in the High Court.

On that I pause to observe that CCR Ord 29, r 1 itself says nothing about the contents of the notice to show cause beyond what is to be gleaned from the terms of para (4) of r 1 itself. Paragraph (4) reads:

'If the person served with the judgment or order fails to obey it, the proper officer shall, at the request of the judgment creditor, issue a notice calling on that person to show cause why a committal order should not be made against him, and subject to paragraph (7) the notice shall be served on him personally.'

However, the form prescribed by the County Court (Forms) Rules 1982, SI 1982/586, for notices to show cause why an order for committal should not be made is Form N78 and that provides for there to be set out in the notice the particular breach or breaches of the order alleged. This is to be compared with RSC Ord 52, r 4 which provides for there to be a notice of motion 'stating the grounds of the application'. I can see no material difference between these requirements.

I return to *Chiltern DC v Keane*. There an undertaking had been given to the court concerning the use to be made of some land and injunctions had also been granted. Sir John Donaldson MR, having observed that 'where the liberty of the subject is involved, this court has time and again asserted that the procedural rules applicable must be strictly complied with, said ([1985] 2 All ER 118 at 119-120, [1985] 1 WLR 619 at 622):

'The notice of motion was personally served on Mr Keane, but it only stated the grounds of the application to commit in general terms. It recited the undertaking and the injunction, and then alleged that there had been a breach. This, on the authorities, is not sufficient. It has been said in many cases that what is required is that the person alleged to be in contempt shall know, with sufficient particularity to enable him to defend himself, what exactly he is said to have done or omitted to do which constitutes a contempt of court. The particular undertakings and injunctions in this case cover a wide range of activities. Mr Keane was entitled to know whether

a it was said by the council that he was in breach of every single requirement of those orders or only some, and if so which, of them and the notice failed to give him that information. Every notice of application to commit must be looked at against its own background. The test, as I have said, is: does it give the person alleged to be in contempt enough information to enable him to meet the charge? If, for example, a defendant is subject to an injunction to leave a stated house not later than a particular time on a particular day, then it would be sufficient to say that he had failed to comply with that order, because it only permits of one breach, namely failure to leave the house by the time stated. But where the order is not in such a simple form and it is possible for the defendant to be in doubt what breach is alleged, then the notice is defective.'

c So the test is, does the notice give the person alleged to be in contempt enough information to enable him to meet the charge? In satisfying this test it is clear that in a suitable case if lengthy particulars are needed, they may be included in a schedule or other addendum either at the foot of the notice or attached to the notice so as to form part of the notice rather than being set out in the body of the notice itself. But a reference in the notice to a wholly separate document for particulars that ought to be in the notice seems to me to be a quite different matter. I do not see how such a reference can cure d what otherwise would be a deficiency in the notice. As I read the rules of court and as I understand the decision in the *Chiltern* case the rules require that the notice itself must contain certain basic information. That information is required to be available to the respondent to the application from within the four corners of the notice itself. From the notice itself the person alleged to be in contempt should know with sufficient particularity e what are the breaches alleged. A fortiori, in my view, where the document referred to is an affidavit, which does not set out particulars in an itemised form, but which leaves the respondent to the committal application to extract and cull for himself from an historical narrative in the affidavit relevant dates and times and so forth, and to work out for himself the precise number of breaches being alleged and the occasions on which they took place.

f I do not think, therefore, that if there are deficiencies in the notice issued on 22 June, those deficiencies should be regarded as having been cured by reason of the references in para 1 to the affidavit attached to the notice and, in para 2, to the affidavit accompanying the notice.

g I turn to consider whether, on this footing, the test which I have mentioned is satisfied in this case. In applying that test the contents of the notice are to be read fairly and sensibly as they would be read by a reasonable person in the position of the alleged contemnor to whom the notice is addressed. Would such a person, having regard to the background against which the committal application is launched, be in any doubt as to the substance of the breaches alleged?

h Paragraphs 1, 2 and 5 all relate to repeated acts. In the context of this litigation it seems to me that, although these allegations are generalised, they are sufficient. Paragraph 4 relates to a specific and identified occasion and there is no difficulty with that paragraph. Paragraphs 3 and 7 relate to particular incidents. It would have been better if the notice had included the details, which were available, of when and where these incidents were said to have occurred, but on the whole, in my view, the information given was sufficient. That leaves para 6 with regard to the private detective and I can see no difficulty with that paragraph: the breach alleged is the hiring of the detective.

j Accordingly, despite the interesting and helpful submissions of counsel for the husband, I am unable to accept this ground of appeal. In my view the notice specified the alleged breaches with what, in the circumstances of this case, was sufficient particularity.

I should, however, mention one further point. At one stage counsel for the husband submitted that any deficiency in the notice went to the vires of the court. A notice

defective in its statement of alleged breaches was not a notice at all, and any subsequent proceedings based on such a notice would be null and void, and a court would have no discretion to waive the defect. When his attention was drawn to CCR Ord 37, r 5(1), counsel for the husband somewhat modified his stance. Having regard to the view I have formed regarding the adequacy of the notice in this case, it is not necessary to pursue this point. I will say only that on a future occasion, when the point arises, the court may have to consider whether the true position is that, so far as the jurisdiction and powers of the court are concerned, a defect in the notice initiating a committal application stands on no different footing from a comparable defect in any other application to the court. The court has in each case a discretion to waive the irregularity, either under CCR Ord 37, r 5(1) in the case of the county court, or under RSC Ord 2 in the case of the High Court. But there is this difference between a committal application and other applications. Such is the importance which the law attaches to the liberty of the subject that normally the procedural rules must be strictly complied with in the case of a committal application, and it would only be in an exceptional case that in the absence of the consent of the respondent it would be just to waive an irregularity in a committal application. Hence it would only be in an exceptional case that, in the absence of such consent, the court would exercise its discretion and waive such an irregularity.

The next point taken by counsel for the husband was that on one matter the husband was embarrassed by the form of the notice with its two references to the wife's affidavit, in that the affidavit evidence of the wife went outside the scope of the breaches of the order alleged in the notice by giving an account of an assault said to have been committed by the husband on the wife on 10 May. In the event the judge found that this assault had taken place and, indeed, that was the first breach recited in the committal order.

The material part of the committal order reads :

‘... the court being of the opinion, upon consideration of the facts disclosed by the evidence given that [then there is a blank in the order which plainly is intended to have been filled with a reference to the respondent] has been guilty of a contempt of this court by a breach of the order, namely having assaulted the Petitioner on 10th May 1987; having followed her in his car on the 10th and 16th May 1987; having made frequent telephone calls to work; and having attended at the Petitioner's place of work.’

I agree with counsel for the husband's submission that it is not possible to find any allegation of assault in the notice to show cause. The nearest allegation is in para 3 where there is an allegation that the husband met the wife and used threatening behaviour, but threatening behaviour is really quite different from the serious actual assault set out in the affidavit when the husband dragged the wife out of the car and across a car park and had his hands round her mouth to stop her screaming. I think, therefore, that in this respect what was set out in the wife's affidavit and found proved by the judge was a breach of which due notice had not been given in the notice to show cause.

The final point taken by counsel for the husband concerned the fourth head of the breaches of the order found by the judge, namely having attended at the wife's place of work. Here also attendance at the wife's place of work was not one of the breaches set out in the notice to show cause, but this item differs from the one just mentioned in that this item was not even mentioned in the wife's affidavit nor, it seems, by the wife in her oral evidence. Further, counsel are agreed, although we have no note of the judge's judgment on this part of the case, that this was not a matter which the judge dealt with when delivering his judgment. Counsel are accordingly agreed that the inclusion of this item in the order must be by way of mistake.

In the light of these two matters, and particularly the first, it is clear that the judge's order cannot stand as it is and that it should be set aside. Apart from the mistake apparently made in drawing up the order, it is evident that in determining this committal application the judge wrongly took into account the serious assault incident.

What then should be done? Under s 13(3) of the Administration of Justice Act 1960 this court has power to reverse or vary the order or decision of the court below in contempt applications and to make such other order as may be just (see *Linnett v Coles* [1986] 3 All ER 652, [1987] QB 555). In the present case the judge made a finding of a serious breach of the order and wrongly took that into account in determining this application. But the judge also found that several other breaches had occurred, and the judge's conclusion regarding those other breaches was not challenged before us. In those circumstances it seems to me that justice requires, not that the judge's order should be set aside and no order at all made on the committal application, but that the judge's order should be set aside and for that order there should be substituted an order which this court, in the exercise of its discretion, considers just having regard to the unchallenged breaches of the order, namely having followed the wife in the husband's car on 10 and 16 May 1987 and having made frequent telephone calls to her at work. Those breaches are serious, particularly having regard to the threats made over the telephone, but in respect of those breaches I think a shorter sentence of imprisonment is called for than the one imposed by the judge for those breaches plus the assault.

The judge's committal order was, in the event, stayed by this court last Friday, so that currently the husband is not in prison. Indeed, he never went to prison at all. These proceedings, however, should have brought home to him the seriousness of his position and the jeopardy in which he will place himself if he commits any further breaches of the order of 6 May or, indeed, of any other order of the court. In all the circumstances I think the just order is that the husband should be committed to prison for 14 days, but the committal will be suspended on condition that he commits no further breach of the order of 6 May, or of any other order of the court relating to his conduct towards the wife or his dealings with her, for six months from today. I would allow the appeal to that extent and make an order accordingly.

WOOLF LJ. I entirely agree. I only give a short judgment of my own to emphasise one point and draw attention to two other points. What I would emphasise is that in proceedings for contempt the court should always have in mind the fact that the liberty of the subject is involved. However, it should not allow that fact to produce a result which unnecessarily makes a mockery of justice.

In this case counsel for the husband accepts that the points he has taken are of a purely technical nature and that the husband had a perfectly fair trial on the allegations with which he was charged before the judge. In those circumstances I wholly indorse the view which Nicholls LJ has expressed which, properly applying CCR Ord 29, results in a decision that the husband was properly found guilty of contempt by the judge. However, in relation to the matter with which he had not been charged properly, the position was otherwise.

The provisions of the CCR Ord 29 and RSC Ord 52 make it clear that a person alleged to have been guilty of contempt is required to be given particulars sufficient to let him know the subject matter of the breach which is alleged. If that purpose is served then the notice is not defective, at least in that respect.

In an appropriate case it is possible to incorporate another document for the purpose of giving to a respondent particulars of what is alleged against him. This can, however, only be done if the notice, or in the case of the High Court the motion, still complies with the provisions of the relevant rules. What is not required by the relevant rules is that the notice of the motion should be drafted as though it was an indictment in criminal proceedings. While a respondent is required to be given particulars of what is alleged to be the breach, the particulars do not need to be set out in the same way as separate counts have to be set out in an indictment, nor do they need to give the particulars that you would normally expect to be seen in a count in an indictment. Furthermore, in my view, rules of duplicity and other rules which are designed to ensure the fairness of a trial before a jury, do not apply to proceedings of a different nature which are brought in respect of an alleged contempt.

The first matter to which I would draw attention arises out of *Linnett v Coles* [1986] 3 All ER 652, [1987] QB 555. That case dealt with the effect of s 13(3) of the Administration of Justice Act 1960 on the powers of this court in a case involving contempt where the order committing the contemnor to prison was defective, and this court held that in an appropriate case the powers contained in s 13(3) could be used to substitute a different order from that which was found to be defective. a

In his argument this morning counsel for the husband accepted that s 13(3) would also apply to the situation where defects were alleged to exist in the notice requiring the respondent to show cause in relation to an alleged breach of an order of the court, and that in an appropriate case the court could exercise the powers contained in s 13(3) in that situation as well. In my view the concessions made by counsel were correctly made. However, counsel for the husband submitted, there will be a different approach to the use of its powers by this court under s 13(3) of the 1960 Act where a defect is alleged in the notice requiring the respondent to show cause, from the approach this court would adopt where the defect is in the order committing the respondent to prison. b
c

In the case of the notice, a defect can clearly materially affect the fairness of the proceedings, so that a respondent does not have a proper opportunity to deal with the matters which are alleged against him. In such a situation it may not be just to make use of the powers under s 13(3).

The proper approach to s 13(3) of the 1960 Act appears from the judgment of Lawton LJ in *Linnett v Coles* [1986] 3 All ER 652 at 656-657, [1987] QB 555 at 562 where he said: d

'Anyone accused of contempt of court is on trial for that misdemeanour and is entitled to a fair trial. If he does not get a fair trial because of the way the judge has behaved or because of material irregularities in the proceedings themselves, then there has been a mistrial, which is no trial at all. In such cases, in my judgment, an unlawful sentence cannot stand and must be quashed. It will depend on the facts of each case whether justice requires a new one to be substituted. If there has been no unfairness or no material irregularity in the proceedings and nothing more than an irregularity in drawing up the committal order has occurred, I can see no reason why the irregularity should not be put right and the sentence varied, if necessary, so as to make it a just one.' e
f

Counsel for the husband also referred to a decision of this court in *Linkleter v Linkleter* (1987) Times, 13 June. That is a very short report and, contrary to the submission of counsel for the husband, speaking for myself I would not regard that case on the material before this court as indicating any different approach with regard to s 13(3) of the 1960 Act from that indicated in *Linnett v Coles*. The report appears to suggest that that court was there considering a different power from that contained in s 13(3), namely the power contained in RSC Ord 59, r 10(3). g

The final matter that I would draw attention to is this. If a notice is irregular in the way indicated by Nicholls LJ in this judgment, and it is not a notice in respect of which the court would feel it right exceptionally to disregard the irregularity, then in those circumstances, as it was made clear in *Jelson (Estates) Ltd v Harvey* [1984] 1 All ER 12, [1983] 1 WLR 1401, the fact that there is such an irregularity does not mean that it is not possible for fresh committal proceedings to be brought. If a notice fails to set out sufficient details of the alleged infringement of the original order, the respondent to that notice has not been in peril and the court has jurisdiction to entertain a further application in proper form founded on the same contempt. h

In that regard it should be noted that CCR Ord 29, r 1(7) provides: i

'Without prejudice to its powers under Order 7, rule 8, the court may dispense with service of a copy of a judgment or order under paragraph (2) [and in particular] a notice to show cause under paragraph (4), if the court thinks it just to do so.'

a It may well be, therefore, that in future if there is a notice which contains an irregularity of a serious nature so that it would not be right for the court to disregard it, it will be possible in an appropriate case, where the respondent would not be prejudiced, for a new notice to be issued and for the court to take advantage of its powers under CCR Ord 29, r 1(7), so as to avoid unnecessary expense or delay in the investigation of the alleged contempt.

b For these reasons, in addition to the reasons given by Nicholls LJ, I would allow the appeal to the extent which he has indicated.

Appeal allowed.

c Solicitors: *Davies Blunden & Evans*, Yateley (for the husband); *Reece-Jones & Johnson*, Sutton (for the wife).

Wendy Shockett Barrister.

R v More

d

HOUSE OF LORDS

LORD KEITH OF KINKEL, LORD ELWYN-JONES, LORD BRANDON OF OAKBROOK, LORD TEMPLEMAN AND LORD ACKNER

5, 6 OCTOBER, 5 NOVEMBER 1987

e *Criminal law – Forgery – False instrument – Instrument purporting to be made by an existing person but he did not in fact exist – Withdrawal form of building society – Defendant opening building society account in name similar to that of payee of stolen cheque and paying cheque into account – Defendant subsequently withdrawing money from account by signing withdrawal form in name of account holder – Whether withdrawal form a ‘false’ instrument – Forgery and Counterfeiting Act 1981, ss 1, 9(1).*

f

The appellant stole a cheque for £5,303 sent by a firm of stockbrokers to a client, Michael Richard Jessel, and made payable to ‘M R Jessel’. The appellant opened a building society account in the name of Mark Richard Jessell and paid the cheque into that account. Later the appellant completed a withdrawal form in respect of the account, signing the form ‘M R Jessell’ and was given a cheque for £5,000 made payable to M R Jessel, which he cashed. The appellant was charged with and convicted of, inter alia, forgery, contrary to s 1^a of the Forgery and Counterfeiting Act 1981 by making a false instrument, namely by signing the withdrawal form in the stockbrokers’ client’s name. The appellant appealed, contending that the withdrawal form was not a ‘false’ instrument within s 9(1)^b of the 1981 Act. The Court of Appeal dismissed his appeal on the ground that the withdrawal form fell within s 9(1)(h) of the 1981 Act because it purported to have been
h ‘made . . . by an existing person but he did not in fact exist’. The appellant appealed to the House of Lords.

Held – A document was ‘false’ for the purposes of s 9(1) of the 1981 Act if it told a lie about itself, in the sense that it purported to be made by a person who did not make it or was altered by a person who did not alter it or otherwise purported to be made or altered in circumstances in which it was not made or altered. The withdrawal form made by the
j appellant, however, did not tell a lie about itself because it clearly purported to be signed

a Section 1 is set out at p 829 j to p 830 a, post

b Section 9(1), so far as material, is set out at p 830 b, post

by the person who had opened the building society account, namely the appellant, who was a real person. It followed that the appellant had not committed the offence of forgery under s 1 of the 1981 Act. His appeal against his conviction for forgery would therefore be allowed and that conviction quashed (see p 826 *h* to p 826 *b* and p 830 *c g h*, post).

Notes

For the offence of forgery, see 11 Halsbury's Laws (4th edn) paras 1326–1375.

For the Forgery and Counterfeiting Act 1981, ss 1, 9, see 12 Halsbury's Statutes (4th edn) 820, 828.

Case referred to in opinions

R v Brown (Kevin) (1983) 79 Cr App R 115, CA.

Appeal

Kevin Vincent More appealed with leave of the Appeal Committee of the House of Lords given on 10 December 1986 against the decision of the Court of Appeal, Criminal Division (Neill LJ, Jupp and Hodgson JJ) on 28 February 1986 and order dated 6 October 1986 dismissing the appellant's appeal against his conviction on 14 February 1985 in the Crown Court at Maidstone sitting at Canterbury before Mr P B Rose sitting as assistant recorder and a jury on an indictment charging him with theft, forgery and obtaining property by deception. The Court of Appeal had refused the appellant leave to appeal to the House of Lords but had certified that the decision involved the following points of law of general public importance: (i) if the case against a defendant at the end of the evidence in a criminal trial is put in such a way that there is more than one factual basis, any one of which would, if proved, establish an essential ingredient of the offence charged or negative a particular defence which has been raised, must all the members of the jury (or an appropriate majority where a 'majority direction' has been given) be agreed on at least one, and the same, such basis before they are entitled to convict the defendant, and if so must the jury be specifically directed to this effect? (ii) if a defendant has opened an account with a stolen cheque, in a name he has adopted for that purpose because it matches the name shown on that cheque as that of its lawful payee, does he make a 'false instrument' as defined in s 9 of the Forgery and Counterfeiting Act 1981 by signing that same name on a document authorising the removal of money from the account which he has opened and if so under which paragraph of s 9(1)? The facts are set out in the opinion of Lord Ackner.

James Townend QC and *James Turner* for the appellant.
Richard Du Cann QC and *Francis Evans* for the Crown.

Their Lordships took time for consideration.

5 November. The following opinions were delivered.

LORD KEITH OF KINKEL. My Lords, I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend Lord Ackner. I agree with it, and for the reasons he gives would quash the conviction on the count of forgery and otherwise dismiss the appeal.

LORD ELWYN-JONES. My Lords, I have had the benefit of reading, in advance, the speech to be delivered by my noble and learned friend Lord Ackner. I agree with it and for the reasons which he gives I would quash the conviction on the count of forgery but otherwise dismiss the appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Ackner. I

agree with it, and for the reasons which he gives I would quash the conviction on the count of forgery but otherwise dismiss the appeal.

LORD TEMPLEMAN. My Lords, for the reasons to be given by my noble and learned friend Lord Ackner, I would quash the conviction on the count of forgery but otherwise dismiss the appeal.

LORD ACKNER. My Lords, the appellant on 14 February 1985 in the Crown Court at Maidstone sitting at Canterbury was found guilty of three offences, namely theft, forgery and obtaining property by deception. Although the factual basis of the prosecution was simplicity itself, the trial lasted five days. I found it in no way surprising that it took the jury less than 1½ hours to reach their verdict.

In June 1984 Mr Michael Richard Jessel was planning to buy a house. He therefore instructed his stockbrokers, Messrs Vivian Gray & Co, to sell some shares on his behalf. On 18 June they sent him a cheque for £5,303·23 to a boarding house in Tunbridge Wells, where Mr Jessel had once lived but where he was not living at that time. The cheque was made payable to 'M. R. JESSEL ESQ'. Mr Jessel did not receive the cheque and he did not authorise anyone else to use it.

On 19 June 1984, the day when this cheque would have arrived in the ordinary course of post, the appellant went to a branch office of the Anglia Building Society in Tunbridge Wells and opened an account in the name of 'Mark Richard Jessell'. He paid into this account the stockbrokers' cheque for £5,303·23. Some ten days later the appellant returned to the branch office of the Anglia Building Society and asked to withdraw £5,000 from the account which he had previously opened. He completed a withdrawal form in respect of that account by signing it 'M. R. Jessell'. He was then given a cheque for £5,000 made payable to 'MR M R JESSEL'.

On 15 August 1984 the appellant was arrested and questioned by the police. He told them that he had taken the cheque from the boarding house and had carried out the various transactions at the branch office of the Anglia Building Society, as described above, and had thus obtained the £5,000. He further told the police that he had taken the cheque and decided to cash it because he needed the money. The money was never recovered because he had 'lost it'.

There was thus the clearest evidence of the theft of the stockbrokers' cheque and obtaining subsequently the cheque for £5,000 by deception.

At the trial the appellant did not challenge that he had made the admissions to which I have referred above. He raised for the first time the defence of duress, explaining that he had not mentioned to the police his version of the facts on which this defence depended, because he only learnt later from his solicitor that he had such a defence. The substance of his evidence to the jury was that in April or May 1984 he went at lunchtime alone to a public house where he met two men called Mick and Andy, whose surnames he never knew. They met again over the following weeks, when they behaved more and more aggressively towards him. Then one day they produced the cheque payable to 'M. R. Jessel'. They told him to open a building society account in the name of Jessell, which he first refused to do. They then said to him: 'We know where you live, and you live with your parents.' He said that as a result of this he felt frightened because they had said how much they would enjoy beating his parents. Under these and additional threats he opened the account and obtained £5,000 in the manner I have described. He told the jury he gave the two men the money and refused to have any himself. Before your Lordships, counsel for the appellant were obliged to concede that the appellant had no answer to the charge of theft or the charge of dishonestly obtaining from the employee of the Anglia Building Society the cheque for £5,000 except the defence of duress. Subject only to that defence, all the ingredients of those two offences had been satisfied by the appellant's own admissions. Thus, the only live issue was whether the prosecution could negative the defence of duress. I shall deal later and separately with the forgery count.

Grounds of appeal in the Court of Appeal

In the Court of Appeal the summing up of the assistant recorder was criticised in the following respect. (1) In respect of the count of theft, the assistant recorder had misdirected the jury by failing to tell them that since the prosecution case was put on the basis of alternative appropriations (referred to in argument as 'the primary' and 'the secondary' appropriation), each member of the jury must agree that the same appropriation had taken place before convicting the appellant. (2) In respect of obtaining the cheque for £5,000 by deception, the assistant recorder had misdirected the jury by failing to tell them that since the prosecution case was put on the basis of a number of false representations each member of the jury must be satisfied as to at least one and the same false representation before convicting the appellant. (3) That the assistant recorder had misdirected the jury by telling them that it was open to the prosecution to negative the defence of duress on a number of bases, but he had failed to tell them that they must all be satisfied on one and the same basis that duress had been disproved before convicting the appellant.

The authority on which counsel for the appellant relied in support of his submissions that the assistant recorder had so misdirected the jury is that of *R v Brown (Kevin)* (1983) 79 Cr App R 115. That case concerned a trial on a charge of fraudulently inducing investments contrary to s 13(1)(a) of the Prevention of Fraud (Investments) Act 1958 by making a number of different misleading statements. The jury specifically asked the trial judge the following question: 'If the individual members of the jury find him guilty of different parts of the count, is he guilty of the whole count, and is the verdict of guilty unanimous?' They were directed that it was sufficient if they all agreed that there was a dishonest inducement, even if they differed as to which of the statements in the particulars they relied on as the inducement. The Court of Appeal, Criminal Division held that that amounted to a misdirection and laid down a general principle in these terms (at 119):

'In a case such as that with which we are now dealing, the following principles apply: 1. Each ingredient of the offence must be proved to the satisfaction of each and every member of the jury (subject to the majority direction). 2. However, where a number of matters are specified in the charge as together constituting one ingredient in the offence, and any one of them is capable of doing so, then it is enough to establish the ingredient that any one of them is proved; but (because of the first principle above) any such matter must be proved to the satisfaction of the whole jury. The jury should be directed accordingly, and it should be made clear to them as well that they should all be satisfied that the statement upon which they are agreed was an inducement as alleged.'

In the course of giving judgment in this appeal, the Court of Appeal, Criminal Division observed:

'It seems to us, however, that it will only be necessary to give a direction on the lines set out in *R v Brown* in the comparatively rare cases where it emerges at some stage in the course of the trial, or as a result of a question asked by the jury, that there is a risk of a disagreement between the members of the jury whether a particular ingredient of the offence has been proved . . . Such a direction will also be necessary where there is a discernible risk in, for example, a case involving obtaining property by deception by a number of representations that the jury might fail to be unanimous as to the making, falsity and efficacy of at least one of the representations.'

Before your Lordships counsel for the appellant sought to argue that the Court of Appeal, Criminal Division was wrong in concluding that an *R v Brown* direction should be given only when it appears to be really necessary. Counsel for the Crown wished to argue that the decision in *R v Brown* was wrong.

Before embarking on the validity of these rival submissions, it must first be decided whether the decision in *R v Brown* has any relevance at all to this appeal. So far as the

a summing up in relation to the charges of theft and obtaining property by deception is concerned, the answer quite clearly is that it has none. Subject to the defence of duress, it was common ground that the appellant had stolen the £5,303.23 cheque and had obtained the £5,000 cheque by deception. There were no ingredients in either of those two offences which required to be established before the jury. The only live issue was whether the prosecution could negative the defence of duress.

b As regards the directions given by the assistant recorder as to the defence of duress, I entirely agree with the view of the Court of Appeal, Criminal Division that they were impeccable. He told the jury to look at this defence in three stages. First to consider whether they were sure that the threats had not been made; if not so sure, then to consider whether they were sure that the defendant was not impelled by the threats that may have been made to commit the offences; finally, if they thought that the threats may have been made and may have impelled the defendant, whether they were sure that c a sober person of reasonable firmness sharing the characteristics of the defendant would not have been so impelled. At the conclusion of his very careful summing up the assistant recorder told the jury in terms that the time had not come and would not come for a considerable period when he could take a majority verdict. He told them: 'Try to reach a unanimous verdict, that is a verdict of you all.' The assistant recorder had accordingly d thus no basis for validly contending that the assistant recorder failed, in relation to the defence of duress, to give an appropriate direction on the lines of the principle laid down in *R v Brown*, assuming always that that case was properly decided and that this case properly attracted such a direction.

e In these circumstances, this appeal is not the appropriate vehicle for deciding as between the rival contentions of counsel, since they are irrelevant to the determination of the appeal. Clearly each ingredient of an offence must be proved to the satisfaction of each and every member of the jury (subject to the majority direction). It is equally essential that a jury be directed in a manner that is easily comprehensible and devoid of unnecessary complications. Whether or not a particular direction adequately expresses to f the jury the obligation of the prosecution to prove to the jury's satisfaction each ingredient of the offence must depend essentially on the precise nature of the charge, the nature of the prosecution's case and the defence and what are the live issues at the conclusion of the evidence.

Forgery

g Given the strength of the prosecution's case on the count of theft and obtaining property by deception, it is unfortunate that a further count of forgery was added, thereby adding a quite unnecessary complication to a very simple prosecution. The count read as follows:

'STATEMENT OF OFFENCE

FORGERY, CONTRARY TO SECTION 1 OF THE FORGERY AND COUNTERFEITING ACT 1981

PARTICULARS OF OFFENCE

h KEVIN VINCENT MORE on the 29th June 1984 made a false instrument namely an Anglia Building Society withdrawal form dated the 29th June 1984, by signing it in the name of M R Jessell with the intention that he should use it to induce Sarah Jane Wood to accept it as genuine and by reason of so accepting it to do some act to her j own or another's prejudice namely to make out a cheque in the sum of £5000 payable to M R Jessell and issue it to Kevin Vincent More so that he could obtain £5000 in cash by presenting the said cheque to the National Westminster Bank.'

Section 1 of the 1981 Act provides:

'A person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept that it is genuine, and

by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.'

Section 9(1) of the 1981 Act defines the meaning of the word 'false' by providing, so far as is relevant to this case:

'An instrument is false for the purposes of this Part of this Act—(a) if it purports to have been made in the form in which it is made by a person who did not in fact make it in that form; or . . . (c) if it purports to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or . . . (h) if it purports to have been made or altered by an existing person but he did not in fact exist.'

It is common ground that the consistent use of the word 'purports' in each of the paras (a) to (h) inclusive of s 9(1) of the Act imports a requirement that for an instrument to be false it must tell a lie about itself, in the sense that it purports to be made by a person who did not make it (or altered by a person who did not alter it) or otherwise purports to be made or altered in circumstances in which it was not made or altered.

The assistant recorder accepted the submission of counsel for the Crown that the withdrawal form came within s 9(1)(c) because the appellant purported to be not only the M R Jessell who opened the account but also the M R Jessell in whose favour the stockbroker's cheque was drawn, which cheque was used to fund the account and from which it was sought to withdraw a similar, slightly smaller sum. The withdrawal form was accordingly a forgery. It had been submitted by counsel for the Crown at the trial that the withdrawal form was caught by s 9(1)(a) in that it purported to have been made in the form in which it was made by the 'M R Jessell' the payee of the stockbroker's cheque, who did not, in fact, make it. The Court of Appeal, Criminal Division, in my judgment, rightly concluded, however, that the withdrawal form could not be brought within either para (a) or para (c). Hodgson J, giving the judgment of the court, said that—

'the document was undoubtedly made by the appellant and it was undoubtedly made in the form of a withdrawal form. It was undoubtedly signed by the person making it, and that signature was undoubtedly the signature of the holder of the account in the name "Mark Richard Jessell".'

The Court of Appeal might well have added that the document did not purport to have been made by the Mr Jessell in whose name a cheque had been drawn to open the account, since the withdrawal form made no mention on the face of it of that cheque.

The Court of Appeal, however, decided that the withdrawal form came within s 9(1)(h) since it purported to have been made by an existing person but he did not in fact exist. But the appellant was a real person. It was he who was the holder of the account and in that capacity had signed the withdrawal form. The withdrawal form clearly purported to be signed by the person who originally opened the account and in this respect it was wholly accurate. Thus, in my judgment, it cannot be validly contended that the document told a lie about itself and I would therefore answer the second certified question in the negative.

Accordingly, I would quash the conviction on the count of forgery but otherwise dismiss the appeal. The decision is solely of academic interest to the appellant, who was sentenced to 12 months' imprisonment on each count, all to run concurrently with 8 months of the 12 months suspended. He has served the unsuspended part of the sentence.

Appeal allowed in part.

Solicitors: *Berry & Berry*, Tunbridge Wells (for the appellant); *Crown Prosecution Service*.

Mary Rose Plummer Barrister.

a South Northamptonshire District Council v Power

COURT OF APPEAL, CIVIL DIVISION

KERR AND WOOLF LJJ

30 MARCH 1987

b

Housing – Local authority houses – Security of tenure – Secure tenancy – Succession on death of secure tenant – Member of tenant's family who has resided with tenant for 12 months – Resided with – Applicant residing with deceased tenant for more than 12 months but for only 5 months in premises comprising secure tenancy – Whether 'resided with' referring to residence with tenant or residence in secure tenancy – Whether applicant qualifying to succeed to tenancy – Housing Act 1980, s 30(2)(b).

c

The defendant and the deceased, a widow, lived together as husband and wife from 1982, firstly at the deceased's home and then from 20 May 1985 until the death of the deceased on 31 October 1985 in a council flat of which the deceased was the secure tenant. Following the death of the deceased the local authority claimed possession of the flat. *d* The defendant contended that he was entitled to succeed to the tenancy under s 30(2)(b)^a of the Housing Act 1980 because he was a member of the tenant's family and had 'resided with the tenant throughout the period of twelve months ending with the tenant's death'. It was common ground that the defendant was a member of the tenant's family but the question arose whether the requirement of 12 months' residence prior to the tenant's death referred to residence with the tenant at any address or residence with the tenant at the council premises which were the subject of the secure tenancy. *e* The judge held that the defendant did not satisfy the requirements of s 30(2)(b) because the defendant and the tenant had lived together at the council flat for less than 12 months. The judge accordingly made a possession order in favour of the council. The defendant appealed.

e

f

Held – Since the requirement under s 30(2)(b) of the 1980 Act for succession to a secure tenancy was residence with the tenant rather than merely living with the tenant, what was required by way of residence was a connection with the property and not merely a close relationship with the person who was the tenant. Accordingly, the requirement of 12 months' residence with the tenant prior to his or her death meant residence with the tenant for that period at the council premises which were the subject of the secure tenancy and since the defendant had only resided with the deceased in the council flat for five months prior to her death he did not qualify under s 30(2)(b) to succeed to her tenancy. The appeal would therefore be dismissed (see p 833 *e* to *j*, p 834 *e*, p 836 *d e*, p 837 *c d j* and p 838 *d e*, post).

g

Edmunds v Jones (1952) [1957] 3 All ER 23n applied.

h Notes

For succession on the death of a secure tenant, see 27 Halsbury's Laws (4th edn) para 874.

As from 1 April 1986 s 30(2) of the Housing Act 1980 has been replaced by s 87 of the Housing Act 1985. For s 87 of the 1985 Act, see 21 Halsbury's Statutes (4th edn) 111.

Cases referred to in judgments

j

Colliver v Stoneman [1957] 3 All ER 20, [1957] 1 WLR 1108, CA.

Edmunds v Jones (1952) [1957] 3 All ER 23n, [1957] 1 WLR 1118, CA.

Wee Ban Yan v Eyun Eng Lowi (1962) 29 MLJ 62.

^a Section 30(2), so far as material, is set out at p 833 *a b*, post

'Wonderland' Cleethorpes, Re, *East Coast Amusement Co Ltd v British Rlys Board* [1963] 2 All ER 775, [1965] AC 58, [1963] 2 WLR 1426, HL.

Appeal

The defendant, Martin Anthony Power, appealed against the decision of his Honour Judge Irvine, sitting in the Banbury County Court on 5 August 1986, granting an order for possession in favour of the plaintiff, South Northamptonshire District Council, against the defendant in respect of the premises at 39 Westhorp, Greatworth, nr Banbury, Oxfordshire, on the ground that the defendant was occupying the premises without licence or consent. The facts are set out in the judgment of Kerr LJ.

Timothy Jones for Mr Power.

W Q Hunter for the local authority.

KERR LJ. This is an appeal from a judgment of his Honour Judge Irvine given on 5 August 1986 in the Banbury County Court. It raises a novel point of general importance both under the housing legislation and the Rent Acts. Since it is a short point we propose to give judgment immediately despite the late hour.

The local authority claims possession of council accommodation at 39 Westhorp, Greatworth, in Oxfordshire. The defendant claims that he is entitled to remain in occupation as a successor on the death of the tenant of the local authority, pursuant to s 30(2)(b) of the Housing Act 1980. That legislation, we have been told, is now to be found in s 87 of the Housing Act 1985, but it is common ground that for present purposes this makes no difference.

The facts are briefly as follows. The defendant, Mr Power, began to live with the deceased, Mrs Tulloch, as husband and wife, in 1982. That was found by the judge. At that time they lived together in Mrs Tulloch's former matrimonial home at Bozeat after her husband had died. In 1985 Mrs Tulloch became a secure tenant of the plaintiff authority at the address to which I have referred. She had not previously been a council tenant anywhere. I mention that for the sake of completeness, but I am not convinced that the position would in that event have been different, though I express no view about it.

The accommodation at 39 Westhorp, Greatworth, appears to have been senior citizen's accommodation for a single person. The judge found as a fact that Mrs Tulloch adopted, as he put it, two faces: one to her family and friends, who knew all about the fact that she had been living with Mr Power for some time, and continued to live with him in this council accommodation and another to the plaintiff local authority, to whom she said nothing about the fact that Mr Power was living with her there. That, however, does not raise any question on this appeal, though we have been told by counsel on behalf of the local authority that, in the event that the authority's claim for possession fails, he has reserved the right to apply in other proceedings to have the tenancy set aside on the ground that the local authority was not aware that Mr Power was also living in that accommodation. On the other side, we have been told by counsel for Mr Power that he would in that event contend that Mr Power had a right to be there, I think under s 35 of the 1980 Act, on the ground that he was a lodger. We are not concerned with that, and I go back to the chronology.

The secure tenancy was granted to Mrs Tulloch on 21 January 1985. But she did not move into the premises until 20 May 1985, when she moved in together with Mr Power. Nothing turns on the latter date. But unfortunately Mrs Tulloch died on 31 October 1985, when she had been a tenant for less than 12 months, about 9 months.

One then comes to the issue raised by s 30 of the Housing Act 1980. I will read sub-ss (1) and (2); one gets no assistance from sub-s (3):

'(1) Where a secure tenancy is a periodic tenancy and, on the death of the tenant,

a there is a person qualified to succeed him, the tenancy vests by virtue of this section in that person . . . unless the tenant was a successor.

(2) A person is qualified to succeed the tenant under a secure tenancy if he occupied the dwelling-house as his only or principal home at the time of the tenant's death and either—(a) he is the tenant's spouse; or (b) he is another member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's death.'

b Mr Power fulfils the requirement of the definition of 'a person [who] is a member of another person's family' in s 50(3) of the 1980 Act. I read the relevant part:

'A person is a member of another's family within the meaning of this Chapter if he is his spouse [and then various other relationships are referred to] or if they live together as husband and wife.'

c The judge found that Mrs Tulloch and Mr Power had lived together as husband and wife since 1982.

But the question, of course, is whether the fact that they had previously lived together as husband and wife in other premises at Bozeat entitles Mr Power to say that he falls within the provisions of s 30(2)(b). Being 'another member of Mrs Tulloch's family', the

d question is: has he resided with the tenant 'throughout the period of twelve months ending with the tenant's death'? Mr Power says that the judge found that he did. What is said, not surprisingly, on behalf of the local authority is that these words connote a requirement of residence, not only with the person who, until his or her death, had been the tenant, but at the premises in question with that particular person for 12 months, during which he or she was the tenant. Which of those two constructions is correct is the

e short issue before this court. It is largely a matter of first impression.

The judge considered it to be a finely balanced point. But at the end of the day he had no hesitation in saying that Mr Power did not fall within that provision solely by reason of the fact that he and Mrs Tulloch had lived together for more than 12 months, since they had lived together elsewhere during part of that period. Accordingly, he made an order for possession in favour of the local authority.

f As a matter of first and last impression I agree with the judge's construction, which has also been my impression about the effect of the parallel provision in the Rent Acts for many years.

The reference in s 30(2)(b) is to the requirement that the member of the family 'has resided with the tenant'. This suggests a connection with the premises of which he claims to be a successor to the tenant. The words 'resided with' are to be contrasted with the

g words 'live together' as husband and wife. Of course, the expression, 'living together as husband and wife' is a colloquial phrase, and one cannot place too much emphasis on it. But the word 'resides' connotes a connection with the property and not merely a close relationship with the person who was the tenant of it.

The other point to which counsel for the local authority has drawn attention, and to which I would give some weight, is that the tenant, with whom the defendant must

h have resided for the required time, must not only have been a tenant of the premises but a tenant under a secure tenancy. Those words are defined in s 28 of the 1980 Act. The tenant has to satisfy sub-s (3), that he is an individual and occupies the dwelling house 'as his only or principal home'. That, of course, was satisfied by Mrs Tulloch at the date of her death, but it shows, I think, that wherever the word 'tenant' occurs in that provision, what the legislation has in mind is not merely a person, but a person who has the

j property qualification, or connection, of being a tenant under a secure tenancy.

Counsel for the local authority also submitted that one gets assistance from Chapter I of the 1980 Act, which deals with the right to buy. He referred to a number of provisions which show, in that context, that occupation of other premises under a secure council house tenancy is sufficient to obtain rights under that part of the Act. He then invited us

to conclude in relation to s 30 that occupation of other secure council house property would also be sufficient to the extent that co-residence with a tenant in such premises would satisfy the requirement of succession, whereas co-residence in non-council house property would not be sufficient. a

If such facts were to arise there might be something in that analogy. But for present purposes I place no reliance at all on the fact that Mrs Tulloch and Mr Power came from private accommodation as opposed to council house accommodation.

That, so far as it goes, is the only assistance that one gets from the 1980 Act itself. Both counsel gave illustrations of odd consequences which could arise if their opponent's construction were correct. But that is a frequent situation and of little help. However, both were agreed, indeed, it is obvious, that this legislation stems from the very similar provisions in the Rent Acts. The corresponding provision is in the Rent Act 1977, Sch 1, para 3. There the word 'tenant' has to be read together with the full description in para 1 in the same way as with s 28 in the present Act. The tenant has to be a tenant under a secure tenancy. So the alleged successor under para 3 has to be a successor to someone who satisfies para 1 by being, immediately before his death, a protected tenant of a dwelling house, or the statutory tenant of it, by virtue of his protected tenancy. Subject to that difference, and the fact that the residence requirement is 6 months in the case of the Rent Acts, whereas it is 12 months in the case of the Housing Act 1980, there is no difference of substance between those provisions. b
c
d

I should add, for the sake of completeness, that there is no definition of 'member of the family' in the Rent Acts. That has been settled by case law. But otherwise I can see no difference if one looks at para 3, where the relevant words are: '... a person who was a member of the original tenant's family [who] was residing with him at the time of, and for a period of six months immediately before, his death ...'.

In construing the 1980 Act, I think that one must have some regard to the case law established under the Rent Acts, from which s 30(2)(b) clearly stems. Under the Rent Acts there has been a right of succession in terms identical with, or similar to, para 3, since long before the 1939-45 war. Such case law as there is in relation to that provision supports the conclusion which the judge reached. Indeed, he said that ultimately he was persuaded by two cases under the Rent Acts. e

Before referring to those, however, I should mention a textbook discussion of the problem, it being common ground that the point has never arisen directly for decision in this country. In Megarry *The Rent Acts* (10th edn, 1970) pp 213-214 there is a discussion of the words 'residing with' and the point is then raised in the following paragraph under the heading 'Place of residence': f

'The Acts oddly make no express requirement that the residence should be on the premises concerned. A transmission may therefore perhaps be possible where, for example, the tenant had occupied the premises for less than six months, or had been absent from them (e.g., with the Army of Occupation in Germany) for more than the last six months, but a member of his family had sufficiently resided with him. It seems unlikely that this was the intention of the legislature, however, and the result can probably be avoided by treating the absent tenant as being for this purpose resident only in the house.' g
h

I think that what Sir Robert Megarry there had in mind was a temporary interruption of residence. I doubt whether he had in mind the possibility that one could have, for the purposes of the six months, co-residence in different premises altogether. When he says that it seems unlikely that this was the intention of the legislature, it is not entirely certain whether he was referring, as I think, to a temporary period of absence, or, as counsel for Mr Power submits, to being able to add in co-residence elsewhere. But the authorities cited in support of the proposition that it seems unlikely that this was the intention of the legislature are certainly more consistent with the former view. j

a It is convenient to refer first to the one which is reported secondly as a note, *Edmunds v Jones* (1952) [1957] 3 All ER 23n, [1957] 1 WLR 1118, which had been decided as long ago as 1952.

b The defendant was the daughter of a deceased tenant of a dwelling house under the Rent Restriction Acts. She was a subtenant of two rooms in the house, but had been sharing the kitchen with her mother. She claimed to be a statutory tenant of the whole house under s 12(1)(g) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, which was then the relevant legislation. For present purposes there is no difference in the operative part of that provision, which is quoted in *Collier v Stoneman* [1957] 3 All ER 20, [1957] 1 WLR 1108, to which *Edmunds v Jones* is reported as a note.

It was held that the daughter could not claim to be a successor of the statutory tenant. The ratio is correctly summarised in the headnote as follows ([1957] 1 WLR 1118 at 1119):

c 'In order that paragraph (g) might be satisfied, the person claiming to succeed to the tenancy of the particular premises must fairly and truly be said to have been residing with the predecessor in the sense that the successor lived and shared for living purposes the whole of the premises to which that person claimed to have succeeded.'

d In that regard Evershed MR put the argument on behalf of the daughter as follows ([1957] 1 WLR 1118 at 1120):

e '... according to the argument, that the daughter, at least quo ad the kitchen (which, as I have said, was an essential element in any dwelling-house), was residing with her mother, and if she was residing with her mother at all so far as concerns [the premises in question] then she has satisfied the language of paragraph (g) of the subsection which I have cited, and so is now entitled to succeed to the tenancy of the whole premises previously vested in Mrs. Taverner [the mother]. The argument is attractive, and was attractively put, if I may say so, but, in my judgment, it is not sound. I think that the words "residing with" must be given their ordinary popular significance. They do not, I think, involve any technical import or have some meaning only to be defined by lawyers. Giving them, then, the ordinary sense of the language it is, to my mind, necessary in order that paragraph (g) may be satisfied, that the person claiming to succeed to the tenancy of the particular premises must fairly and truly be said to have been residing with the predecessor in those premises in the sense that the successor lived and shared for living purposes the whole of the premises to which he or she claims to have succeeded.'

f g Later he said ([1957] 1 WLR 1118 at 1120):

'As I have already said, I think that what is contemplated is the case of a dependent child, or whoever it may be, being one of the household of the predecessor quo ad the particular house, and that, as it seems to me, the appellant in this case cannot prove.'

h Jenkins LJ agreed and said ([1957] 1 WLR 1118 at 1121):

i 'I agree with my Lord that the words "residing with" in section 12(1)(g) mean residing with the deceased tenant quo ad the whole of the premises comprised in the tenancy in question. It is with reference to that tenancy that the expression "residing with" is used, and I do not think in the context the words "residing with" can be regarded as appropriate to a member of a tenant's family who is in the premises and lives on the premises under a subletting which gives that member of the family the right to possession of part of the premises to the exclusion of the tenant ...'

That decision was followed in principle, but distinguished on the facts, in *Collier v*

Stoneman [1957] 3 All ER 20, [1957] 1 WLR 1108. In that case the statutory tenant was the grandmother of the plaintiff. She was the tenant of a flat, which consisted of two rooms and a kitchen, on the first floor of the house. Some six years previous to her death she had allowed the plaintiff, her granddaughter, and her husband to live in the back room where they had previously been allowed to store their furniture. The plaintiff and her husband had the back room to themselves and the statutory tenant, the deceased, had the front room to herself and the kitchen was shared between them. When the tenant (the grandmother) died the plaintiff claimed to be entitled to succeed as a member of the family. One can see at once that the facts are strikingly different from those of *Edmunds v Jones* since in this case the plaintiff was not a subtenant but merely the occupant of a room, though an essential part of the premises, the kitchen, was again shared between them. In that case the succession was upheld and this court followed the passages from *Edmunds v Jones* quoted above. a

Those are the cases cited in *Megarry* in the passage to which I have referred. They are also summarised under the heading "Residing with", (a) Meaning' (see p 212). They are the leading cases in that context. Counsel for the local authority is therefore entitled to say, as he does, that in relation to the Rent Acts the construction for which the local authority here contends has been settled and accepted for at least three decades. It is perfectly true, as counsel for Mr Power points out, that the contrary argument on which he relies in this case was not raised in those cases, and perhaps could not have been raised. But since the present legislation is based on the Rent Acts, and I think everybody's understanding has always been that the connection which is required to establish a succession is a double one, both a family one and a residential one in the premises in question to which the succession is claimed, I have no doubt that the 1980 Act should be construed in the same sense. b

I think one also derives some assistance, as Sir Robert Megarry thought, from a Malaysian case which he cites together with *Edmunds v Jones* and *Collier v Stoneman* for the proposition that it seems unlikely that the legislature intended to include co-residence elsewhere. That was in effect rejected in *Wee Ban Yan v Eyun Eng Lowi* (1962) 29 MLJ 62. The legislation was not entirely identical, nor the facts. But it was certainly argued that the co-residence of a husband and wife in other premises conferred a right of succession on the widow in relation to the premises in question because she was, in the words of that legislation, 'the widow of the tenant who was residing with him at the time of his death'; and that was rejected. c

Finally, by way of analogy, counsel for the local authority referred to the speech of Viscount Simonds in the decision of the House of Lords in *Re 'Wonderland' Cleethorpes, East Coast Amusement Co Ltd v British Rlys Board* [1963] 2 All ER 775 at 777, [1965] AC 58 at 70-71. In that case a tenant company claimed the benefit of certain improvement which it had made to the premises under a previous tenancy in the context of Pt II of the Landlord and Tenant Act 1954, but its claim was rejected. I am fully aware of the danger of construing even identical words in one piece of legislation with reference to another. Nevertheless, the argument which the House of Lords rejected in that case was surprisingly similar. In effect, the tenant was saying that, albeit not under the same tenancy, it had made relevant improvements to those premises in the past. That was rejected, because they had to be improvements made by the company *quoad* tenant under that tenancy, or by a predecessor in title thereunder. d

It is of some importance to note that Viscount Simonds referred to the general approach to the construction of legislation which intervenes, as here, in what would otherwise be the common law position as between landlord and tenant. He said ([1963] 2 All ER 775 at 778, [1965] AC 58 at 71): e

'Undoubtedly the Act of 1954 in important respects derogates from the common law rights of the landlord: he is no longer the master of the situation to grant or deny a new lease to his tenant, but, [and these are the important words] if there is f

- a any ambiguity about the extent of that derogation, the principle is clear that it is to be resolved in favour of maintaining common law rights unless they are clearly taken away.'

b By way of analogy, if there be any doubt about the meaning of the present provision, then it ought to be construed narrowly. One should lean against the construction put forward on behalf of Mr Power, which relies on a statutory succession which he would not possess at common law.

It remains to mention that the clear view which I have formed is not shared by the authors Arden and Partington *Housing Law* (1983) p 898, para 20-55. They refer to s 30(2) of the 1980 Act, and add in a note:

- c 'Such residence need not be in the same dwelling as the one in which the secure tenant died, as long as they have resided together during the relevant period.'

With all due respect, I cannot agree. No reasons are given, nor is there any reference to the case law on the Rent Acts, which is clearly to the contrary. There is no reason why the position under the housing legislation should be different.

Accordingly, I would dismiss this appeal.

- d **WOOLF LJ.** I agree that this appeal should be dismissed.

Like the judge in the court below, my view of the case has changed during the course of argument. Looking at the terms of s 30 of the Housing Act 1980, which Kerr LJ has set out in the judgment he has just given, and reading those words literally, I can see the force of the argument advanced by counsel for Mr Power that his client complies with the requirements of the express language of the section.

- e First of all, Mr Power occupied the dwelling house at the time of Mrs Tulloch's death; secondly, Mrs Tulloch was, at the time of her death, a secure tenant; thirdly, Mr Power, having regard to the statutory interpretation provided by s 50(3) of the 1980 Act of the term 'tenant's family', was a member of Mrs Tulloch's family; and, fourthly, at the time of Mrs Tulloch's death Mr Power had resided with her throughout the period of 12 months ending with her death.

- f However, the 1980 Act, in Chapter II, was extending to tenants of local authorities a similar protection to that provided to tenants of private landlords by the Rent Acts, the provisions of which are now contained in the Rent Act 1977. When one looks at the provisions of the 1977 Act which deal with the transmission of statutory tenants on the death of the tenant and which are contained in Pt 1 of Sch 1 to that Act, one finds that, if Mr Power and Mrs Tulloch had at the time of her death been occupying a dwelling house the landlord of which was not a local authority, Mr Power would also have been able to comply with the requirements of the express language of Pt 1 of that schedule, and in particular with the provisions of para 3, which provides as follows:

- h 'Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him at the time of and for the period of 6 months immediately before his death then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by the county court, shall be the statutory tenant if and so long as he occupies the dwelling-house as his residence.'

- i Having regard to the long-standing decisions of this court to which Kerr LJ has referred in the course of his judgment on the interpretation of 'residing with' in relation to the Rent Act 1977, and the predecessor legislation to that Act, it appears clear to me that where the 1980 Act refers to a tenant and sets out the qualifications which have to be fulfilled before there can be succession, it is speaking of the person who has, throughout the relevant period, been the tenant of those premises.

I do not propose to repeat the citations which Kerr LJ has made from those authorities,

except to refer to one short passage in the decision in *Edmunds v Jones* (1952) [1957] 3 All ER 23n, [1957] 1 WLR 1118 where in his judgment Jenkins LJ sets out pithily the position to which I am making reference. He there says ([1957] 1 WLR 1118 at 1121): a

‘I agree with my Lord that the words “residing with” in section 12(1)(g) mean residing with the deceased tenant quo ad the whole of the premises comprised in the tenancy in question. It is with reference to that tenancy that the expression “residing with” is used . . .’ b

In my view, although of course Jenkins LJ was not dealing with the same problem as that with which this court is faced, what he said has equally to be applied to the situation which this case discloses in relation to the letting of premises by a private individual.

I would also adopt the same approach to s 30 of the 1980 Act, dealing with lettings by a local authority. The provisions of s 30(2)(b) must be read in a way which requires the period of 12 months’ residence ending with the death of the tenant to be the period during which the tenant was a secure tenant of the local authority. c

I would leave open the question argued by counsel for the local authority, whether it would be sufficient compliance with the requirements of s 30(2) if Mrs Tulloch had throughout the period of 12 months, ending with her death, been a secure tenant of one or more local authority and not necessarily a secure tenant of the particular premises. Counsel for the local authorities submitted that it would be sufficient if she had been such a secure tenant. d

For the reasons which I have just given, and for the reasons given by Kerr LJ in greater detail in his judgment, I would therefore dismiss this appeal.

Appeal dismissed. Leave to appeal to House of Lords refused.

Solicitors: *Franklin Piggott & Curtin*, Banbury (for Mr Power); *Shoosmiths & Harrison*, Banbury (for the local authority).

Wendy Shockett Barrister.

a City and Metropolitan Properties Ltd v Greycroft Ltd

CHANCERY DIVISION

JOHN MOWBRAY QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

21, 22, 23 JANUARY 1987

b

Landlord and tenant – Repair – Landlord's covenant – Breach of covenant – Assignment of lease – Effect of assignment – Whether landlord's liability for breach of repairing covenant surviving assignment – Whether tenant entitled to sue for damages for breach after assignment.

c

In 1982 the tenant acquired the leasehold of a flat which was in serious disrepair because of the landlord's failure to comply with its repairing covenants under the lease. Some months later the tenant attempted to sell the property at auction but it failed to reach the reserve. The tenant then issued a writ seeking specific performance of the landlord's covenant. The landlord carried out the repairs and the tenant sold the property. The tenant then amended its claim to claim damages arising out of the disrepair during the tenancy, including the costs of the abortive auction and running expenses while the disrepair delayed the sale. The landlord contended (i) that when the tenant assigned the lease its right of action passed to the assignee and (ii) that the damages claimed were too remote.

d

Held – By analogy with the rule that a tenant's liability for breach of covenant survived the assignment of the lease, a landlord's liability to the tenant for breach of covenant also survived the assignment of the lease. The tenant was therefore entitled to such damage as he could establish had flowed from the landlord's breach of covenant and an inquiry as to damages would therefore be ordered (see p 840 c to f and p 842 b c e f h j to p 843 a, post).

e

f Notes

For the lessor's liability to repair, see 27 Halsbury's Laws (4th edn) paras 264–268, and for cases on the subject, see 31(2) Digest (Reissue) 597–605, 4863–4928.

Cases referred to in judgment

Calabar Properties Ltd v Stitcher [1983] 3 All ER 759, [1984] 1 WLR 287, CA.

g

Hadley v Baxendale (1854) 9 Exch 341, [1843–60] All ER Rep 461, 156 ER 145.

King (decd), Re, Robinson v Gray [1963] 1 All ER 781, [1963] Ch 459, [1963] 2 WLR 629, CA.

London and County (A & D) Ltd v Wilfred Sportsman Ltd (Greenwoods (Hosiery and Outfitters) Ltd, third party) [1970] 2 All ER 600, [1971] Ch 764, [1970] 3 WLR 418, CA.

Spencer's Case (1583) 5 Co Rep 16a, [1558–1774] All ER Rep 68, 77 ER 72.

h

Case also cited

Lewes v Ridge (1601) Cro Eliz 863, 78 ER 1089.

Action

j

By a writ dated 10 August 1984 the plaintiff, City and Metropolitan Properties Ltd, which was the tenant of a flat at 23 Belsize Crescent London NW3, sought as against the defendant, Greycroft Ltd (the landlord), (i) an order for specific performance by the landlord of its repairing obligations in respect of the flat, (ii) alternatively, a mandatory injunction requiring the landlord to carry out repairs, (iii) damages and (iv) interest. Following assignment of the residue of its lease the plaintiff amended its statement of claim to claim financial loss resulting from its inability to assign the premises for the value it would have fetched if the landlord had carried out the repairs. The facts are set out in the judgment.

David Neuberger for the tenant.
Gabriel Moss for the landlord.

JOHN MOWBRAY QC. The landlord here bought a second-floor flat (and, I think, the whole building) at 23 Belsize Crescent in London NW3 subject to a 99-year lease of the flat dated 16 July 1979 between Lansdowne Securities Ltd and Moonmoor Ltd. The tenant company acquired the lease on 11 August 1982, it says for £28,000. At that time the landlord was, as is now admitted, in serious breach of the lessor's structural repairing covenant in cl 5(3) of the lease. The local authority had served the landlord with a statutory notice to repair, and the writ in this action, then claiming specific performance of the covenant, was issued on 10 August 1984, but the repairs were not done until a few days before 20 December 1984, when the tenant sold the lease again. The tenant amended the writ and now claims consequential damages from the landlord for damage sustained while it was the tenant.

The landlord's first defence is that, when the tenant assigned the lease, all its rights passed to the assignee, including any right to damages such as are claimed under the pre-existing writ, so that the tenant has no cause of action left to support its claim.

In my view that defence is not well founded. No authority was cited on the precise question whether a tenant who has assigned his lease can afterwards recover damages from the landlord for breaches of the landlord's covenants committed while the tenant held the lease. It is common ground, though, that a tenant (not the original lessor) who has assigned his lease again remains liable to the landlord for breaches of covenant which he committed while tenant: see *Megarry and Wade on the Law of Real Property* (5th edn, 1984) p 750, para 5, *Woodfall on Landlord and Tenant* (28th edn, 1978) vol 1, para 1-1095 and 27 *Halsbury's Laws* (4th edn) para 395.

Both this liability and the benefit of the landlord's covenants run with the lease at common law by privity of estate under *Spencer's Case* (1583) 5 Co Rep 16a, [1558-1774] All ER Rep 68 (see 1 *Smith LC* (13th edn, 1929) 51). There is a close analogy between the two. I take the view that, by this analogy, the landlord's liability to the tenant for existing breaches survives the assignment of the lease in the same way as the tenant's liability to the landlord.

Counsel for the landlord argues that the tenant's rights against the landlord did not survive the assignment of the lease, because on the assignment s 142(1) of the Law of Property Act 1925 made a statutory transfer of the tenant's rights to the assignee of the lease. Section 142(1) reads:

'The obligation under a condition or of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.'

Counsel for the landlord argued that the middle part of s 142(1) carried out the transfer, that is the words:

'... and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise.'

He pointed out that the Court of Appeal has held s 141(1) to make a statutory transfer of the whole benefit of a tenant's covenant to an assignee of the reversion: see *Re King (decd)*,

Robinson v Gray [1963] 1 All ER 781, [1963] Ch 459 and *London and County (A & D) Ltd v Wilfred Sportsman Ltd (Greenwoods (Hosiery and Outfitters) Ltd, third party)* [1970] 2 All ER 600, [1971] Ch 764. He asked me to apply that principle by analogy to an assignment of the lease.

It is not possible to apply those decisions. They turned on words corresponding to the first part of s 142(1): '... shall ... be annexed and incident to and shall go with that reversionary estate ...' The middle passage of s 142(1) is quite different. It does not say that the right to take advantage of the landlord's covenants is annexed or incident to the term, or 'shall go with' it, the graphic phrase specially relied on by Diplock LJ in *Re King (decd)* [1963] 1 All ER 781 at 798, [1963] Ch 459 at 497. It is not possible to apply the Court of Appeal decisions to the middle passage. If the intention had been to effect a statutory transfer of the right to an assignee of the term, I should have expected words to have been used similar to those in s 141(1) and the beginning of s 142(1) itself.

What is more, the middle passage of s 142(1) does not on its separate interpretation show any intention to restrict a tenant's proceedings to any particular period. The words 'from time to time' mean as occasion may require. If the intention had been to limit the tenant's right to recover damages to the time when he was tenant, I should have expected the sub-s (1) to say 'for the time being'.

Counsel for the landlord said that these conclusions could lead to anomaly and injustice, particularly that both assignor and assignee tenants might attack the landlord for the disrepair and both recover damages for it, which could overlap. He very reasonably referred to *Re King* [1963] 1 All ER 781 at 739, 799, [1963] Ch 459 at 489, 498 per Upjohn and Diplock LJ on this point. I do not see how there can be any overlap in the present case, because the repairs were done before the assignment. The mere consequential damages of the assignor are personal and could not overlap any consequential damages of an assignee, who, in the present case, could not suffer any damage anyhow. It is true that a possible overlap of rights could occur in a case where disrepair continued over the assignment, but s 142 would not prevent the assignee's damages from being reduced to allow for his having bought cheap because of the disrepair; cf s 141(1) and *Re King* [1963] 1 All ER 781 at 793, [1963] Ch 459 at 489.

Counsel for the landlord also said that there could be several successive assignors who sold at depressed prices during the disrepair and each sued the landlord for the shortfall. I think this is a rather fanciful apprehension. It could only arise if the landlord delayed so long that a number of successive tenants sold in despair or disgust. Even where the disrepair lasted over the assignment, I do not see how any consequential damage to assignor or assignee could overlap, because each would be personal damages arising from the plaintiff's personal circumstances.

I conclude that the first defence which I have been considering, based on s 142(1), fails.

As the landlord now admits that there was serious disrepair, in breach of the lessor's covenant, no evidence was called before me, but counsel for the tenant outlined the heads of damage claimed. They are (1) the costs of an abortive sale by auction, (2) the tenant's running loss on the flat while the disrepair was delaying its resale (the tenant says the interest on the mortgage raised to buy it, rent, rates and other expenses exceeded what was gained from letting out (or rather licensing out) the flat (the structural disrepair of the building did not prevent this)), (3) loss of executive time in dealing with the landlord and the local authority in getting the repairs done and (4) loss of opportunity to make profits with the proceeds of the flat while sale at a suitable price was impeded by the disrepair.

The second defence, urged in answer to all four heads of damages, is that they are all too remote, because they arise from the tenant having bought the flat as a speculation for early resale at a profit, something which neither the parties to the lease at its grant nor the present landlord when the present tenant bought the lease in 1982 could have known about. I turn to this defence in general in a minute, but in any case it does not answer the first head of damages claimed.

The first head of damages is the costs of an attempted sale of the flat by auction on 5 or 6 September 1983. It did not reach its reserve and was withdrawn. I do not know whether it was reasonable to put it up for sale at all, or to sell by auction, or to put on the reserve, or withdraw the property, nor whether the highest bid received really showed an overall loss. But, whether or not the tenant bought as a speculation, it was entitled to quantify its damage from the landlord's breach of covenant by selling the flat with the building in disrepair and then suing the landlord for the difference between the price it fetched and the value it would have had if the repairs had been done: see *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759 at 768, [1984] 1 WLR 287 at 297-298 in the judgment of Griffiths LJ. (Incidentally, Griffiths LJ saw no difficulty in the tenant suing the landlord after the sale.) Therefore, the second defence does not apply and the tenant should be given the opportunity of establishing that the auction costs are properly recoverable as damages. I am not prejudging that question, but I will leave the tenant free to address it by ordering an inquiry as to damages.

I now return to the second defence in general. Stephenson LJ said in *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759 at 765, [1984] 1 WLR 287 at 293 that speculative damages for loss of rental or capital value could be recovered if the landlord knew that the flat was bought as a speculation. Griffiths LJ said ([1983] 3 All ER 759 at 770, [1984] 1 WLR 287 at 299):

'If the tenant has rented the property to let it and the landlord is aware of this, then "the difference in value to the tenant" may be measured by his loss of rent if he cannot let it because of the landlord's breach. If the tenant is driven out of occupation by the breach and forced to sell the property then "the difference in value to the tenant" may be measured by the difference between the selling price and the price he would have obtained if the landlord had observed his repairing covenant. But each case depends on its own circumstances . . .'

Counsel for the landlord said that the landlord here had no knowledge, and was not aware, that the tenant had bought as a speculation, and therefore on those statements the tenant could not recover damages for commercial loss. He may very well be right in saying that the necessary contemplation of the parties cannot be established, but I have concluded that it would not be right to shut the tenant out from trying to establish it on the inquiry.

My reasons are these. I do not take Stephenson and Griffiths LJ in the passages I have just mentioned as meaning to define the precise circumstances in which commercial losses can be recovered in such a case as the present. They took imaginary examples of cases where the landlord actually subjectively knew, or was aware, of the tenant's speculative purpose. That brought their examples into the second branch of the rule in *Hadley v Braxendale* (1854) 9 Exch 341, [1843-60] All ER Rep 461 and avoided any question about what the parties might or might not reasonably have contemplated, the objective test in the first branch of the rule. But I do not read them as saying that the first branch of the rule could never apply, or that there must always be actual knowledge or awareness on the part of the landlord. In the present case the lease is of a residential flat, but it was originally granted to a company and it expressly contemplates that it will be assigned and mortgaged during its 99-year life. Clause 3(9) requires all such dealings to be registered with the lessor's solicitors. So there is some evidence (though not much) to be considered on the inquiry from which it can be argued that the parties to the lease (or, if that is relevant, the parties to the action as the persons in privity of estate) must be taken to have contemplated that the lease would be treated as an item of commerce. In the circumstances, and as the landlord admits breaches of covenant and I am ordering an inquiry anyway, I will not make any direction which would prevent the tenant from putting forward such an argument, with any supporting evidence. It will be for the inquiry to decide whether the tenant can recover for executive time spent in administering the lettings and so forth, and the tenant will need to show why the large

a capital profit made on its ultimate resale for £50,000 should not be set off against any loss. This will all be a steeply uphill task, but on the whole I think the tenant should be left free to undertake it.

I will give directions though, preventing the award of any damages under heads (3) and (4). Head (3) is an attempt to recover as damages something which is more like costs but is not recoverable as costs. There is no precedent for it, and counsel for the tenant himself disarmingly called head (4) a cheeky claim. I respectfully agree. Such damages
b are too remote.

Order accordingly.

Solicitors: *Stein Swede Jay & Bibring* (for the tenant); *Charles Caplin & Co* (for the landlord).

c Hazel Hartman Barrister.

Doughty v General Dental Council

d PRIVY COUNCIL

LORD BRIDGE OF HARWICH, LORD GRIFFITHS AND LORD MACKAY OF CLASHFERN

24 JUNE, 29 JULY 1987

Dentist – Professional misconduct – Erasure from register – Charge of professional misconduct – Whether infamous or disgraceful conduct in a professional respect required to be proved –
e *Whether dentists name can be erased from register for professional misconduct even though conduct not dishonest – Whether failure satisfactorily to complete treatment encompassing administering unnecessary treatment – Dentists Act 1957, s 25(1).*

The appellant, a registered dentist, was charged by the Professional Conduct Committee of the General Dental Council with three charges, namely (i) failing to retain radiographs of patients and failing to submit those radiographs to the Dental Estimates Board when required to do so (which charge was admitted), (ii) failing to exercise a proper degree of skill and attention in the treatment of certain patients (which was partly admitted) and (iii) failing to complete the treatment of certain patients (which was denied). It was alleged that the appellant had been guilty of serious professional misconduct in relation to all three charges. The committee found the appellant guilty of all three charges and
f directed that his name be erased from the register pursuant to s 25(1)^a of the Dentists Act 1957. He appealed to the Privy Council, contending, inter alia, that he ought not to have been struck off because it had not been shown that his opinion regarding the treatment given was not honestly held.

Held – For the purposes of s 25(1) of the 1957 Act ‘serious professional misconduct’ was
h not to be equated with infamous or disgraceful conduct in a professional respect, which was formerly the criterion for erasure from the register. Instead, serious professional misconduct denoted a serious falling short, whether by omission or commission, of the standards of conduct expected among dentists. Since the committee had found that the appellant’s dental treatments were such that no dentist of reasonable skill exercising reasonable care would have carried them out the committee had been entitled to direct
j that the appellant’s name be erased from the register, even though there had been no dishonesty on his part (see p 847 f to h and p 848 a to f, post).

Felix v General Dental Council [1960] 2 All ER 391 considered.

a Section 25(1), so far as material, is set out at p 847 b c, post

Per curiam. An allegation of failure satisfactorily to complete treatment required by a patient cannot encompass an allegation of administering treatment which was not necessary (see p 846 b c, post). a

Notes

For disciplinary proceedings against registered dentists and for appeals against striking off, see 30 Halsbury's Laws (4th edn) 248, 254, 271, and for cases on the subject, see 33 Digest (Reissue) 298, 305-307, 2378-2393, 2420-2429. b

As from 1 October 1984 s 25(1) of the Dentists Act 1957 was replaced by s 27(1) of and para 1 of Sch 3 to the Dentists Act 1984. For s 27 of and Sch 3 to the 1984 Act, see 28 Halsbury's Statutes (4th edn) 270, 305.

Cases referred to in judgment

Felix v General Dental Council [1960] 2 All ER 391, [1960] AC 704, [1960] 2 WLR 934, PC. c

McEniff v General Dental Council [1980] 1 All ER 461, [1980] 1 WLR 328, PC.

R v General Council of Medical Education and Registration of the UK [1930] 1 KB 562, CA.

Sivarajah v General Medical Council [1964] 1 All ER 504, [1964] 1 WLR 112, PC.

Appeal

Alexander Robert Doughty appealed against the determination of the Professional Conduct Committee of the General Dental Council on 12 March 1987 whereby it held that the appellant had been guilty of serious professional misconduct in relation to three charges and that his name should be erased from the Dentists Register in accordance with s 27 of the Dentists Act 1984. The facts are set out in the judgment of the Board. d

Kuldip Singh for the appellant.

Julian Bevan for the council. e

29 July. The following judgment of the Board was delivered. f

LORD MACKAY OF CLASHFERN. This is an appeal from a decision of the Professional Conduct Committee of the General Dental Council on 12 March 1987 that the appellant had been guilty of serious professional misconduct in relation to three charges and that his name should be erased from the Dentists Register. The three charges in question were: g

"That being a registered dentist: (1) Between 10th January and 26th October 1984 you accepted 19 patients, whose names and addresses are shown on List "A" [which is attached to the charge] for dental treatment as National Health Service patients, and thereafter provided them with dental treatment in the course of which, having obtained radiographs of these patients, you: (a) Failed to retain those radiographs for a reasonable period of time after completion of the treatment; (b) Failed to submit those radiographs to the Dental Estimates Board when required to do so by a letter from the Board dated 27th November, 1984. (2) Between 5th June and 16th November, 1984, you accepted 6 patients, whose names and addresses are shown on List "B" [which is attached to the charge] for dental treatment as National Health Service patients and thereafter provided them with dental treatment in the course of which you failed to exercise a proper degree of skill and attention. (3) Between 21st August and 5th October, 1984, you accepted 4 patients, whose names and addresses are shown on List "C" [which is attached to the charge] for dental treatment as National Health Service patients, and thereafter provided them with dental treatment in the course of which you failed satisfactorily to complete the treatment h
j

required by the patients . . . And that in relation to the facts alleged in each of the above charges you have been guilty of serious professional misconduct.'

At the close of the case for the council submissions were made on behalf of the appellant. These were successful in relation to charge 4, which their Lordships have not narrated and with which this appeal is accordingly not concerned and also in relation to one of the patients mentioned in charge 2. At the conclusion of the evidence relating to the facts alleged the president of the Professional Conduct Committee announced the decision in the following terms:

' . . . the Committee has decided that the facts alleged against you in charge one, which you have admitted, in charge two, in relation to each of the five remaining patients and in charge three with the exception of those in relation to the patient, Mr. Goldberger, have been proved to the satisfaction of the Committee. In relation to the facts alleged against you in respect of Mr. Goldberger, you have not been guilty of serious professional misconduct.'

Thereafter the committee went on to hear evidence led on behalf of the appellant directed to whether the facts found proved constituted serious professional misconduct and heard counsel on that matter. The committee announced their decision in the following terms:

'In relation to the facts alleged in head 1 of the charge which have been admitted, the Committee finds that you have been guilty of serious professional misconduct. In relation to the facts alleged against you in charge 2 in respect of the five remaining patients and in charge 3 in respect of the three remaining patients, the Committee finds that you have been guilty of serious professional misconduct.'

The committee directed that the appellant's name be erased from the Dentists Register.

As the committee decision records, the facts alleged in charge 1 were admitted on behalf of the appellant. The facts alleged in charge 2 in respect of two of the named patients were admitted on behalf of the appellant. On charge 2 evidence was led from the remaining patients and from Mr Taylor, a qualified dentist who was a member of the Dental Estimates Board and had been in general practice from 1958 until he took up his position with the Dental Estimates Board in August 1978. He gave evidence criticising root canal treatment that had been given by the appellant to the three remaining patients in respect of whom the facts alleged in the charge were found proved. The criticism was offered under two heads: first, that the root canal treatments were not necessary and, second, that the root canal treatments were not properly carried out. In respect of one of the patients criticism was offered under both heads and in respect of the remaining patients under one head for each. In relation to charge 3, evidence was given by the three patients in respect of whom the facts alleged in the charge were found proved and also by Mrs Baker, an officer of the dental staff of the Department of Health and Social Security who qualified as a dentist in 1970 and took a diploma in orthodontics in 1977. She gave evidence in respect of two of these patients and evidence in respect of the third was given by Mr Davidson, a registered dental practitioner qualified in 1950 and now employed as an officer of the dental staff of the Department of Health and Social Security. Again criticism was offered under the same two heads: under both heads in respect of two of the patients and under the second head in respect of the third.

At the hearing of this appeal counsel for the appellant in his very clear and forceful submissions first pointed to the distinction in wording between charges 2 and 3. He submitted that charge 3 was not concerned with whether or not the treatment in question was necessary but only with whether it was satisfactorily completed. This question had been discussed at the hearing before the committee at the stage when counsel then appearing for the appellant was making submissions at the close of the evidence for the council. After discussion, the legal assessor to the committee gave his view as follows:

'The word "required" is a simple English word which should be given a simple English meaning. It is wide enough to cover this aspect of the matter, namely the provision of treatment which was not in fact necessary to be completed at all, although the patient may have agreed that it was; so it is possible for you, under charge 3, to look at, as a head of the charge, the provision of root canal treatment which was not necessary as well as that which was properly executed.'

Counsel for the council submitted that the wording of charge 3 was wide enough to cover allegations that the treatment criticised was unnecessary.

Their Lordships cannot accept the counsel's submission. An allegation of failure 'satisfactorily to complete the treatment required by the patient' cannot, by any stretch of language be read as including an allegation of having administered treatment which was not necessary. It follows that the legal assessor's direction was erroneous but not necessarily that the committee's decision was thereby invalidated. In *Sivarajah v General Medical Council* [1964] 1 All ER 504 at 507, [1964] 1 WLR 112 at 117 Lord Guest said:

'Thus what might amount to a misdirection in law by a judge to a jury at a criminal trial does not necessarily invalidate the committee's decision. The question is whether it can "fairly be thought to have been of sufficient significance to the result to invalidate the committee's decision".'

This was followed in *McEniff v General Dental Council* [1980] 1 All ER 461 at 465, [1980] 1 WLR 328 at 332. In the present case there is not and could not have been any suggestion that the evidence given in relation to charge 2 was not covered by the words of that charge and it is difficult to see why the wording of charge 3 is different, since the evidence given criticising the appellant's treatment was broadly similar under both charges. No objection was taken to the evidence as it was being led and the appellant had full opportunity to meet it in his own evidence. In the whole circumstances of this appeal their Lordships are satisfied that the misdirection contained in the legal assessor's observations which have been quoted neither prejudiced the appellant nor caused any miscarriage of justice. It did not therefore invalidate the committee's decision.

The next point taken by counsel for the appellant was that in order to prove charges 2 and 3 it was necessary to show that the opinion held by the appellant in relation to the treatment was not honestly held by him and could not honestly be held by a dentist. This submission was founded principally on the observations of Lord Jenkins when giving the judgment of this Board in *Felix v General Dental Council* [1960] 2 All ER 391 at 400, [1960] AC 704 at 721:

'With respect to the treatment alleged to have been unnecessary, the evidence (as their Lordships have already observed) showed that, according to the appellant, he honestly believed it to be necessary (or likely to be found necessary) while the dentists who disagreed with him did not claim that the opinion expressed by the appellant was one which no dentist could honestly hold. In this state of the evidence, their Lordships think it would be wrong to impute to the Disciplinary Committee an implied finding to the effect that the appellant did not honestly hold that opinion. An honestly held opinion, even if wrong, in their Lordships' view plainly cannot amount to infamous or disgraceful conduct.'

Counsel for the council submitted that the evidence was sufficient to entitle the committee both to hold the facts alleged in charges 2 and 3 proved so far as they had done so and also to hold that those facts constituted serious professional misconduct.

In considering the applicability of Lord Jenkins's observations to the circumstances of the present appeal, it has to be noted that Lord Jenkins was speaking of a case in which dishonesty was very much the issue and in the context of the statutory provision which was the basis of the proceedings in *Felix v General Dental Council*, namely s 25 of the Dentists Act 1957. So far as relevant it was in these terms:

a '(1) A registered dentist who either before or after registration . . . (b) has been guilty of any infamous or disgraceful conduct in a professional respect, shall be liable to have his name erased from the register . . .'

At that time this was the only penalty available in respect of such conduct. The Dentists Act 1983, s 15(1), provided:

b 'For section 25(1) of the [1957] Act (erasure from register for crime or infamous conduct) there shall be substituted—“(1) A registered dentist who (whether before or after registration) . . . (b) has been guilty of serious professional misconduct, shall be liable to have his name erased from the register, or to have his registration in it suspended, in accordance with section 26(3) of this Act . . .”’

c The suspension referred to is suspension for such period not exceeding 12 months as may be specified in the committee's determination. Counsel for the appellant suggests that this change in language was not intended to effect a change in substance. In *R v General Council of Medical Education and Registration of the UK* [1930] 1 KB 562 at 569, referring to the statutory provision there applicable, namely 'infamous conduct in a professional respect', Scrutton LJ said:

d 'It is a great pity that the word "infamous" is used to describe the conduct of a medical practitioner who advertises. As in the case of the Bar so in the medical profession advertising is serious misconduct in a professional respect and that is all that is meant by the phrase "infamous conduct"; it means no more than serious misconduct judged according to the rules written or unwritten governing the profession.'

e In the General Medical Council's booklet entitled *Professional Conduct and Discipline: Fitness to Practice* (1985) the council stated: 'In proposing the substitution of the expression "serious professional misconduct" for the phrase "infamous conduct in a professional respect" the Council intended that the phrases should have the same significance.'

f Their Lordships readily accept that what was infamous or disgraceful conduct in a professional respect would also constitute serious professional misconduct but they consider that it would not be right to require the council to establish now that the conduct complained of was infamous or disgraceful and therefore not right to apply the criteria which Lord Jenkins derived from the dictionary definitions of these words which he quoted in *Felix v General Dental Council*. Their Lordships consider it relevant, in reaching a conclusion on whether Parliament intended by the change of wording to
g make a change of substance, to notice that in addition to this change and in close conjunction with it the additional and much less severe penalty of suspension for a period not exceeding 12 months was provided. Further, in terms of s 1(2) of the Dentists Act 1984, which is the statute presently applicable, 'It shall be the general concern of the Council to promote high standards of dental education at all its stages and high standards of professional conduct among dentists . . .' In the light of these considerations, in their
h Lordships' view what is now required is that the council should establish conduct connected with his profession in which the dentist concerned has fallen short, by omission or commission, of the standards of conduct expected among dentists and that such falling short as is established should be serious. On an appeal to this Board, the Board has the responsibility of deciding whether the committee were entitled to take the view that the evidence established that there had been a falling short of these standards and were also entitled to take the view that such falling short as was established was serious.
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In the present case the three charges of serious professional misconduct of which the appellant has been found guilty do not impute any dishonesty on his part. It was not suggested that he was carrying out unnecessary treatments for the purpose of enhancing

his remuneration. What was suggested was that, judged by proper professional standards in the light of the objective facts about the individual patients that were presented in evidence to the committee, the dental treatments criticised as unnecessary would be treatments that no dentist of reasonable skill exercising reasonable care would carry out. It was for the committee with their expertise in this matter to judge as between the witnesses called by the council and the appellant, who had every opportunity to give his own reasons and explanations for what he did, and to judge whether the allegation was made out subject to the matter already dealt with in relation to charge 3. The point taken by counsel for the appellant at this stage of his submission was pressed primarily in relation to the criticisms of the appellant's treatment as unnecessary. With regard to the other criticisms it appears to their Lordships that the failures admitted in relation to charge 1 and admitted in part and proved to a further extent in relation to charge 2 and proved in relation to charge 3 amounted to professional misconduct. Whether the misconduct was serious depended on a number of factors, for example in relation to charge 1 on the number of patients in respect of whom the failure occurred and the importance of preserving the record for the well being of the patient and as a basis for decision on future treatment of the patient. In relation to charges 2 and 3 the seriousness of the conduct depended on the appreciation of such factors as the number of patients involved, the number of treatments criticised in relation to each patient and particularly in relation to unsatisfactory treatments, and the nature and extent of the failure to complete the treatment properly. On all of these matters the committee were particularly well qualified to reach a view and their Lordships see no reason to disagree with their findings.

Counsel for the appellant stated that the appellant had ceased practising in the middle of 1986 and that he had no present intention to return to practice but he was prosecuting this appeal in order to clear his name. Their Lordships are happy to make clear that in their judgment the findings against the appellant do not import any moral stigma. All the failures found proved related only to work which the appellant carried out as a dentist but in their Lordships' opinion these were failures of a kind which the committee were entitled to hold rendered it right for them to direct erasure of the appellant's name from the Dentists Register. This is a matter very much for the professional judgment of the committee, with which their Lordships see no cause to interfere.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the council's costs before this Board.

Appeal dismissed.

Solicitors: *Chabra Cass & Co* (for the appellant); *Waterhouse & Co* (for the council).

Sophie Craven Barrister.

a Atkinson v Atkinson

COURT OF APPEAL, CIVIL DIVISION

MAY LJ AND WATERHOUSE J

23 JULY, 11 AUGUST 1987

- b** *Divorce – Financial provision – Periodical payments – Termination – Wife cohabiting with another man – Whether court can take into consideration wife's cohabitation in exercising its power to vary periodical payments order.*

The parties were divorced in 1981 and it was ordered, inter alia, that the husband should pay to the wife by way of maintenance pending suit £5,500 per annum during their joint lives or until further order. Subsequently the wife formed a long-term relationship with another man. The husband applied for an order that the existing periodical payments order be discharged or varied on the grounds that the wife was cohabiting with another man and that it was no longer just that the husband should have to continue to make payments under the order. The judge held that cohabitation was only relevant in so far as it resulted in some diminution of the wife's needs, either on account of financial support given by her cohabitee or because it was cheaper for people to live together in a joint household rather than to live separately. He reduced the amount of the periodical payments order to £4,500 per annum. The husband appealed, contending that the judge had been wrong to consider himself prevented by authority from reducing the order to a nominal amount.

- c** **Held** – Although the overall circumstances of cohabitation by an ex-wife, particularly the financial consequences, could be such that it would be inappropriate for maintenance to continue, there was no statutory requirement that the court, in exercising its power to vary a periodical payments order, should give decisive weight to the fact of her settled cohabitation, since cohabitation was not to be equated with remarriage and did not necessarily disentitle the ex-wife to maintenance. On the facts, it was not an appropriate case in which to discontinue maintenance or progressively reduce it to a nominal sum. The appeal would therefore be dismissed (see p 857 *e* to p 858 *b d e*, post).

Notes

For periodical payments orders in matrimonial proceedings, see 13 Halsbury's Laws (4th edn) paras 1076–1095.

g Cases referred to in judgments

Barnes v Barnes [1972] 3 All ER 872, [1972] 1 WLR 1381, CA.

Chamberlain v Chamberlain [1974] 1 All ER 33, [1973] 1 WLR 1557, CA.

Duxbury v Duxbury [1987] 1 FLR 7, CA.

MH v MH (1982) 3 FLR 429.

- h** *S v S* [1986] 3 All ER 566, [1986] Fam 189, [1986] 3 WLR 518; *rvsd in part* [1987] 2 All ER 312, [1987] 1 WLR 382, CA.

Stockford v Stockford (1982) 3 FLR 58, CA.

Suter v Suter and Jones [1987] 2 All ER 336, [1987] 3 WLR 9, CA.

Wachtel v Wachtel [1973] 1 All ER 829, [1973] Fam 72, [1973] 2 WLR 366, CA.

j Interlocutory appeal

Robert Thornton Atkinson (the husband) appealed against the decision of his Honour D S Forrester-Paton QC sitting as a deputy circuit judge in the Hartlepool County Court on 28 February 1987 whereby it was ordered that the order of 15 April 1982 as varied on 8 March 1983 be further varied as from 1 February 1986 that the husband pay to the

respondent, Angela Brockett Atkinson (the wife), periodical payments during their lives, or until further order, in the sum of £4,500 per annum. The facts are set out in the judgment of Waterhouse J. a

Robert Johnson QC and Michael J Taylor for the husband.
Paul Focke QC for the wife.

Cur adv vult b

11 August. The following judgments were delivered.

MAY LJ. Waterhouse J is unable to be with us today. He has, however, authorised me to hand down a judgment which he has written and with which I entirely agree. In those circumstances and for the reasons set out in that judgment, this appeal will be dismissed. c

WATERHOUSE J. This appeal, from a decision of his Honour D S Forrester-Paton QC sitting as a deputy circuit judge at Hartlepool County Court on 28 February 1987, raises in sharp focus the question whether or not a former wife who, after the divorce, begins to cohabit with another man on a permanent basis is entitled to continuing maintenance for herself from her ex-husband.

In the instant case the parties were married on 25 June 1960, when the husband was 23 years old and the wife a year younger. The marriage lasted almost 22 years until they separated finally in May 1982; and there are two daughters, who are now grown up and independent of their parents. It seems that there was a progressive breakdown of the marriage from 1972 onwards and the wife's petition for divorce, relying on the husband's behaviour, was filed in January 1982. The decree nisi was pronounced on 10 May 1982 and it was made absolute on 29 June 1982. d

The husband is a successful businessman as a director of a company of builders' merchants. The company is and was prosperous so that he was able to provide an affluent style of living for his wife and family: his income was £30,000 per annum before the separation and it has now risen to £40,000. e

The parties were able to reach agreement on financial matters in the course of the divorce proceedings and the agreed terms were embodied in two orders of the court. The first, on 15 April 1982, provided that the husband should pay to the wife by way of maintenance pending suit £5,500 per annum during their joint lives or until further order by monthly instalments less tax at the standard rate, and that the payments were to continue as periodical payments from the date of the decree absolute. The second, on 10 May 1982, embodied the property and other capital arrangements, which were expressed to be final. In short, the husband agreed to buy a house at Nether Poppleton, near York, for the wife in her name for £26,400, paying also the costs of the purchase. The wife was to take also agreed chattels from the former matrimonial home and a motor car and she was to receive a lump sum payment of £5,000 within 28 days. In return, the wife was to transfer to the husband her interest in the matrimonial home at Hartlepool. f

The terms of the order were duly implemented and the wife went to live at Nether Poppleton. She worked part-time and briefly at a shop in York but she had to give this up and the judge found that there is no real possibility of future employment for her because of her physical disabilities. On 8 March 1983 the periodical payments were increased, by consent, to £6,000 per annum. Then, in February 1984 she sold the house at Nether Poppleton and bought another at Dunnington. Her idea was to improve the newly acquired house and to run a bed and breakfast business there, but the venture was unsuccessful and she sold it in October 1985. After clearing her debts and buying a new car, she was left with about £23,000 capital, so that her position overall had worsened over a period of about 3½ years following the divorce. g
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In 1982 the wife met and became friendly with a man called Austin Jeff, who is about five years older than her. He was formerly the manager of a catering equipment business but had been made redundant three years earlier. The relationship between them developed and he began to cohabit with the wife at Nether Poppleton from time to time and then at Dunnington. Instead of continuing in the catering equipment business, he had chosen to set himself up as a nurseryman, using the garden of the house at Acomb in which he and his former wife had lived and which they owned jointly. He has continued as a nurseryman at that address ever since. As for the wife in the present proceedings, she moved with Mr Jeff to a tenanted house at Barn Moor for about eight months on the sale of her house at Dunnington but in June 1986 she helped Mr Jeff to buy out his ex-wife's interest in the Acomb house.

The purchase price agreed with Mrs Jeff was £32,000 and a further sum of £16,000 was spent on repairs and improvements. Of the total sum, £20,000 was provided by a mortgage, the wife paid £23,000 and Mr Jeff contributed £5,000 by way of set-off in relation to his financial settlement with Mrs Jeff, which has not yet been completed. In the course of the hearing below a deed of variation, dated 8 January 1987, was executed by the wife and Mr Jeff declaring that they are entitled to the Acomb property in the proportion of 23 to 5, that is in proportion to their respective capital contributions. It provides also that Mr Jeff undertakes to pay all interest on the mortgage, currently about £41.50 per week according to the judge's calculation; but it is silent as to payment of the endowment assurance premiums required as additional security for the mortgage loan. Mr Jeff may make capital payments to the wife, if he chooses to do so, in consideration of adjustment of their shares but his only potential source of capital is a fund of £27,000 held in suspense pending a final settlement with his former wife. He and his ex-wife own also a small house that is let to a protected tenant and he expects to take this as part of the settlement.

The result of all this is that the wife's capital position has neither worsened nor improved significantly in consequence of the joint venture at Acomb. It is, of course, tied to that of Mr Jeff in the property but no doubt her own stake in it will appreciate, at least in line with inflation, and she will not herself have to find the mortgage interest. It is also clear, however, that the mortgage loan must have been obtained, at least partly, on the basis of the wife's income from the husband's periodical payments.

The income position, as I will describe it, is more difficult to unravel. Mr Jeff earns only a very modest income as a nurseryman and the judge's finding was that he hoped to earn £70 to £75 per week in the current year. Moreover, the mortgage interest is a substantial first call on this. At the time of the hearing below he and the wife had not yet made firm arrangements about the payment of household bills but the judge's finding, abundantly supported by the evidence, was that their expenditure in keeping up the style of life that they had chosen would probably absorb the whole of their combined income, assuming that the wife continued to receive £6,000 a year from the husband. The judge added:

'Her income being the larger she will be making the larger contribution. In that sense it may be said that Mr Jeff will be dependent on her, but the truth is that the arrangement, so long as it lasts, benefits both of them. Two people sharing a house and a common household can each live more cheaply than if they were living in separate establishments. I do not regard either of them as supporting the other: they are mutually dependent.'

A further finding by the judge was that, if the wife's periodical payments were to cease or to be severely reduced, she and Mr Jeff would be unable to keep up the mortgage payments, unless he were to find a job bringing in a sufficient income, the house would have to be sold and Mr Jeff's business as a nurseryman would cease. Mr Jeff's prospect of employment in catering or otherwise would be speculative until he sought other work

but it was thought that he might be able to earn £8,000 a year in a managerial job of the kind that he had previously held.

Finally, the judge was satisfied that the decision of the wife and Mr Jeff not to marry was 'financially motivated to a very large extent' despite other motives disingenuously suggested by the wife. It was clear that they intended to live together on a long-term basis and the judge thought, on balance, that it was more likely than not that they would marry, if only to conform with social convention, if it did not mean the loss of £6,000 a year.

On the basis of these facts the husband applied for an order that the existing periodical payments order in favour of the wife should be discharged or varied on two grounds, namely (1) that the wife was cohabiting with Mr Jeff and (2) that it was no longer just that the husband should have to continue to make payments under the order. Essentially, however, both grounds were based on the same facts. The husband did not suggest that he was unable to continue making the payments for any financial reason and no other material change of circumstance was alleged. Moreover, it is not a case in which any offer of a capital payment in discharge of the husband's future maintenance obligations has been put forward. On the other hand, the judge rightly rejected a belated request on behalf of the wife that he should consider an increase in the periodical payments order because no proper evidential foundation for such a request had been laid.

In a very full judgment, the judge below cited all the relevant statutory provisions and reviewed the major recent decisions on this topic, to which I will refer later in this judgment. In the end, he said that he felt constrained by the decision of Wood J in *MH v MH* (1982) 3 FLR 429 and by dicta of Waite J in *S v S* [1986] 3 All ER 566, [1986] Fam 189 to decide the case on the basis that cohabitation was only relevant in so far as it resulted in some diminution of the wife's needs, either on account of financial support given by her cohabitee or because it was simply cheaper for people to live together in a joint household rather than to live separately. After a detailed examination of the relevant factors on that basis, his decision was to reduce the amount of the periodical payments order to £4,500 a year with effect from 1 February 1988 because he considered that Mr Jeff ought to be able to obtain more remunerative employment by that date, with a consequent reduction in the wife's needs of about £1,500 a year before tax. Provision was also made in the order for this variation to be suspended if the wife were to apply within six months for an increase in the periodical payments order.

It is necessary to add that the judge stated expressly that, if he had not felt constrained by authority, he would have reduced the periodical payments order to a nominal sum, the reduction to take effect by gradual stages over a period of two or three years; thereafter the order would, in effect, have been suspended so long as cohabitation continued.

The husband now appeals against this decision but there is no cross-appeal by the wife against the reduction made in the periodical payments order. We have not heard any argument on the merits of the calculation of the reduction and I stress that nothing in this judgment is intended to reflect one way or the other on the correctness of the calculation on the facts of this case.

Counsel for the husband now submits that the trial judge was wrong to regard himself as prevented by authority from reducing the order to a nominal amount. In the notice of appeal it was suggested that the order should have been discharged immediately but counsel for the husband has recognised in the course of argument the difficulty of applying the 'clean break' principle fully after the event, so to speak, in the circumstances of this case. Equally, it is accepted on behalf of the husband that, in the absence of any offer by him of a further capital payment, the court cannot itself order a further lump sum payment in lieu of maintenance as a 'clean break', an alternative proposed in the notice of appeal (see s 31(5) of the Matrimonial Causes Act 1973, which has not been amended). The appeal has proceeded, therefore, on the basis that the husband's case is that the judge below should have ordered a progressive reduction in the periodical

payments order to a nominal amount until further order on the footing that the payments would remain nominal thereafter whilst the cohabitation continued.

- a* In support of this basic proposition, counsel for the husband submits that the trial judge was wrong to decide that the fact of cohabitation was relevant only to the wife's needs. He suggests that it is relevant on a much wider basis as a circumstance or change to which the court should have regard within the terms of s 31(7) of the 1973 Act, as amended by s 6(3) of the Matrimonial and Family Proceedings Act 1984. Moreover, the court should also have had regard to the cohabitation as conduct of the wife that it would be inequitable to disregard within the meaning of s 25(2)(g) of the 1973 Act, as amended by s 3 of the 1984 Act. In this context it is suggested that the broad policy of the court should differentiate between the case of a woman with a lover who stays with her from time to time and from whom she receives some financial help (as in *S v S*) and the case of a woman who throws in her lot with another man as cohabitee in a stable relationship (as in *MH v MH*). It is submitted that the former may properly be dealt with by examination of the impact of the financial help on the ex-wife's income and needs whereas the latter should receive only nominal maintenance, whatever the precise financial arrangements may be.

- d* A facet of this same argument is that an ex-wife who cohabits permanently with another man should not (it is said) be in a better position than an ex-wife who remarries, yet the latter has no right to continuing maintenance because of the provisions of s 28(1) of the 1973 Act governing the duration of the order. It is suggested that this argument should apply with particular force in the instant case in which the decision of the ex-wife and her partner not to remarry is financially motivated, otherwise the law would seem to be 'an ass'. They should not be permitted to pursue the 'good life', as the judge described it, if they can only do so at the expense of the ex-husband. It is pointed out also that, even if Mr Jeff obtains other employment, the wife here will remain better off under the judge's order than she would be if she remarried.

- e* An additional and separate argument advanced on behalf of the husband is that an order of the kind that he seeks would achieve as closely as is practicable the 'clean break' objective defined in s 31(7)(a) of the 1973 Act as amended. It is submitted that the order made by the trial judge breached that principle or did not acknowledge that objective because the husband and the wife will remain bound by the continuing maintenance obligation, which is likely to give rise to further applications for variation, in relation to which the earning capacity of Mr Jeff will be a central issue.

- f* In response to this argument, counsel for the wife submits that the judge rightly took the fact of the wife's cohabitation into account as a circumstance of the case with others and nothing more. It is central to her case that, unlike an ex-wife who remarries, she has not acquired any right of support or similar rights of a married woman against Mr Jeff: she remains in that sense an independent, single woman. In reality, her financial position is no different from that of a woman who sets up home with a member of her family, such as a brother, or a woman friend. The fact that there is a sexual aspect to her relationship with Mr Jeff is irrelevant, it is suggested, because she is no longer married and there is nothing about her conduct as such that it would be inequitable for the court to disregard; there has been no financial irresponsibility on her part and, on the judge's findings, she has not prejudiced herself by the association with Mr Jeff in any material way, save for the fact that she has not acquired new rights as a married woman, for what they might be worth in this case.

- g* A further argument on behalf of the wife is that it is unreal to attempt to quantify cohabitation in the way suggested by the husband. The suggested dichotomy between the facts of *S v S* [1986] 3 All ER 566, [1986] Fam 189 on the one hand and *MH v MH* (1982) 3 FLR 429 on the other would itself produce an unreal situation, the consequences of which could be evaded by any determined and knowledgeable ex-wife. The policy of the law is more rationally reflected, it is submitted, in the distinction between the woman who acquires a new matrimonial status by remarriage and the woman who does not.

Finally, counsel for the wife submits that the 'clean break' principle has no application to the facts of the present case and that the trial judge did not consider fully, in view of his conclusions, what its impact would be if an attempt were to be made to apply it. In short, in the light of the events that have happened, the wife could not realistically be expected 'to adjust without undue hardship to the termination of those payments' within the terms of s 31(7) of the 1973 Act as amended, even if the payments were to be reduced progressively to a nominal amount. It is stressed on her behalf that the consent orders made in 1982 were not designed to achieve a 'clean break' and that they cannot now be rewritten as far as the property settlement is concerned. The wife has arranged her affairs on the basis of those orders and the law as it has been understood hitherto. At the age of 49 years now, her only source of income is the maintenance paid by the husband and she entered into the joint venture with Mr Jeff in the belief that those payments would continue if she did not remarry. It is said that she earned her modest financial independence by her contribution as wife and mother during a long marriage and that it would be manifestly unjust to deprive her of it when her scope for adjustment is severely limited by her age, health, disabilities and lack of substantial capital to generate other income. At the end of the day, her needs remain unchanged and she would be reduced to poverty if the orders sought by the husband were to be made.

It is unnecessary to prolong this judgment by repeating here the now familiar provisions of ss 25 and 31 of the 1973 Act in their amended forms, which govern the husband's application to vary the periodical payments order. It is sufficient to say, firstly, that in exercising its power to vary the court is required to have regard to all the circumstances of the case including any change in any of the matters to which the court was required to have regard when making the order to which the application to vary relates. Secondly, the court must consider whether in all the circumstances and after having regard to any such change it would be appropriate to vary the order so that payments are required to be made only for such further period 'as will in the opinion of the court be sufficient to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments'.

The exercise of this jurisdiction to vary an order was considered by Wood J in *MH v MH* (1982) 3 FLR 429. In that case the parties separated after an 11-year marriage, in the course of which three children were born. By a separation deed provision was made for the wife to have a home for life and a lump sum of £250,000. Later, on the divorce, the deed was made a rule of court and there were consent orders also for maintenance for the wife, which was partly secured, and maintenance for the children. Later again, the husband discovered that the wife had formed an intimate relationship with another man after the separation but before the divorce and that, about four years after the divorce, they were living together as husband and wife. On the husband's application for variation of the order for periodical payments to the wife, Wood J reduced the amount from £3,900 a year to £500 a year, leaving intact the separate secured periodical payments order of £4,500 a year. His decision was based (at the invitation of the parties) on a broad view of the wife's changed situation and, in particular, the cohabitee's potential income, which was conceded. However, in the course of his judgment the judge said (at 436-437):

'It is not in dispute that if, at the date of the original orders, the wife and Mr. Howeson had been living together as now, that factor would have been a material consideration under the provisions of s. 25, whether the parties had reached agreement or the court had investigated the matter itself. Prima facie, therefore, the existence of this relationship is relevant under s. 31(7). I therefore answer the first question which I put to myself in the affirmative. Once it is established that the court has the right to reopen the matter, then it must apply s. 25 and review the whole situation afresh. As I said above, it is conceded that the present relationship would originally have been relevant under s. 25 and, therefore it must be relevant

a now. The tendency of the law has been to ensure that a woman does not have the right to maintenance from two men at the same time. I use the word "right" advisedly. Has the moment yet arrived when the law says that she is not entitled to be in a position to receive maintenance from two men without that factor being taken into consideration by the court? In my judgment the powers of the court under the Matrimonial Causes Act 1973 have certainly reached that stage. I put a further question. "Is it in law, and in fact, fair, just and reasonable that a divorced woman's own financial position (I exclude consideration of maintenance of the children) should be better whilst she is in a stable relationship with another man amounting to cohabitation, than whilst she is married to him?" I think not. Indeed, it is becoming a more frequent practice for orders under ss. 23 and 24 to include provision for extinction or review upon cohabitation with someone else, whether those orders relate to property provisions, e.g. *Chamberlain v. Chamberlain* ([1974] 1 All ER 33, [1973] 1 WLR 1557) or to purely money payments. The possibility of a variation in periodical payments on the assumption of cohabitation with another man was envisaged by the Court of Appeal in *Wachtel v. Wachtel* ([1973] 1 All ER 829 at 841, [1973] Fam. 72 at 97), where the court said: "So far as periodical payments are concerned, they are, of course to be assessed without regard to the prospects of remarriage. If the wife does in fact remarry, they cease. If she goes to live with another man—without marrying him—they may be reviewed." Secondly, therefore, I hold that this is a case where some variation should be considered. Lastly, it is submitted that there is no evidence that the wife has benefited financially and, therefore, that, although the court is entitled to re-examine the situation, no change in the order should be made. If this were accepted, it seems to me that in many cases it would be virtually impossible for a husband to prove precisely the extent of any benefit received by the wife, and when this is impossible the court would be unable to make an order which was fair, just and reasonable between the parties.'

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It will be noted, however, that the judge made only a calculated variation, albeit substantial, of the original order on the basis of a change of circumstances within s 35(7). He said also that it did not seem to him to matter whether he based himself on 'all the circumstances of the case' or 'conduct' within the terms of s 25 before it was amended.

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In *S v S* [1986] 3 All ER 566, [1986] Fam 189 there had been consent orders on the dissolution of the marriage for payment of a lump sum of £125,000 and periodical payments of £23,000 a year. The case is reported because subsequently the husband offered to pay a further sum of £120,000 and to release his charge on the wife's house in commutation of the periodical payments order, which Waite J considered to be insufficient. There was an issue at the hearing, however, about the wife's relationship with a boyfriend, described by the judge as rich and generous, who had made substantial gifts to her from time to time. Dealing with the relevance of that issue, Waite J said ([1986] 3 All ER 566 at 573–574, [1986] Fam 189 at 199):

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'The husband's counsel cited a number of cases in which judges have been called on to deal with the impact on a husband's maintenance liability of relationships maintained by particular claimants, in varying degrees of intimacy or dependence, with a third party. No principle is in my judgment to be deduced from them; nor, with respect, do I see how such issues can ever be concluded by authority. In a jurisdiction as discretionary as this one, such relationships are certainly to be taken into account as one of the many factors to which the court is bound to have regard, but in the delicate weighing process which the discretion involves of one factor against the other, they are not entitled to any advance marking on the scales. The appropriate finding to be made on this aspect of the case is, in my judgment, simply that the wife has a rich and generous boyfriend of long standing whose loyalty and generosity she may reasonably expect to continue for a number of years still to come. That is something which is relevant, certainly, to any sensible assessment of

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her maintenance requirements. Its influence on the final arithmetic will not, however, depend on any rule of thumb approach; it is simply something to be taken into account with all the other numerous factors in the case.' a

Finally, we have been referred to two cases in this court reported this year. In the first, *Duxbury v Duxbury* [1987] 1 FLR 7, the husband appealed against a lump sum order, which had been coupled with a transfer of property order, made on a 'clean break' basis. The major ground of appeal was that the trial judge had failed to take into account the wife's cohabitation with another man in assessing the lump sum payment of £600,000, based largely on the wife's assessed needs in terms of net income. In the judgment of this court, Ackner LJ said (at 13): b

'In my judgment the judge was wholly justified in failing to take that fact into account, since it was irrelevant. He had to consider what were the reasonable needs of Mrs Duxbury in the circumstances, and, as I have already pointed out, it was accepted that the sum to meet those reasonable needs, after she had had the house transferred to her, was the annual disposable sum, the net figure of £28,000. How she spent her money was her affair. The fact that she might spend some part of it upon Mr Black, who as a result would benefit from it, would merely reduce the satisfying of her reasonable needs which required *ex hypothesi* the sum of £28,000 *per annum*. It was just as irrelevant that she should be spending part of her money upon Mr Black as if she decided to have living with her an impecunious friend or an elderly relative, who, again, would be an expense which she herself would be defraying out of the income which had been assessed as being appropriate solely for her needs.' c d

Later in his judgment, Ackner LJ commented on an alternative suggestion that the judge should have reflected his disapproval of the extra-marital relationship by awarding a lesser sum by way of a lump sum and periodic maintenance. He said (at 14): e

'The oddity of such an approach is, first, that if the judge wished that Mrs Duxbury should regularize her position, such an order would have had exactly the opposite effect, because the periodic maintenance would cease immediately upon remarriage. He could not therefore have achieved by an order, a more effective way of ensuring that they continued to cohabit together, without regularizing their position. But the other oddity is, on what basis and in what manner was the reduction to be made? Was he to assess the wisdom of Mrs Duxbury in deciding at the present moment not to marry Mr Black, which would require a considerable enquiry and might turn out to be fully justified? In those circumstances, was he to make any reduction at all, and if so, on what basis? On the other hand, if he concluded that she was wholly unjustified in regularizing the present situation, what sort of reduction should he make? In my judgment, one has only to state the problems which arise out of such an approach to appreciate that, when one comes to apply s. 25 of the 1973 Act, one is faced with essentially a financial and not a moral exercise, save only this, that, as is provided by the new sub-s (1)(g), the conduct of each of the parties is available to be considered and should be considered if that conduct is such that it would in the opinion of the court be inequitable to disregard it. As I have already stated, it was common ground that neither party wished the judge to have regard to the conduct of the other when considering the figures in the case. In other words, it was essentially a mathematical operation which had to produce a fair and proper result.' f g h i

In the second recent case, *Suter v Suter and Jones* [1987] 2 All ER 336, [1987] 3 WLR 9, this court had to consider the application of the 'clean break' principle in a case in which the wife's conduct had been held to be relevant for the purposes of s 25(2)(g) of the 1973 Act and in which the judge had upheld an order for periodical payments in favour of the

a wife at the rate of £100 per month until the two children in her care and control had attained the age of 18 years. The evidence indicated that the wife, to whom sole ownership of the former matrimonial home had been transferred, subject to a mortgage, had an annual deficit of £570, if the periodical payments to her were disregarded, but she had a lover who slept every night with her, except when he went off with friends. The lover had an income of £4,050 a year net but she did not ask him for money and he provided no financial support for the household. Having reviewed the relevant statutory provisions, Sir Roualeyn Cumming-Bruce, with whose judgment May LJ agreed, said (1987) 2 All ER 336 at 343, [1987] 3 WLR 9 at 19):

c 'In my view there is no reason, on the facts found, to expect that the children will find themselves without a roof over their heads if periodical payments for the wife came to an end. Mr Jones should and could make a sufficient contribution to the expenses of his residence without any contribution from the husband beyond his payments of maintenance for the children. The wife may organise herself to earn more remuneration by her own efforts. If there is a financial crisis, I see no reason why the DHSS should not be asked to contribute to the mortgage interest: see *Barnes v Barnes* [1972] 3 All ER 872, [1972] 1 WLR 1381 and *Stockford v Stockford* (1982) 3 FLR 58. The principle in point is that the husband should not be ordered to pay more for his wife's support than is just.'

d After considering the figures, Sir Roualeyn went on to conclude that the co-respondent was in a position to contribute at least £12 per week for the privileges which he enjoyed in the wife's house and that the wife's periodical payments order should, therefore, be reduced to a nominal amount.

e For my part, I am unable to derive from these cases or from the amended legislation itself any binding authority or persuasive support for the basic proposition on which the husband in the instant case relies, namely that settled cohabitation by an ex-wife with a man should be equated to remarriage, at least whilst it lasts, and should disentitle the ex-wife to anything more than nominal maintenance whatever the particular financial and other circumstances of the parties may be. In my judgment it is clear that the wife's cohabitation constitutes a change of circumstance within the meaning of the new s 31(7) of the 1973 Act. I accept also that the cohabitation, the decision not to remarry and the reasons for it are conduct which it would be inequitable for the court to disregard within the terms of the new s 25(2)(g) of that Act. In considering any application to vary or discharge a periodical payments order, however, the court must carry out the full exercise required by s 31(7), involving a review of all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates.

g I can find no warrant for equating in this context remarriage with cohabitation, a word which itself presents problems of definition. The effect of remarriage is dealt with separately in s 28, governing the duration of a periodical payments order, and the policy that an ex-wife should lose her right to maintenance from her ex-husband on acquiring a new matrimonial status and new matrimonial rights against another man is readily understandable. I do not consider that it is open to the courts to add a gloss to those existing provisions by equating cohabitation, however defined, with remarriage, without legislative sanction.

j The court is invited on behalf of the husband to give decisive weight in the s 37 exercise to the fact of cohabitation, praying in aid, if necessary, the concept of 'conduct'. But it is conceded by counsel that a punitive approach would not be appropriate in this case and, in my judgment, that concession is rightly made. The variety of human folly is, of course, infinite and there may well be cases in which an ex-wife's conduct in the context of cohabitation, such as financial irresponsibility or sexual or other misconduct, may make it necessary and appropriate that a periodical payments order should be discharged or reduced to a nominal amount. Again, the overall circumstances of the

cohabitation, particularly the financial consequences, may be such that it would be inappropriate for maintenance to continue (see *Suter v Suter and Jones* [1987] 2 All ER 336, [1987] 3 WLR 9). But, in general, there is no statutory requirement that the court should give decisive weight to the fact of cohabitation. If the court were to do so, it would impose an unjustified fetter (in the present state of the law) on the freedom of an ex-wife to lead her own life as she chooses following a divorce (see the judgment of Ackner LJ in *Duxbury v Duxbury* [1987] 1 FLR 7).

It can be argued persuasively, however, that the fact of cohabitation does provide an additional reason, if one is required, for the court to pursue the 'clean break' objective specified in s 31(7) (and in similar terms in the new s 25A). It seems that the trial judge had this in mind in the instant case but there is considerable force in counsel's criticism on behalf of the wife that the judge had not thought through the consequences of a 'clean break' when stating that his preferred solution, if he had not been constrained by authority, would have been for progressively reducing periodical payments leading to a nominal amount. Such an order would only be justified if, in the opinion of the court, the period during which the payments were to continue 'would be sufficient to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments'. On the facts found by the judge, however, the wife here has no means of generating income herself and I am unable to find any evidential support for a finding that she would be able in the foreseeable future to adjust without undue hardship to termination of the periodical payments.

It follows that I would dismiss the husband's appeal because, on a review of all the financial and other circumstances outlined earlier in this judgment, a reduction in the periodical payments order beyond that ordered by the trial judge would not be justified. Any greater decrease would reduce her virtually to poverty level and I do not understand counsel for the husband to argue that there should be a further variation unless the wife's cohabitation is regarded as decisive without detailed consideration of the figures.

I would add finally that I am not impressed by the argument that the result of all this is to make the law appear to be 'an ass'. It may be that, if the bald question were put to a man, rather than a woman, in the street, the immediate response would be that maintenance should cease on an ex-wife's cohabitation. What is more important is that, in my view, he would be at best nonplussed if presented with the succinct and forceful arguments that have been addressed to us by counsel on both sides on the hearing of this appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *R Bell & Son*, Hartlepool (for the husband); *Denison Till*, York (for the wife).

Carolyn Toulmin Barrister.

Rafidain Bank v Agom Universal Sugar Trading Co Ltd and another

COURT OF APPEAL, CIVIL DIVISION

WATKINS, NOURSE LJJ AND MICHAEL DAVIES J

22, 23 JULY 1987

Discovery – Production of documents – Affidavit – Documents referred to in affidavit – Documents not in possession, custody or power of deponent – Whether court having jurisdiction to order production – RSC Ord 24, r 11(1).

The plaintiff bank sought recovery of £12m paid by it to the defendant, claiming that the money had been paid under a mistake procured by fraud. The defendant claimed that the payment was compensation authorised by the government of Iraq pursuant to a cease-fire agreement between Iraq and the Patriotic Union of Kurdistan. The defendant's affidavits alleged there were certain 'protocols' in existence which contained or evidenced the compensation agreement. The plaintiff sought production of the protocols but the defendant claimed that the documents were not in its possession, custody or power and that it was impossible to get the documents out of Kurdistan. The master ordered production of the documents pursuant to RSC Ord 24, r 11(1)^a. An appeal by the defendant was dismissed by the judge. The defendant appealed to the Court of Appeal, contending that the court had no jurisdiction to order discovery of documents referred to in pleadings or affidavits unless those documents were in the possession, custody or power of the party in whose pleadings or affidavits the documents were referred to.

Held – The court had jurisdiction under RSC Ord 24, r 11(1) to order discovery of documents referred to in a party's pleadings and affidavits notwithstanding that the documents were not in the custody, possession or power of that party, but the absence of custody, possession or power could well amount to good cause for the court to refuse to exercise its discretion under r 11(1) to order discovery. In all the circumstances there were no grounds for interfering with the exercise of the judge's discretion. The appeal would accordingly be dismissed (see p 862 *d* to *h*, p 863 *b* to *d* and p 864 *b c*, post).

Quilter v Heatly (1883) 23 Ch D 42 considered.

Notes

For the production of documents referred to in pleadings and affidavits, see 13 Halsbury's Laws (4th edn) para 58, and for cases on the subject, see 18 Digest (Reissue) 83–85, 583–611.

Cases referred to in judgments

Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 WLR 627, HL.

Quilter v Heatly (1883) 23 Ch D 42, CA.

Appeal

By a notice of appeal dated 5 March 1987 the first defendant, Agom Universal Sugar Trading Co Ltd, appealed with leave of the judge against the order of Sir Neil Lawson sitting as a judge of the High Court dismissing the first defendant's appeal against the order of Master Bickford Smith made on 27 November 1986 whereby he ordered pursuant to RSC Ord 24 that the first defendant produce for inspection certain documents referred to in affidavits sworn on 28 March 1985 on behalf of the first defendant on an

^a Rule 11(1) is set out at p 861 *h j*, post

application by the plaintiff, Rafidain Bank (a bank which was recognised by the Bank of England and which was the principal commercial bank of the State of Iraq), for summary judgment under RSC Ord 14 against the first defendant and the second defendant, Bank of Credit and Commerce International SA. The facts are set out in the judgment of Nourse LJ.

Gavin Lightman QC and Patrick Talbot for the first defendant.

Jules Sher QC and Stephen Nathan for the plaintiff.

The second defendant was not represented.

NOURSE LJ (giving the first judgment at the invitation of Watkins LJ). This is an appeal from a decision of Sir Neil Lawson, sitting as a judge of the High Court in the Queen's Bench Division, on a question of discovery. The question arises in relation to RSC Ord 24, rr 10 to 13, which relate to the inspection of documents referred to in pleadings and affidavits.

The facts of this unusual case and the issues to which they give rise can be gathered from the judgments which were delivered in this court on 18 December 1986 (see (1986) Times, 23 December). I do not propose to repeat them.

The plaintiff bank seeks recovery of \$12m paid by it to the first defendant in January 1985. It says that that sum was paid under a mistake procured by fraud. The first defendant says that the payment was a payment of compensation made deliberately, having been authorised or directed by the government of Iraq pursuant to a ceasefire agreement between Iraq and the Patriotic Union of Kurdistan (the PUK).

The plaintiff bank proceeded under Ord 14 and obtained judgment from the master. Skinner J allowed an appeal by the first defendant. He gave it leave to defend conditional on the sum of \$12m, which had been paid into court by the second defendant, remaining there. That decision was later affirmed by this court on the occasion already referred to.

In the mean time the first defendant's affidavits on the Ord 14 summons had alleged that there were certain 'protocols' in existence which contained or evidenced the agreement by Iraq to pay compensation. Thus in one affidavit it was stated that the protocols 'will clearly refer to the agreement to pay compensation'. It was said that it was hoped and intended that these documents would be forthcoming from Iraq.

The plaintiff bank took steps under Ord 24, rr 10 and 11, and on 27 November 1986 Master Bickford-Smith made an order pursuant to r 11(1) requiring the first defendant to produce the protocols and certain other documents referred to in its evidence for inspection by the plaintiff's solicitors not later than 10.30 am on 9 December 1986. That order has never been fully complied with, although from time to time the period for compliance with it has been extended. While no concession to this effect is made by the plaintiff bank, I will proceed throughout on the footing that the protocols and other documents are not in the possession, custody or power of the first defendant.

The position in regard to these documents as it stood on 18 December 1986 was described by Lawton LJ in his judgment. Having recorded that two unnamed Kurds had come forward and made statements, he said:

'In the course of making those statements both Kurds revealed that there were in existence documents supporting the averment that the Iraqi government had agreed to pay compensation to the Patriotic Union of Kurdistan. Those documents, however, have never been disclosed in this country. Attempts have been made by the plaintiffs to get sight of them. The court has made orders directing the first defendants to produce them but they have not done so. Their explanation is that it has been found impossible to get the documents out of Kurdistan. Individuals can get through the lines but anyone carrying documents who was stopped would be in the gravest danger, probably of life. That, say the first defendants, is the reason why the documents have never been produced.'

The first defendant's appeal against the master's order came before Sir Neil Lawson on 5 February 1987, when it was dismissed, although the time for compliance was extended until 8 April 1987. Three further extensions were granted by the same judge, but on 29 June the time finally ran out. On the following day, 30 June, the plaintiff bank issued a summons, returnable before the master next Thursday, 30 July, seeking an order that the first defendant's defence be struck out and that judgment be entered for the plaintiff bank in default of compliance by the first defendant with the master's order of 27 November 1986 as subsequently varied by Sir Neil Lawson. Now the first defendant appeals against Sir Neil Lawson's decision not to interfere with the substance of the master's order. It is said that that order ought never to have been made in the first place.

Two intervening developments must here be mentioned. Firstly, some documents have been produced by the first defendant, although it is conceded that none of them contains or evidences the specific alleged agreement by Iraq to pay the \$12m compensation. Secondly, pursuant to the leave to defend, which was confirmed by this court on 18 December, the first defendant served a defence in the action on 15 January. It may be significant that that defence contains no reference to the alleged protocols or to any other of the documents which were referred to in the first defendant's affidavits on the Ord 14 summons. The agreement for payment of compensation now alleged by the first defendant is an oral one. It is not alleged that it is either contained in or evidenced by any written document. The heart of the defence is contained in para 4(f):

'During the course of each of the said rounds of talks it was agreed and/or confirmed between the Government of Iraq, and the PUK that in consideration of the PUK continuing and/or agreeing to continue the ceasefire between the Government of Iraq and the PUK (i) the Government of Iraq would pay to the PUK: (a) 15,000,000—00 US Dollars outside Iraq immediately and (b) a further 1,000,000—00 US Dollars for each month that the said ceasefire continued; (ii) that the payment of the said sums of money would be kept secret between them and that the said sums of money would be transferred to the order of the PUK.'

The primary submission of counsel for the first defendant on this appeal is that the court has no jurisdiction to order discovery of documents referred to in pleadings or affidavits unless those documents are in the possession, custody or power of the party in whose pleadings or affidavits the reference is made. This submission requires the material provisions of rr 10 to 13 of Ord 24 to be set out. Rule 10(1) provides:

'Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.'

Rule 10(2) requires the party on whom a notice is served to serve a counter-notice stating a time—

'at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.'

Rule 11(1) is in these terms:

'If a party who is required by rule 9 to serve such a notice as is therein mentioned or who is served with a notice under rule 10(1)—(a) fails to serve a notice under rule 9 or, as the case may be, rule 10(2), or (b) objects to produce any document for inspection, or (c) offers inspection at a time or place such that, in the opinion of the Court, it is unreasonable to offer inspection then or, as the case may be, there, then, subject to rule 13(1), the Court may, on the application of the party entitled to inspection, make an order for production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit.'

I interpose here to point out that so far there has been no reference to documents 'in the possession, custody or power' of a party. However, r 11(2) is in these terms: a

'Without prejudice to paragraph (1) but subject to rule 13(1) the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to inspect any documents in the possession, custody or power of that other party relating to any matter in question in the cause or matter.'

I need not read r 11(3), which provides for evidence in support of an application under r 11(2). I observe, however, that the deponent must state his belief that the documents are in the possession, custody or power of the other party. b

Rule 12 is not directly material to this appeal. Again I observe that it is a rule which is expressly directed to documents in the possession, custody or power of a party.

Rule 13(1) is in these terms:

'No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.'

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I should state here that although the satisfaction of the requirements of that paragraph was in issue below, nothing has been made of that point here. In other words, it is clear that, if the plaintiff surmounts all other hurdles, it has shown that the production of the document is necessary for disposing fairly of the action. Rule 13(2) is not material to the present case. d

Looking at those provisions aside from authority, in particular at the contrast in wording between r 10(1) on the one hand and r 11(2) and (3) on the other, I find it impossible to hold that r 10(1) applies only to documents which are in the possession, custody or power of the party concerned. It seems to me, both as a matter of construction and as one of common sense, that the omission of such a requirement is deliberate. The party who refers to the documents does so by choice, usually because they are either an essential part of his cause of action or defence or of significant probative value to him. Neither of those functions presupposes that they will be in his possession, custody or power. As Lindley LJ observed in *Quilter v Heatly* (1883) 23 Ch D 42 at 50, a case to which I will refer again later, the material provisions were evidently intended to give the other party the same advantage as if the documents referred to had been fully set out in the pleadings. Why should that advantage be automatically denied to him because the documents are not in the possession, custody or power of the party who refers to them? Moreover, under r 11(1) the court is not bound to make an order for production. It has a discretion to do so or not as it sees fit. The authorities establish that an order will not be made if good cause to the contrary is shown. Doubtless the absence of possession, custody or power will sometimes amount to a good cause. But why should it invariably do so? Suppose a case where there was a technical absence of possession, custody or power but nevertheless evidence that the third party who had possession of the document would very likely make it available if only he was asked to do so. I can see no reason for thinking that it was intended that the court should be powerless to make an order whose practical effect would be to require the request to be made to the third party. e
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Counsel for the first defendant relied on authority. He referred us to the speech of Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627, which is of no assistance in construing the provisions of Ord 24, r 10(1). Then he relied on the following passage in the judgment of Jessel MR in *Quilter v Heatly* 23 Ch D 42 at 49: i

'As to items 1 and 4, which are copies of letters written by the Plaintiff, the case stands differently. If the summons had asked for the production of the letters themselves, the answer would almost certainly have been that the Plaintiff had not got them, and could not get them, which of course would have been a complete answer to the application as regards them.'

- I cannot read that observation as showing that Jessel MR thought that there was no jurisdiction to order production if possession, custody or power was absent. It is entirely explicable as an expression of his opinion that there would, in the events stated, have been good cause shown, an exception for which he himself had expressly allowed (see 23 Ch D 42 at 48). Indeed, it seems to me that all three judgments in that case are consistent with the notion that the question is one not of jurisdiction but of discretion. None of the other authorities or texts to which counsel for the first defendant has referred us say anything to the contrary. Nor do I accept counsel's alternative way of putting it, which is that, even if it is not a question of jurisdiction, it is one of invariable practice. I am quite satisfied that it is not. It is a question of discretion to be exercised on the facts of each particular case.

For these reasons I am in entire agreement with the conclusion expressed by Sir Neil Lawson on this question in his judgment:

- 'In the exercise of its discretion the court may well not order to produce for inspection under r 11(1) unless it is satisfied that the documents in question are in the possession, custody or power of the person to whom the order is directed. It seems to me that the submission of no jurisdiction where the documents are not in the possession, custody or power fails in relation to this particular order.'
- There being no question of jurisdiction or invariable practice of the court at stake, counsel for the first defendant is left with the burden of satisfying us that Sir Neil Lawson, in confirming the master's order, erred in principle or exercised his discretion in a manner which was plainly wrong. Counsel accepts that that is a heavy burden, but he seeks to discharge it by relying on a number of submissions. He makes a general submission to the effect that it would need special circumstances before it would be right to make an order in the case of documents which were not only outside the possession, custody or power of the party concerned, but were in a remote foreign country which was undergoing a state of hostilities on more than one front. I do not think that that is a conclusive feature of the case. It is well answered by the plaintiff bank's assertion that it would be monstrous if the first defendant was able to sit back and say that it was quite separate from the PUK; that the documents were not in its own power but in that of the PUK, and that it should not therefore be ordered to produce them. The reality is, says the plaintiff bank, that if the PUK expect the first defendant to defend the claim for the money the first defendant is entitled to require production of the documents necessary to do so, and the PUK is bound to supply them whatever the difficulties.

- Then counsel for the first defendant relies on a number of more specific points. He says that the documents were referred to in affidavits on an application which is now exhausted, and that the first defendant's pleaded case is not now based on the documents, so that they are accordingly not fundamental to the defence. Those are points which do not impress me at all. The documents would never have been referred to in the affidavits on the Ord 14 summons unless the first defendant had taken the view that they were of material significance in the action.

- Next counsel for the first defendant submits that the plaintiff's case is that the documents did not exist in the first place and that the purpose of this application was to establish their non-existence. That again is a point with which I am not at all impressed. The attitude of the plaintiff to the failure of the first defendant to produce these documents and the use which the plaintiff can make of that failure are entirely irrelevant to the question whether or not the first defendant should produce them.

- Counsel further says that the first defendant is entitled to its trial on the defences pleaded and that the plaintiff bank is sufficiently protected by the principle that, if the documents are not disclosed, the first defendant will be debarred from relying on them at the trial. That was an automatic provision of the rules in the old days. It has now gone, but it would be the usual practice at trial for the judge not to allow reliance to be placed on the documents if they had not then been produced. I do not think that that point carries counsel for the first defendant any further.

Finally, pervading the whole of counsel's resistance to the master's order is the peril which he says the first defendant will be in if the order stands and the application to strike out the defence proceeds. As to that, I wish to say as little as is possible. I would merely observe, first, that the master's order was not an 'unless' order and, second, that nothing which is decided on this appeal will be in any way conclusive of the application to strike out the defence. That is something which will have to be considered entirely on its own merits and with regard to all the circumstances of the case, albeit that those circumstances may well include a failure to comply with the order for production. I think that it is neither necessary nor desirable to say anything more about that matter.

For the reasons which I have given, it is clear to me that Sir Neil Lawson exercised his discretion in a manner with which it is impossible for this court to interfere.

I would dismiss this appeal accordingly.

MICHAEL DAVIES J. I agree, for the reasons stated by Nourse LJ, that this appeal should be dismissed.

WATKINS LJ. I agree, and add one or two observations of my own with reference only to the effect of the case relied on by counsel for the first defendant, namely *Quilter v Heatly* (1883) 23 Ch D 42. Sir Neil Lawson, in giving his judgment, said:

'When one reads the case one finds that it does not bear this proposition out [that is, the proposition advanced by counsel for the first defendant]. The effect of this case has been mis-cited in *The Supreme Court Practice* 1985 vol 1, para 24/10/1.

I agree entirely with that, and would invite the editors of *The Supreme Court Practice* to re-examine the aptness of the reference to that case in the notes to r 10.

The general effect of r 10 in its entirety and r 11(1) was succinctly expressed by Bowen LJ in *Quilter's* case 23 Ch D 42 at 51 when he said of the predecessors of these provisions:

'The party against whom the application is made must produce them unless he can shew good cause why he should not. If he refuses, the party applying can go to the Judge, who may refuse the application if he sees good reason for so doing.'

I see no reason whatsoever why the broad scope of rr 10 and 11(1) should be restricted in any way, subject of course to the exercise of the court's discretion. It is plain to me that the additional power given to the court in r 11(2) and (3) contains an exceptional restriction, namely that the making of an order is dependent on whether the documents sought to be inspected are in the possession, custody or power of the party to whom the order if made is directed.

For the reasons given by Nourse LJ and for those I have myself expressed, I too would dismiss this appeal.

Appeal dismissed.

Solicitors: *Boodle Hatfield* (for the first defendant); *Landau & Scanlan* (for the plaintiff).

Azza Abdallah Barrister.

Harrison v Tew

COURT OF APPEAL, CIVIL DIVISION

DILLON, NICHOLLS LJ AND SIR FREDERICK LAWTON

7, 8, 11 MAY, 6 JULY 1987

b *Costs – Taxation – Solicitor – Bill of costs for contentious business – Court's inherent jurisdiction to order taxation of solicitor's bill of costs – Client not applying for taxation of costs within 12 months after bill paid – Client alleging excessive overcharging in bill – Whether court having inherent jurisdiction to order taxation when overcharging excessive – Whether court's inherent jurisdiction in cases of professional misconduct applying – Whether court having jurisdiction to order taxation more than 12 months after bill paid – Solicitors Act 1974, s 70(4).*

c The defendant solicitor acted for the plaintiffs in a number of property transactions and delivered ten bills of costs between October 1977 and May 1981 in respect of them. Payment was made by a transfer, with the prior agreement and approval of the plaintiffs, of the appropriate sum to the firm's account whenever the solicitor received money on the plaintiffs' account following the sale of land. More than a year after the last bill had been paid the plaintiffs consulted other solicitors and in November 1983 the plaintiffs issued an originating summons for taxation of the bills, claiming that the bills were excessive and that they had been overcharged by more than £100,000. Under s 70(4)^a of the Solicitors Act 1974 the power to order taxation was not exercisable by the party chargeable with the bill 'after the expiration of 12 months from the payment of the bill'. The master nevertheless directed that the bills be referred to the taxing master and, on appeal by the solicitor, that reference was upheld. The solicitor appealed to the Court of Appeal. The questions arose whether s 70(4) excluded the court's inherent jurisdiction to order taxation of a solicitor's bill of costs and whether the plaintiffs' bills could be referred to taxation notwithstanding that they had been paid more than 12 months before the application for taxation was made.

f **Held** (Nicholls LJ dissenting) – Having regard to s 70(4) of the 1974 Act, the court had no inherent jurisdiction to order taxation of a solicitor's bill of costs when the application for taxation was made more than 12 months after the bill had been paid, even if it was established that the solicitor's overcharging was so excessive as to amount to serious professional misconduct, since s 70(4) was a statutory provision which displaced the court's inherent jurisdiction over solicitors in the context of the taxation of costs. Since the plaintiffs had applied for taxation more than 12 months after the solicitor's bills had been paid there was no jurisdiction to order taxation. The appeal would therefore be allowed (see p 875 b to j, p 876 c to e g and p 884 j to p 885 b e f, post).

Dictum of Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] 1 All ER at 102 applied.

h *Storers & Co v Johnson & Weatherall* (1890) 15 App Cas 203 and *Symbol Park Lane Ltd v Steggles Palmer (a firm)* [1985] 2 All ER 167 distinguished.
Re a solicitor [1961] 2 All ER 321 disapproved.

j Per Dillon LJ and Sir Frederick Lawton. An application for taxation is not appropriate where there is an allegation of serious professional misconduct against a solicitor based on excessive overcharging; instead the allegation should be made by way of either disciplinary proceedings before the Law Society or an action by the client against the solicitor (see p 867 f and p 885 f to h, post).

Notes

For the court jurisdiction to order taxation of a solicitor's bill of costs, see 44 Halsbury's

a Section 70(4) is set out at p 867 j, post

Laws (4th edn) paras 178–181, and for cases on the subject, see 44 Digest (Reissue) 248–256, 2494–2616.

For the Solicitors Act 1974, s 70, see 44 Halsbury's Statutes (3rd edn) 1539.

Cases referred to in judgment

Anon (1817) 2 Chit 155.

Arrowsmith, Ex p (1806) 13 Ves 124, 33 ER 241, LC.

Barker, Re (1834) 6 Sim 476, 58 ER 673.

Binns v Hey (1843) 13 LJQB 28.

Bowles's Trustees, Ex p (1835) 1 Bing NC 632, 131 ER 1261.

Boycott, Re (1885) 29 Ch D 571, CA.

Burton v Chatterton (1820) 3 B & Ald 486, 106 ER 739.

Chadwell v Bruer (1728) 1 Barn KB 43, 94 ER 30.

Clutterbuck v Combes (1833) 5 B & Ad 400, 110 ER 838.

Cowdell v Neale (1856) CBNS 332, 140 ER 137.

Dagley v Kentish (1831) 2 B & Ad 411, 109 ER 1195.

Doe d Palmer v Roe (1835) 4 Dowl 95.

Downes, Re (1844) 5 Beav 425, 49 ER 643.

Electrical Trades Union v Tarlo [1964] 2 All ER 1, [1964] Ch 720, [1964] 2 WLR 1041.

Gaitskell, Re (1845) 1 Ph 576, 41 ER 752, LC.

Jackson, Re, re Cottrell, Boughton-Leigh v Boughton-Leigh (1889) 40 Ch D 495.

Jones v Roberts (1838) 8 Sim 397, 59 ER 158.

King, Ex p (1834) 1 Ad & El 560, 110 ER 1321.

Langford v Nott (1820) 1 Jac & W 291, 37 ER 386.

Marsh v Joseph [1897] 1 Ch 213, [1895–9] All ER Rep 977, CA.

Myers v Elman [1939] 4 All ER 484, [1940] AC 282, HL.

National Enterprises Ltd v Racial Communications Ltd, Racial Communications Ltd v National Enterprises Ltd [1974] 3 All ER 1010, [1975] Ch 397, [1975] 2 WLR 222, CA.

Park, Re, Cole v Park (1889) 41 Ch D 326, CA.

Pritchard v J H Cobden Ltd [1987] 1 All ER 300, [1987] 2 WLR 627, CA.

R v Bach (1821) 9 Price 349, 147 ER 115, Exch.

Shiloh Spinners Ltd v Harding [1973] 1 All ER 90, [1973] AC 691, [1973] 2 WLR 28, HL.

Solicitor, Re a [1961] 2 All ER 321, [1961] Ch 491, [1961] 2 WLR 698.

Springate v Springate (1795) 1 Salk 332, 91 ER 293.

Storer & Co v Johnson & Weatherall (1890) 15 App Cas 203, HL; varying sub nom *Re Johnson & Weatherall* (1888) 37 Ch D 433, CA.

Sutton v Sears [1959] 3 All ER 545, [1960] 2 QB 97, [1959] 3 WLR 791.

Sutton & Elliot, Re (1883) 11 QBD 377, CA.

Symbol Park Lane Ltd v Steggles Palmer (a firm) [1985] 2 All ER 167, [1985] 1 WLR 668, CA.

Thew (R & T) Ltd v Reeves (No 2) [1982] 3 All ER 1086, [1982] QB 1283, [1982] 3 WLR 869, CA.

Tyther, Re, ex p Pemberton (1852) 2 De GM & G 960, 42 ER 1147, LJJ.

Uxbridge (Earl), Ex p (1801) 6 Ves 425, 31 ER 1126, LC.

Watson v Postan (1832) 2 Cr & J 370, 149 ER 158.

Wellborne, Re [1901] 1 Ch 312, CA.

Weymouth v Knipe (1837) 3 Bing NC 387, 132 ER 459.

Williams v Griffith (1840) 6 M & W 32, 151 ER 310.

Wilson v Gutteridge (1824) 3 B & C 157, 107 ER 693.

Young v Bristol Aeroplane Co Ltd [1944] 2 All ER 293, [1944] KB 718, CA.

Cases also cited

Abbey National Building Society Ltd v Maybeech Ltd [1984] 3 All ER 262, [1985] Ch 190.

Anton Piller KG v Manufacturing Processes Ltd [1976] 1 All ER 779, [1976] Ch 55, CA.

Barrs v Bethell [1982] 1 All ER 106, [1982] Ch 294.

EMI Records Ltd v Ian Cameron Wallace Ltd [1982] 2 All ER 980, [1983] Ch 59, CA.

- a** *Farrell v Alexander* [1976] 2 All ER 721, [1977] AC 59, HL.
Forsinard Estates Ltd v Dykes [1971] 1 All ER 1018, [1971] 1 WLR 232.
Lovelock v Margo [1963] 2 All ER 13, [1963] 2 QB 786, CA.
Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210, [1881-5] All ER Rep 949, HL.
Official Custodian for Charities v Parway Estates Developments Ltd [1984] 3 All ER 679, [1985] Ch 151, CA.
- b** *Polak v Winchester (Marchioness)* [1956] 2 All ER 660, [1956] 1 WLR 818, CA.
Smith v Edwards (1888) 22 QBD 10, CA.
Thatcher v CH Pearce & Sons (Contractors) Ltd [1968] 1 WLR 748, Bristol Assizes.
W v Hertfordshire CC [1985] 2 All ER 301, sub nom *Re W (a minor)* (wardship: jurisdiction) [1985] AC 791, HL.

c Appeal

On 15 March 1984 Master Creightmore ordered that bills of costs delivered by the defendant, Mr Geoffrey Herbert Tew, a solicitor, to the plaintiffs, David Rhys Harrison, Charles Egbert Harrison and Selina Harrison, should be referred to the taxing master for taxation notwithstanding that 12 months had elapsed since the bills were delivered. Mr Tew appealed and on 2 December 1986 Sir Neil Lawson, sitting as a judge of the High Court, dismissed the appeal but gave Mr Tew leave to appeal on the question whether s 70(4) of the Solicitors Act 1974 precluded the court from directing a taxation of the bills under its inherent jurisdiction. Mr Tew appealed. The facts are set out in the judgment of Dillon LJ.

- Alan Newman and Antony White* for the defendant.
- e** *Peter Bowsher QC and Gordon Bishop* for the plaintiffs.
Roger Cooke for the Law Society.

Cur adv vult

- f** 6 July. The following judgments were delivered.

DILLON LJ. The defendant in these proceedings, Mr Geoffrey Tew, the senior partner in a firm of solicitors, Messrs Geoffrey Tew & Co of Leicester, appeals, by leave of the judge limited to a particular point of law, against a decision of Sir Neil Lawson, sitting as a judge of the High Court in the Queen's Bench Division, given on 2 December 1986, whereby the judge dismissed an appeal by Mr Tew against a decision of Master Creightmore of 15 March 1984, which had directed that some ten bills of costs rendered by Mr Tew to the first plaintiff, Mr David Harrison, be referred to the taxing master for taxation. The point of law raised by the appeal is whether the court has any jurisdiction to order the taxation of a bill of costs on the application of the party chargeable with the bill, when the bill has been paid by that party and his application for the taxation of the bill was not made until more than 12 months after the bill had been paid.

h Subsection (4) of s 70 of the Solicitors Act 1974, the statute currently in force, provides that:

'The power to order taxation conferred by subsection (2) shall not be exercisable on an application made by the party chargeable with the bill after the expiration of 12 months from the payment of the bill.'

j The question on the appeal is whether, despite sub-s (4), the court has inherent jurisdiction to direct taxation of a bill on the application of the party chargeable even though the application for taxation was not made by the party chargeable until after the expiration of 12 months from the payment of the bill.

If there is jurisdiction, its exercise would of course be a matter for the discretion of the court. No question of the exercise of discretion arises on this appeal, since the leave to

appeal granted by Sir Neil Lawson was limited to the question of jurisdiction and no more extensive leave to appeal has been sought.

A separate point is, however, taken in a respondent's notice in that it is submitted that in truth, though Mr Tew has had the money, none of these bills has ever been 'paid' in that what is said to have constituted payment took place, it is submitted, before delivery of the bill to the party chargeable.

Because of the importance of both points to the solicitors' profession, this court allowed an application by the Law Society to be permitted to attend the hearing of the appeal and address arguments to the court. There is precedent for such a course. In the event, however, though we heard counsel for the Law Society on the question of the jurisdiction to order taxation, we did not find it necessary to hear counsel for the Law Society or counsel for Mr Tew on the submission that the bills had not been paid.

As to the facts, Mr David Harrison is a farmer who, in the latter part of the 1970s, was engaged in a number of property transactions. There were sales of land, particularly of parts of a property called Grove Farm at Narborough in Leicestershire, which were sold for development at fairly substantial prices, and there were also purchases of land, and mortgages of land and some dealings with other property. Mr David Harrison's parents, the second and third plaintiffs, were beneficially interested in some of the land, but it seems that the instructions to Mr Tew were given by Mr David Harrison. Mr Tew had known Mr David Harrison for over 20 years before the commencement of these proceedings.

The ten bills in question were delivered by Mr Tew on various dates from October 1977 to May 1981. But the originating summons in these proceedings seeking the taxation of those bills was not issued until 17 November 1983.

As to the payment of the bills, the evidence as it stood when the summons was before Master Creightmore, and again when Mr Tew's appeal against the master's order for taxation was before Sir Neil Lawson, was briefly that Mr David Harrison had deposed that each bill had been settled on occasions when Mr Tew had received large sums of money representing the purchase price of various parts of land sold off in the late 1970s and in 1981, and Mr Tew had deposed that Mr David Harrison had always agreed his bills and agreed them willingly. The contention that the bills had not been 'paid', though adumbrated, was not pursued by the plaintiffs before the master or before the judge, as the master and the judge both decided against Mr Tew on the footing that the court could direct taxation under its inherent jurisdiction, even though the bills had been paid more than 12 months before the issue of the originating summons. When, however, the respondent's notice was served in this court, Mr Tew filed, with leave, a further affidavit which goes into the course of dealing between himself and Mr David Harrison in greater detail. It is submitted for the plaintiffs that Mr Tew's account in that affidavit may not be wholly consistent, in the case of some of the bills, with some of the contemporary documents. I have no doubt, however, that what is proved by Mr Tew is: (i) when his firm received moneys into its client account on Mr Harrison's behalf, Mr Harrison and Mr Tew sat down in Mr Tew's office and prepared a handwritten statement written by Mr Tew in Mr Harrison's presence, setting out how the moneys received should be paid out. If moneys were to be paid to Mr Tew's firm in respect of costs, this would be discussed, agreed and written down with the other matters to be paid; (ii) when the details had been agreed, and Mr Harrison was still in Mr Tew's office, the handwritten statement would be typed up and a copy of the typed version, together with Mr Tew's firm's bill for any costs of the firm which Mr Harrison had agreed were to be then paid, would be handed to Mr Harrison in Mr Tew's office, since Mr Harrison had given express instructions that such statements and bills were to be handed to him physically, and not sent by post; and (iii) a few days later, or on occasion even later the same day, Mr Tew would make the agreed payments out of his firm's clients' account on Mr Harrison's behalf, including the necessary transfer to the firm's own account of any agreed costs of the firm as set out in the bill agreed and handed to Mr Harrison.

a On these facts I have no doubt that there was a settled account between Mr Harrison and Mr Tew on each occasion, and each of the bills was paid by Mr Harrison in that Mr Tew made the transfer of the appropriate sum to his firm's account with the prior agreement and authority of Mr Harrison and after the relevant bill of costs had been delivered to Mr Harrison. The point taken in the respondent's notice therefore fails.

b The plaintiffs claim that the costs charged by the ten disputed bills, and thus paid by Mr Harrison, were excessive to the tune of over £100,000. They say that they only discovered this when they consulted other solicitors more than a year after the last bill was paid, and that justice requires that the bills should be taxed and any excess overpaid should be refunded. The plaintiffs' assessment of the excess depends on a calculation from certain available files made by a costs draftsman whom their present solicitors have retained. There are questions whether the files which that draftsman was able to examine were in truth all the files relevant to the work done by Mr Tew which is covered by the disputed bills, and there are other problems of missing file notes and documents which c Mr Tew claimed would make any taxation of these bills now onerous to him. These are matters, however, with which we are not concerned on this appeal, since they go only to the court's discretion in making the order for taxation, or to the conduct of the taxation if the order for taxation of the bills stands. For the same reason, we are not concerned with the delays which occurred between the making of Master Creightmore's order in d March 1984 and the hearing before Sir Neil Lawson in December 1986.

e The question, with which we are concerned, of whether the court had jurisdiction to make the order for taxation, notwithstanding that the bills had all been paid more than 12 months before the application to the court for taxation was made, involves consideration of the inherent jurisdiction of the court over solicitors as officers of the court, and the effect on that jurisdiction of the statutory provisions as to the taxation of solicitors' costs from time to time in force. We have had the benefit of a careful analysis by counsel of the successive statutory provisions and of numerous decisions of the courts under some of those provisions.

f The earliest statute to which we were referred, the Act 3 Jac 1 c 7, 'An act to reform the multitudes and misdemeanors of attornies and solicitors at law, and to avoid unnecessary suits and charges in law' (1605), though historically interesting, does not assist in the inquiry.

g The first statute to which we have been referred which contains provision for the court to order taxation of a solicitor's bill of costs was the Act 2 Geo 2 c 23 (attorneys and solicitors (1729)). This Act contains many provisions which regulated the solicitors' profession. In particular, s 23 was concerned with the recovery by a solicitor or attorney of any fees, charges or disbursements at law or in equity. It provided that a solicitor could not bring an action for such fees etc until after the expiration of one month or more from the delivery of the solicitor's bill, and a provision to that effect has been included in every subsequent Act down to the 1974 Act. It also provided that the court could order the taxation of a solicitor's bill for such fees etc without money being brought into court. There is no doubt that the court had exercised inherent jurisdiction over solicitors as h officers of the court, long before the 1729 Act, to direct taxation of their bills on the application of their clients: see *Ex p Earl of Uxbridge* (1801) 6 Ves 425, 31 ER 1126 per Lord Eldon LC and *Ex p Arrowsmith* (1806) 13 Ves 124, 33 ER 241 per Lord Erskine LC and see also *Chadwell v Bruer* (1728) 1 Barn KB 43, 94 ER 30. But it seems to have been the practice under that inherent jurisdiction to require the client who sought taxation to bring the amount of the disputed bill into court; s 23 of the 1729 Act made it possible j for taxation to be ordered without the money being brought into court.

The question whether, despite the 1729 Act, the court retained inherent jurisdiction to direct the taxation of a solicitor's bill seems to have given rise to considerable doubt and difference of judicial opinion in cases decided in the common law courts in the 1820s and 1830s. It is unnecessary to go into the details of these battles of long ago. The preponderant view seems to have been that, if a solicitor sued on a bill which did not

include any 'fees, charges or disbursements at law, or in equity', that bill was outside s 23 of the 1729 Act and so could not be referred for taxation, but it should be treated like any other tradesman's bill which the party charged was free to dispute at the trial. a

The next relevant statute was the Solicitors Act 1843. This was a consolidating and amending Act which repealed the 1729 Act. The difficulties which had been encountered under that Act over whether particular charges were within the phrase 'fees, charges or disbursements at law, or in equity' were got over by the use of the wider phrase 'any Fees, Charges, or Disbursements for any Business done' by the solicitor. b

Section 37 of the 1843 Act repeated the former provision (but so as now to relate to a bill for any business done) that a solicitor could not sue for his costs until after the expiration of one month from the delivery of his bill. It provided for the court to have power to order the taxation of the bill, but it also provided that, on an application made after a verdict should have been obtained or a writ of inquiry executed in any action for the recovery by the solicitor of his demand for costs, or after the expiration of 12 months from the delivery of the bill, the court should only direct taxation of the bill if special circumstances were proved to the satisfaction of the court. c

Section 39 of the 1843 Act provided that, where a trustee, executor or administrator was chargeable with a solicitor's bill, taxation of the bill might be ordered on the application of a beneficiary interested in the relevant trust property.

Section 41 provided that the payment of the bill should not preclude the bill being referred by the court for taxation, if special circumstances should appear to the court to require the same 'provided the Application for such Reference be made within Twelve Calendar Months after Payment'. d

In a succession of cases, from the decision of Lord Langdale MR in *Re Downes* (1844) 5 Beav 425, 49 ER 643 to the decision of this court in *Re Wellborne* [1901] 1 Ch 312, it was held that s 41 of the 1843 Act applied to applications by beneficiaries for taxation under s 39 with the result that the court had no jurisdiction to order on a beneficiary's application the taxation of a bill rendered by a solicitor to a trustee executor or administrator as the party chargeable which that party had paid more than a year before the beneficiary's application to the court for the taxation of the bill was made. These decisions afford us no assistance in the present case, however, since they were applications for taxation merely under the statute, the 1843 Act, and not under the inherent jurisdiction of the court; it appears that the inherent jurisdiction only extended to ordering the taxation of a solicitor's bill at his own client's instance, and not on the application of a third party: see *Chadwell v Bruer* (1728) 1 Barn KB 43, 94 ER 30 and *Re Jackson, re Cottrell Boughton-Leigh v Boughton-Leigh* (1889) 40 Ch D 495. e

In *Re Johnson & Weatherall* (1888) 37 Ch D 433, however, this court held that, though it had no jurisdiction under the 1843 Act to order the taxation of a part of a bill, it had inherent jurisdiction to order on terms the taxation of a part of a bill (in fact the bill of London agents for services for provincial solicitors, where the bill covered services for many different clients and the provincial solicitors only sought to have taxed so much of the bill as related to one particular action for one client). Cotton LJ said (at 442): f

'... I am of opinion that the Court, under its general jurisdiction can order taxation of bills relating to Court business, whether the bill be an agent's bill or a bill delivered by a solicitor to his client, and also can refer part of a bill for taxation ...' g

Lindley LJ said (at 443):

'I am not disposed to construe sect. 37 as depriving the Court of its power to refer part of a bill for taxation or of any other power which it had before.' h

The court did not have occasion to refer to s 41 of the 1843 Act, and the proviso to that section quoted above, since the part in issue of the London agents' bill had not been paid.

Shortly after the decision in *Re Johnson & Weatherall*, Stirling J in *Re Park, Cole v Park* (1889) 41 Ch D 326 at 331, in a valuable and often cited explanation of the court's

a practice in controlling solicitors' claims for remuneration, set out that the court had a three fold jurisdiction, firstly the statutory jurisdiction conferred by the Solicitors Acts, secondly its general jurisdiction over solicitors as officers of the court and thirdly its ordinary jurisdiction in dealing with contested claims. So far as regards the general, or inherent, jurisdiction over solicitors as officers of the court, however, he was merely concerned to affirm its existence without examining its scope or its relationship with the statutory jurisdiction. For present purposes *Re Park, Cole v Park* adds nothing to *Re Johnson & Weatherall*.

b The decision of this court in *Re Johnson & Weatherall* was affirmed by the House of Lords (see sub nom *Storer & Co v Johnson & Weatherall* (1890) 15 App Cas 203). The argument in the House of Lords seems to have been predominantly concerned with the terms on which the taxation of the part of the bill should be ordered. The importance of the decision is that Lord Halsbury LC stated, in apparently general terms, as follows (at 206):

c '... I think it is quite clear that the Solicitors Act did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might therefore order that the costs should be taxed, although not in terms of the Solicitors Act, and they might have selected one particular portion of the bill of costs to be taxed. The moment it was taken out of the region of the Solicitors Act and brought within the general jurisdiction of the Court, then the Court could exercise its own jurisdiction in the way it might think fit ...'

d The 1843 Act was replaced by the Solicitors Act 1932 and that in turn was replaced by the Solicitors Act 1957. The relevant provisions of the 1957 Act (which do not materially differ from provisions in ss 65, 66 and 67 of the 1932 Act) are in ss 68, 69 and 70 of the 1957 Act as follows:

e '68.—(1) Subject to the provisions of this Act, no action shall be brought to recover any costs due to a solicitor until one month after a bill thereof has been delivered in accordance with the requirements set out in the next following subsection ...'

f '69.—(1) On the application, made within one month of the delivery of a solicitor's bill, of the party chargeable therewith, the High Court shall, without requiring any sum to be paid into court, order that the bill shall be taxed and that no action shall be commenced thereon until the taxation is completed.

g (2) If no such application is made within the period mentioned in the last foregoing subsection, then, on the application either of the solicitor or of the party chargeable with the bill, the court may, upon such terms, if any, as they think fit (not being terms as to the costs of the taxation), order—(a) that the bill shall be taxed; (b) that, until the taxation is completed, no action shall be commenced on the bill, and any action already commenced be stayed: Provided that—(i) if twelve months have expired from the delivery of the bill, or if the bill has been paid, or if a verdict has been obtained or a writ of inquiry executed in an action for the recovery of the costs covered thereby, no order shall be made on the application of the party chargeable with the bill except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the taxation as the court may think fit; (ii) in no event shall any such order be made after the expiration of twelve months from the payment of the bill ...'

h '70.—(1) Where a person other than the person who is the party chargeable with the bill for the purposes of the last foregoing section has paid, or is or was liable to pay, the bill either to the solicitor or to the party chargeable with the bill, that person or his executors, administrators or assignees may apply to the court for an order for the taxation of the bill as if he were the party chargeable therewith, and the court may make thereon the same order, if any, as they might have made if the

application had been made by that party: Provided that, in cases where the court have no power to make an order except in special circumstances, the court may, in considering whether there are special circumstances sufficient to justify them in making an order, take into account circumstances affecting the applicant but which do not affect the party chargeable with the bill.

(2) If a trustee, executor or administrator has become liable to pay a bill of a solicitor, the High Court may, upon the application of any person interested in any property out of which the trustee, executor or administrator has paid, or is entitled to pay, the bill, and upon such terms, if any, as they think fit, order the bill to be taxed, and may order such payments, in respect of the amount found due to or by the solicitor and in respect of the cost of the taxation, to be made to or by the applicant, or to or by the solicitor, or to the executor, administrator or trustee, as they think fit: Provided that in considering any such application the court shall have regard to—(a) the provisions of the last foregoing section as to applications by the party chargeable with the taxation of a solicitor's bill so far as they are capable of being applied to an application made under this subsection; (b) the extent and nature of the interest of the applicant . . .

Against the statutory background of the 1957 Act *Re a solicitor* [1961] 2 All ER 321, [1961] Ch 491 came before the court. In that case the solicitor's bill had been delivered on 25 November 1959 and had been paid on 22 December 1959. On 12 May 1960 the client issued a summons for the taxation of the bill but, for no sinister reason, that summons did not come on for hearing until March 1961. The significance of those dates is that, though under the 1843 Act the period which was not to exceed 12 months under s 37 or s 41 was the period from the delivery or payment of the bill to the making of the application for taxation of the bill, under the wording of the 1957 Act (as of the 1932 Act) the period was from the delivery or payment of the bill to the making of the order for taxation. It was consequently submitted for the solicitor that no order for the taxation of the bill could be made in March 1961, when more than 12 months had elapsed from the date when the bill was paid, either under the 1957 Act or under the court's inherent jurisdiction, in the face of proviso (ii) to s 69(2) of the 1957 Act, quoted above, that 'in no event shall any such order be made after the expiration of twelve months from the payment of the bill'.

Cross J rejected that submission. He drew attention to the difference in wording between the 1843 and 1957 Acts, which he considered to have been unintentional and which has since been corrected in the current 1974 Act (see [1961] 2 All ER 321 at 327, [1961] Ch 491 at 502). He held that he therefore had no power to order taxation of the paid bill under the 1957 Act, but he also held that he had power, if special circumstances were shown (as he held that they were because the bill was redolent of overcharge) to direct taxation of the bill under the inherent jurisdiction. He cited part of the passage in Lord Halsbury LC's speech in *Storer & Co v Johnson & Weatherall* (1890) 15 App Cas 203 at 206 which I have cited above and continued ([1961] 2 All ER 321 at 328, [1961] Ch 491 at 503):

'It is true that the precise point was not before him, but I do not see why I should qualify his language and read s 41 of the Act of 1843 as impliedly curtailing the inherent jurisdiction in any way. The presumption should, I think, be against any such curtailment. Further, it is to be remembered that to deal with a solicitor's costs under the inherent jurisdiction is not at all the same thing as to order a taxation of them under the Solicitors Act. In the first place, the one-sixth rule as to costs of the taxation does not apply. Again, some, and not all, of the items in the bill can be dealt with. Finally, the standard applied will not necessarily be the same.'

If the reasoning of Cross J in *Re a solicitor* is right, this present appeal must fail.

The decision of Cross J and a dictum of McNair J in *Sutton v Sears* [1959] 3 All ER 545 at 550, [1960] 2 QB 97 at 102, were accepted by Wilberforce J in *Electrical Trades Union v Tarlo* [1964] 2 All ER 1 at 8, [1964] Ch 720 at 734 as establishing the proposition that the

a court has inherent jurisdiction to secure that the solicitor, as an officer of the court, is remunerated properly, and no more, for work he does as a solicitor.

The decision of Cross J was also considered by this court in a case in 1985 to which I shall have to refer, but before that happened the 1957 Act had been replaced by the 1974 Act.

b Sections 69 and 71 of the 1974 Act set out without any significant difference in wording the provisions of ss 68 and 70 of the 1957 Act. Section 70 of the 1974 Act provides by sub-ss (1), (2) and (3) as follows:

'(1) Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be taxed and that no action be commenced on the bill until the taxation is completed.

c (2) Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the taxation), order—(a) that the bill be taxed; and (b) that no action be commenced on the bill, and that any action already commenced be stayed, until the taxation is completed.

d (3) Where an application under subsection (2) is made by the party chargeable with the bill—(a) after the expiration of 12 months from the delivery of the bill, or (b) after a judgment has been obtained for the recovery of the costs covered by the bill, or (c) after the bill has been paid, but before the expiration of 12 months from the payment of the bill, no order shall be made except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the taxation as the court may think fit.'

There is then sub-s (4) which I have already set out at the start of this judgment.

f The change in wording between s 59 of the 1957 Act and s 70 of the 1974 Act was obviously mainly at any rate directed to the point to which Cross J had drawn attention, that there had been a change in the terminus of the 12-month period between the 1843 Act and the 1932 and 1957 Acts. It has been submitted that Parliament has gone further and has indorsed Cross J's decision as to the scope of the inherent jurisdiction to order taxation in that in s 70(4) of the 1974 Act Parliament has provided that 'The power to order taxation conferred by subsection (2) shall not be exercisable ...'. I find this submission less than compelling, however, since, had Parliament intended specifically to g indorse the inherent jurisdiction, it would have been so easy to provide that 'nothing in this section shall affect the inherent jurisdiction of the court to order taxation of a solicitor's bill'. In my judgment, s 70 was concerned merely to set out the statutory code; it neither indorses nor denies the inherent jurisdiction but leaves the effect of that to the general law.

h Since the enactment of the 1974 Act there has been one further case in which the courts have had to consider the inherent jurisdiction to order taxation of a solicitor's bill. That was the decision of this court in *Symbol Park Lane Ltd v Steggle Palmer (a firm)* [1985] 2 All ER 167, [1985] 1 WLR 668. In that case the bills had not been paid. They had been delivered by the solicitors to their client and the client had allowed more than 12 months from the date of the delivery to elapse before applying to the court for the taxation of the bills. There was a finding of fact which was not challenged that there were no special i circumstances to warrant an order for taxation under s 70(3) of the 1974 Act. It was, however, submitted in this court that, even though there were no special circumstances, the court should order the taxation of the bills under its inherent jurisdiction. The decision of this court was that on the facts there was no injustice to the client which required the court to exercise its inherent jurisdiction; all that had happened was that the client had simply allowed the 12-month period to elapse without making an application for taxation of the bills.

In giving the judgment of the court, Robert Goff LJ, after referring to *Storer & Co v Johnson & Weatherall* (1890) 15 App Cas 203 and *Re a solicitor* [1961] 2 All ER 321, [1961] a Ch 491, said ([1985] 2 All ER 167 at 172, [1985] 1 WLR 668 at 674):

‘... having regard to the fact that there is on the statute book a Solicitors Act which makes express statutory provision for taxation of a solicitor’s bill of costs under certain specified conditions, the existence of that statutory jurisdiction must be taken into account when considering whether the inherent jurisdiction should be exercised ... In our judgment, bearing in mind the existence and nature of the statutory jurisdiction, and the circumstances in which the inherent jurisdiction has been invoked in the two relevant authorities, the inherent jurisdiction must be regarded as a residual jurisdiction which will only be invoked in special circumstances where, although an order for taxation cannot be made under the statute, justice requires that it should be made. The structure of s 70 of the 1974 Act is such that, in our judgment, the court should only invoke the inherent jurisdiction to supplement the statutory jurisdiction when it is necessary to do so to put right what would otherwise be a clear injustice.’ b c

The practical application of *Symbol Park Lane Ltd v Steggle Palmer* was that, where the statute had provided that an order for taxation should only be made if special circumstances were shown, the inherent jurisdiction did not warrant making an order for taxation in the absence of special circumstances. The direct application of that to paid bills is that the statute has provided that, if an application for taxation is made by the party chargeable after the bill has been paid but before the expiration of 12 months from the payment of the bill, no order for taxation shall be made except in special circumstances; therefore, the inherent jurisdiction would not warrant the making of an order for taxation on such an application in the absence of special circumstances. I do not regard the judgment of Robert Goff LJ as deciding, so as to be binding on us under the doctrine of *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293, [1944] KB 718, that, in the case of a paid bill, where the application for taxation is made after the expiration of 12 months from the payment of the bill, and the statute has provided that, whether or not there are special circumstances, the power to order taxation shall not be exercisable, yet the inherent jurisdiction would warrant the making of an order for taxation of the bill if there are circumstances so special that justice required the order to be made despite the statute. d e f

There is, of course, the separate question whether the issue in this case has already been decided, so far as this court is concerned, by the House of Lords in *Storer & Co v Johnson & Weatherall*, ie whether in that case the House of Lords has laid down the wider rule that the courts retain and, if justice requires, will exercise an inherent jurisdiction to control the remuneration of solicitors even in the face of statutory provisions such as s 41 of the 1843 Act. But *Storer & Co v Johnson & Weatherall* was not a case of a paid bill, and their Lordships were not concerned with s 41. The judgments in the Court of Appeal were limited to what was before the court (see especially that of Lindley LJ quoted above) and I do not myself believe that Lord Halsbury LC intended to do more than affirm what the Court of Appeal had stated. g h

In my judgment, therefore, we in this court are not controlled by binding authority and have to make up our own minds on the issue.

In *Shiloh Spinners Ltd v Harding* [1973] 1 All ER 90, [1973] AC 691, a case concerned with the power of the courts to grant relief against forfeiture otherwise than as between landlord and tenant, Lord Wilberforce had to consider the effect on the equitable jurisdiction to grant relief of the intervention of Parliament in providing specific machinery for the granting of relief against forfeiture of leases. He said ([1973] 1 All ER 90 at 102, [1973] AC 691 at 724–725): j

‘This, it is said, negatives an intention that any corresponding jurisdiction should exist outside the cases of leases. I do not accept this argument. In my opinion where

a the courts have established a general principle of law or equity, and the legislature steps in with particular legislation in a particular area, it must, unless showing a contrary intention, be taken to have left cases outside that area where they were under the influence of the general law. To suppose otherwise involves the conclusion that an existing jurisdiction has been cut down by implication, by an enactment moreover which is positive in character (for it amplifies the jurisdiction in cases of leases) rather than negative.'

b In my judgment, it is inherent in that statement of the law that, where the legislature has stepped in with particular legislation in a particular area, then within that particular area the existing jurisdiction is ousted or curtailed, at any rate in so far as the particular legislation is negative in character. In other words, if in a particular field where the courts have previously had inherent power to grant relief Parliament has intervened by setting up a detailed statutory scheme for relief and has expressly provided that in particular circumstances relief shall not be granted, the courts cannot thereafter, in those particular circumstances, continue to grant the relief, under the label of their former inherent jurisdiction. The courts have to respect the particular restrictions imposed by Parliament, for which Parliament has, it is to be assumed, had good reasons.

c Does it make any difference that solicitors are officers of the court? Cross J seems to have been of the view that there was a presumption against the curtailment of the court's inherent power over solicitors even by negative provisions in a statute such as the proviso in s 41 of the 1843 Act. But I do not see why, so far as curtailment by Parliament is concerned, the inherent jurisdiction over solicitors should be different from any other inherent jurisdiction of the courts, since what is at the root of the problem is the sovereignty of Parliament, which is as absolute in relation to solicitors as in relation to anything else, and the need for the courts to respect the conditions which Parliament has laid down.

e One may conjecture that Parliament did not have in mind, when enacting the successive Solicitors Acts, that taxation, even of a bill long paid, may be a very useful weapon to establish the misconduct of solicitors in cases of gross overcharging or fraud. What is clear, however, is that Parliament has consistently from 1843 to 1974 expressed its will that a solicitor should not have to face taxation of a paid bill when the application for taxation (ignoring the mistake in the drafting of the 1932 and 1957 Acts) is made more than 12 months after the bill has been paid.

f There is no doubt that gross overcharging may amount to serious professional misconduct. Moreover, where the solicitor's profit costs in a bill are, as with the bills in the present case, expressed as a lump sum, the most convenient course for finding out whether there has been gross overcharging, and, if so, to what extent, is to order the bill to be taxed.

g But the inherent jurisdiction of the court, statute apart, to order the taxation of a solicitor's bill where it is established or is suspected that the solicitor has been guilty of serious professional misconduct by overcharging is not to my mind a separate jurisdiction from the inherent jurisdiction of the court, referred to by Wilberforce J in *Electrical Trades Union v Tarlo* [1964] 2 All ER 1 at 8, [1964] Ch 720 at 734, to secure that the solicitor as an officer of the court is remunerated properly and no more for work he does as a solicitor, or from the inherent jurisdiction referred to by Lord Halsbury LC in *Storer & Co v Johnson & Weatherall* (1890) 15 App Cas 203 at 206 to do justice in the premises when dealing with one of their own officers. They are merely applications of the general control which the court has inherently, statute apart, over its own officers.

j In *Re a solicitor* [1961] 2 All ER 321, [1961] Ch 491 Cross J thought the solicitor's bill was redolent of overcharging. It was easier for a judge to form such a view then when money was relatively stable. I would, however, for my part have been disposed to take the same view of Mr Tew's bills in the present case, subject to the qualifications (1) that we have heard no argument on the facts and (2) that, because of inflation, it is more difficult to price by instinct and experience, in the money values of the time, work done

seven to ten years ago. Where the question is one of alleged overcharging on the scale alleged here, I do not find it at all a satisfactory solution to say, on a matter of jurisdiction, that it is not enough, for an order for taxation to be made, to say that, in view of the amount of the overcharging and the dependence of the client on the solicitor, justice requires that the bill be taxed (although paid for more than a year) but it would be enough if a further averment were added that the overcharging amounted to professional misconduct. a

In *Storer & Co v Johnson & Weatherall* the courts had no hesitation in granting relief under the inherent jurisdiction which was available, although the application had been launched under the statute of the time. In the present case, where the only question before this court is whether there is inherent jurisdiction to order taxation, and the facts relevant to the exercise of the jurisdiction are not subject to our consideration, it would not be right to allow the appeal if there is any jurisdiction which would allow the taxation of the bills although they have been paid. b

But I feel constrained by the wording of the statute to the conclusion that there is no such jurisdiction. Section 70(4) of the 1974 Act cannot be read as subject to a gloss 'unless the solicitor in question was guilty, or appears to have been guilty of serious professional misconduct'. If the reasoning above is correct that sub-s (4) precludes an order for the taxation of a bill if the bill was paid more than 12 months before the application for taxation was made, even though (as in *Re a solicitor*) the bill is redolent of overcharging and justice would otherwise require that the bill be taxed, that must equally be so even if the solicitor may by his overcharging have been guilty of serious professional misconduct. The disciplinary powers of the court under its inherent jurisdiction over its own officers are as much subject to the sovereignty of Parliament as any other aspects of those powers. c

The disciplinary powers of the court are indeed preserved by s 50 of the 1974 Act, but that, on the express wording of s 50(2), is 'subject to the provisions of this Act', and those provisions include s 70(4). d

This does not mean that the court is bereft of all power to inquire, either in disciplinary proceedings or in an action by the client or anyone else against the solicitor, into the question whether the solicitor has been guilty of serious professional misconduct by gross overcharging or fraud, if the solicitor's bill has been paid more than 12 months before the relevant application to the court was made. It merely means that the route of an order for taxation of the bill is not available as the route for making that inquiry. e

I respectfully differ, therefore, from the judgment of Cross J in *Re a solicitor*. I do so with the more diffidence and hesitation in that I was myself counsel for the unsuccessful solicitor in that case. However, for the reasons which I have endeavoured to set out, I am of the view that Master Creightmore had no jurisdiction to order the taxation of Mr Tew's bills on an application made more than 12 months after they had been paid. Accordingly, I would allow this appeal. f

NICHOLLS LJ. The principal question raised by this appeal is whether the court has power to order taxation of a solicitor's bill on an application made by the party chargeable more than 12 months after the bill has been paid. A subsidiary question raised by the plaintiffs is whether there was 'payment' of the bills in question in the present case. On this subsidiary question I agree with the views of Dillon LJ. g

I turn to the principal question. Sections 69 to 72 of the Solicitors Act 1974 contain detailed provisions regarding taxation of solicitors' bills. Of these provisions, s 70(4) contains an unqualified bar on ordering taxation under the power mentioned in that section on an application made by the party chargeable more than 12 months from payment of the bill. The 1974 Act does not expressly state whether, or to what extent, these statutory taxation provisions exclude the inherent jurisdiction of the court to order taxation of a solicitor's bill. Thus the question raised by this appeal is whether, and to what extent, these statutory provisions have the effect, by implication, of excluding the h

a inherent jurisdiction, particularly in a case where a taxation under the 1974 Act is prohibited by s 70(4).

The inherent jurisdiction and the 1729 Act

b The 1974 Act has a lengthy ancestry, and the distant forerunner of s 70(4) of the 1974 Act was s 41 of the Solicitors Act 1843. In turn, the 1843 Act was preceded by the Act 2 Geo 2 c 23 (attorneys and solicitors (1729)). That there was and, subject to the effect of this statutory intervention, there still is, an inherent jurisdiction in the court to order taxation of bills of solicitors for work done by them as solicitors is clear. I do not think that some apparent vacillation on this point in the 1830s, to which I shall come, is sufficient to cast any real doubt on this.

c I should first refer briefly to the 1729 Act, because the early judicial pronouncements on the inherent jurisdiction were made after the passing of that Act. Section 23 of the 1729 Act prohibited the commencement of an action or suit by an attorney or solicitor for the recovery of certain fees until one month after the delivery of a bill. Section 23 provided for the reference of bills for taxation being made by the court in which the business contained in the bill, or the greater part thereof, had been transacted, on the application of the party chargeable by the bill, without any money being paid into court, but against an undertaking by the applicant to pay the sum found due on taxation. d Although s 23 of the 1729 Act is the ancient predecessor of ss 69 to 72 of the 1974 Act, there were significant differences. Section 23 applied only to taxations on the application of the party chargeable by the bill. The section did not apply to cases where a third party was liable to pay, or had paid, a bill, or where third parties, such as beneficiaries, were interested in property out of which a chargeable trustee or personal representative had paid or was entitled to pay the bill. Section 23 applied only to certain fees, viz 'fees, e charges or disbursements at law, or in equity'. This phrase was interpreted as applying only where the business was either some proceeding in a suit in a court of law or equity or some proceeding with a view to such a suit (*Burton v Chatterton* (1820) 3 B & Ald 486, 106 ER 739 and *Re Gaitskell* (1845) 1 Ph 576 at 579, 41 ER 752 at 753). Above all, for present purposes, s 23 contained no cut-off date for taxation applications.

f With that introduction I come to the early authorities confirming that, under the original inherent jurisdiction which the court exercised over solicitors as its officers, the court had power to ensure, by means of taxation, that a solicitor did not claim excessive remuneration for professional work done by him.

That there was no such power is, perhaps, suggested by a brief note concerning *Springate v Springate* (1795) 1 Salk 332, 91 ER 293, which reads:

g 'No rule ought to be made for referring an attorney's bill delivered to his client, unless there be an action pending thereupon.'

h But in *Ex p Arrowsmith* (1806) 13 Ves 124 at 125, 33 ER 241 Lord Erskine LC observed that the jurisdiction to tax the bills of attorneys and solicitors as officers of the courts subsisted long before the 1729 Act. In 1817 in *Anon* 2 Chit 155 three judges of the Court of King's Bench expressed the view that, though the 1729 Act applied only to particular cases, and bills of particular descriptions, 'yet the Court still retains, and has always exercised a right, at common law, to direct taxation of other bills of costs; such is the constant practice'. In 1821 in *R v Bach* 9 Price 349, 147 ER 115 the Court of Exchequer made an order that a Crown solicitor (outside the 1729 Act, by virtue of s 47) should pay the costs of a taxation and pay interest on sums overpaid. Richards CB said (9 Price 349 i at 354, 147 ER 115 at 116-117):

'As to the order which we are called upon to make respecting the costs of the taxation of the Crown Solicitor's bill, I have no hesitation in saying, that in this case we ought to make such order. In so doing, we do not derive our jurisdiction from the statute of the 2d of Geo II., but we may avail ourselves of that statute for the

principle of the *quantum* of costs disallowed, as affording a criterion which should direct our judgment in similar cases. Our authority rests entirely upon the control which the Court inherently possesses over the conduct of its officers; and there can be no doubt that, in this proceeding, the Solicitor of the Stamps acted as an officer of this Court.'

In 1824 in *Wilson v Gutteridge* 3 B & C 157, 107 ER 693 an attorney brought an action to recover the amount due on his bill. The Court of King's Bench upheld an order referring to taxation a bill in which nearly all the items were outside the scope of the 1729 Act. The court held that it had a paramount jurisdiction, independent of the Act, to refer an attorney's bill for taxation.

However, in the 1830s the tide of authority largely flowed in the opposite direction in the common law courts. In *Dagley v Kentish* (1831) 2 B & Ad 411, 109 ER 1195, in an action brought by an attorney on his bill which did not contain any item taxable under the Act, the Court of King's Bench declined to refer the bill to taxation, regarding the matter as doubtful. Subsequently in other cases dicta were pronounced to the same effect: *Clutterbuck v Combes* (1833) 5 B & Ad 400, 110 ER 838, *Ex p King* (1834) 1 Ad & El 560, 110 ER 1321 and *Ex p Bowles's Trustees* (1835) 1 Bing NC 632, 131 ER 1261. In 1835 in *Doe d Palmer v Roe* 4 Dowl 95 at 102 the state of the law was summarised by Coleridge J in this way:

'It may now be considered as settled, that the Courts have no general inherent power to order the taxation of an attorney's bill. Such a power was asserted in *Wilson v. Gutteridge* (3 B & C 157, 107 ER 693); but it was doubted by all the Judges, on a consultation, with them, in the case of *Dagley v. Kentish* (2 B & Ad 411, 109 ER 1195); and it was denied in *Clutterbuck v. Combes* (5 B & Ad 400, 110 ER 838); and in *Ex parte King* (1 Ad & El 560, 110 ER 1321). It should be observed, that there is nothing in these decisions, which at all interferes with the general power of the Courts to call their officers to account, upon any charge of extortion, or misconduct in the course of their practice.'

That was a case in which the application for taxation was made, not by the client, but by a third party who had paid the bill. From authorities such as *Langford v Nott* (1820) 1 Jac & W 291, 37 ER 386, *Re Downes* (1844) 5 Beav 425, 49 ER 643 and *Re Jackson, re Cottrell, Boughton-Leigh v Boughton-Leigh* (1889) 40 Ch D 495 it seems that the inherent jurisdiction never extended beyond ordering taxation on the application of the client himself. But, as appears from the cases mentioned by Coleridge J, his observations on the court's inherent jurisdiction were general in their application.

The second matter to note regarding this case is that Coleridge J expressly distinguished the question of the general inherent jurisdiction of the court to order taxation of a bill from the question of the court's power (viz jurisdiction) over its officers in cases of extortion or misconduct in the course of their practice.

By way of contrast was the decision of the Court of Exchequer in *Watson v Postan* (1832) 2 Cr & J 370, 149 ER 158. This case was decided after *Dagley v Kentish* but, so it seems, without that or any other decision being cited to the court. There, in an action on an attorney's bill, an order for taxation was made without the client giving the undertaking to pay the amount found due on taxation, as provided for in the 1729 Act. In upholding this order Lord Lyndhurst CB observed that the order was made not under the 1729 Act but 'under the jurisdiction which the Court has at common law' (see 2 Cr & J 370 at 370-371, 149 ER 158). It is not clear from the report whether the bill there comprised or included items within the scope of the 1729 Act.

In 1840 in *Williams v Griffith* 6 M & W 32, 151 ER 310 the Court of Exchequer sought to establish a uniform practice after conferring with the other courts. The decision, given by Alderson B, was that the rule laid down in *Dagley v Kentish* (1831) 2 B & Ad 411, 109 ER 1195 should be adhered to in all cases where the bill contained no taxable item, but that where the bill contained taxable items the court had authority, after action brought,

to refer it for taxation without requiring any admission of liability on the bill (see 6 M & W 32 at 35, 151 ER 310 at 311).

a I do not find this decision easy to understand. The taxation jurisdiction upheld was not of a taxation under the 1729 Act, since one of the conditions for a taxation under s 23 was a submission by the party chargeable to pay the amount found due on taxation. If the taxation envisaged was under the inherent jurisdiction of the court over solicitors as its officers, it is difficult to see why it was not equally available before action brought or why it was not available in cases not within the scope of the 1729 Act. It may be that the court took the view that such a taxation was not under the inherent jurisdiction but was simply an exercise by the court of its ordinary jurisdiction over contested claims, with taxation being merely a convenient way of ascertaining the reasonableness of items charged, and that (as suggested by Alderson B (see 6 M & W 32 at 34–35, 151 ER 310 at 310–311)) taxation would not be a convenient course in the case of a bill not containing taxable items because the officers of the court conducting the taxation would have no special expertise in the case of such a bill. It may also be that the distinction between these two jurisdictions was not as clear then as it is now. Be that as it may, the court reached its decision with reluctance, expressing the view that, although they adhered to the decision in *Dagley v Kentish*, they would have been much disposed to have decided otherwise if the matter had been *res integra*.

d The Court of Chancery, meanwhile, seems to have been unimpressed by this narrower view of the extent of the court's inherent jurisdiction. In *Re Barker* (1834) 6 Sim 476, 58 ER 673 a petition was presented to the court for an order for taxation of a bill which was not taxable under the 1729 Act. Shadwell V-C, whilst commenting that there was very strong authority to show that the court had a general jurisdiction in a case not within the 1729 Act, declined to decide the point. Instead, he ordered taxation on the basis that, as the court had jurisdiction to tax a solicitor's bill where the solicitor was holding his client's deeds, so it had jurisdiction where the solicitor held the client's money (see 6 Sim 476 at 479–480, 58 ER 673 at 674). In that case the solicitor had deducted the amount of his bill from his client's money when accounting to the client. In *Jones v Roberts* (1838) 8 Sim 397, 59 ER 158 the question arose of taxation of an agency bill. In *Weymouth v Knipe* (1837) 3 Bing NC 387, 132 ER 459 the Court of Common Pleas had decided that it had no power to order taxation of such a bill, because the only authority for ordering taxation of an attorney's bill was that conferred by statute, and the Act 12 Geo 2 c 13, s 6 (attorneys and solicitors (1739)) had expressly removed agency bills from the ambit of s 23 of the 1729 Act. Shadwell V-C declined to follow that decision, expressing the view that the contrary was the established practice of the Court of Chancery. He added (8 Sim 397 at 403, 59 ER 158 at 160):

g 'I can easily understand that this Court might have assumed a larger jurisdiction than the courts of common law; as it has often taken the lead and suggested to the legislature what ought to be done. As, for instance, in cases of set off and of landlords taking advantage of breaches of covenants for payment of rent, this Court did interfere long before there was any statutory interference. It is reasonable, therefore, to suppose that, before either of the statutes of Geo. 2 were passed, this Court had the jurisdiction which it is now called upon to exercise; and there is nothing in either of those statutes, to take away that jurisdiction. When the Court says that the taxation is to take place on the amount of the bill being brought into Court, it is taking a course which is quite independent of either of the statutes.'

j *The 1843 Act*

It was against this background that the 1843 Act was passed. Sections 37 to 43 contained lengthy and elaborate provisions regarding taxation of solicitors' bills, much wider in their scope than the provisions in the 1729 Act. All business done by a solicitor in his professional capacity was covered. There was no exception for agency business. Third parties could obtain taxation orders, as well as a solicitor's own clients. An undertaking to pay the amount found due was no longer a prerequisite to obtaining a

reference to taxation. Thenceforth the court had power to order judgment to be entered for the amount found due, or to make such other order as was appropriate. But the right to obtain a taxation varied according to the time at which, or circumstances in which, the application was made. There was an absolute right to an order for taxation on an application made within one month of the delivery of a bill, without making any payment into court. If the application was made later the court had a discretion to refer the bill on such terms as the court should think fit. If the application was made more than 12 months after the delivery of the bill or after judgment taxation was not to be ordered except under special circumstances, proved to the satisfaction of the court. Section 41 dealt with paid bills. Section 41 provided that payment of a bill should not preclude taxation if the court considered the special circumstances required it, on such terms as the court considered were right, 'provided the Application for such Reference be made within Twelve Calendar Months after Payment'. The 1729 Act was repealed.

Plainly, there is much force in the view that the intention of Parliament in 1843 was to sweep away the prevailing uncertainties and differences in the practices of the different courts, and to set in place for the future a regulatory code which, as to bills within the scope of the new Act, was to be comprehensive. For example, it would seem to fly in the face of the apparent intention of Parliament if the court were thereafter to be able to order taxation of a bill more than a year after it had been delivered, where there were no special circumstances. Likewise in the case of any paid bill, in the absence of special circumstances. Likewise also, by parity of reasoning, if the court were to order taxation of a bill paid more than one year before the application was made, whatever the circumstances.

I pause, however, to observe that it was not until the Solicitors Act 1888 that Parliament set up a solicitors disciplinary tribunal. In 1843 it was the court alone that had power, under its inherent jurisdiction, to discipline solicitors in respect of professional misconduct. The 1843 Act made no express reference to this power of the court, and I can see no reason for thinking that this Act was intended to curtail the scope of this power.

After 1843

I turn to see what guidance, on the construction and effect of the 1843 Act, can be obtained from the subsequent authorities. They are mostly nineteenth century cases, but it is a notable feature that the first reported case in which the question raised by the present appeal was clearly in issue, clearly argued, and then decided by the court was in 1961. Before then there were several cases in which, without contrary argument, distinguished judges considered or assumed that the taxation code in the 1843 Act was exhaustive in respect of bills falling within its ambit. There was also one case in particular in which other distinguished judges considered that the inherent jurisdiction remained available to be used where justice so required. But no case prior to 1961 has been drawn to our attention in which a court ordered taxation of a bill falling within the ambit of the 1843 Act or of the subsequent Acts, otherwise than under the statutory powers.

I can summarise the authorities as follows. In the first of the two categories is the decision of Patteson J in *Binns v Hey* (1843) 13 LJQB 28. There some bills had been paid more than a year before the applications were made, and Patteson J's opinion was that s 41 of the 1843 Act had deprived him of the power to refer those bills to taxation. In the following year, in *Re Downes* (1844) 5 Beav 425 at 429, 49 ER 643 Lord Langdale MR agreed with this construction of the Act. In *Re Tyther, ex p Pemberton* (1852) 2 De GM & G 960, 42 ER 1147 Lord Cranworth LC entertained doubt whether there was jurisdiction, in the absence of fraud, to order a taxation more than 12 months after payment of a bill. In *Cowdell v Neale* (1856) 1 CBNS 332, 140 ER 137 Cresswell J, giving the judgment of the Court of Common Pleas, held that, in the absence of special circumstances as required by the 1843 Act, the client of a solicitor was unable to obtain taxation of a bill where more than one year had elapsed since its delivery. Again, in *Re Sutton & Elliott* (1883) 11 QB 377, where the Court of Appeal (Brett MR and Lindley LJ) had to consider a question

a on taxation by a client of his solicitor's bill which had been paid for over a year, it seems to have been assumed on all sides that the only relevant jurisdiction possessed by the court was the jurisdiction governed by the 1843 Act. It was also so assumed by the Court of Appeal in *Re Boycott* (1885) 29 Ch D 571 esp at 576 per Cotton LJ. However, in none of these cases was the continued existence of the general inherent jurisdiction of the court over solicitors overtly canvassed, nor was the relationship of this jurisdiction to the statutory taxation code expressly considered.

b To the opposite effect are dicta, of the highest authority, in *Re Johnson & Weatherall* (1888) 37 Ch D 433, CA; *varied* (1890) 15 App Cas 203, HL. There, solicitors who were acting as the London agents of a Manchester firm of solicitors, delivered a bill of their agency charges to their professional clients covering several matters. The country principals sought taxation of part only of the agents' bill, that relating to one particular action. North J held that the 1843 Act did not enable part only of a bill to be taxed. The country solicitors appealed, and contended, inter alia, that the court had an inherent jurisdiction to refer for taxation a part of a bill for business in an action. The respondents to the appeal, the London agents, did not oppose the making of an order for taxation, against an undertaking by the country solicitors to pay the cash balance claimed to be due within a short limited time. Accordingly, no contrary argument was addressed to the court on the extent of the court's inherent jurisdiction after the 1843 Act. Cotton LJ said (37 Ch D 433 at 442):

c 'I do not think that the *Solicitors Act*, 1843, gives any jurisdiction to tax part of an agent's bill; but I am of opinion that the Court, under its general jurisdiction can order taxation of bills relating to Court business, whether the bill be an agent's bill or a bill delivered by a solicitor to his client, and also can refer part of a bill for taxation . . .'

d Lindley LJ was not disposed to construe s 37 of the 1843 Act as depriving the court of its power to refer part of a bill for taxation 'or of any other power which it had before' (at 443). Bowen LJ expressed himself more narrowly: 'I also am of opinion that the Act does not deprive the Court of jurisdiction to refer part of a bill for taxation . . .' (see at 443).

e f The country solicitors were unwilling to give the undertaking required by the court, and appealed to the House of Lords. Before that appeal was heard, *Re Park, Cole v Park* (1889) 41 Ch D 326 came before Stirling J and the Court of Appeal. Stirling J's judgment contains the classic passage setting out the threefold jurisdiction of the court in dealing with solicitors' costs, and he cited *Re Johnson & Weatherall* (1888) 37 Ch D 433 as an example of the exercise of the court's inherent jurisdiction over its officers (see 41 Ch D 326 at 331).

g In their Lordships' House in *Re Johnson & Weatherall*, sub nom *Storer & Co v Johnson & Weatherall* (1890) 15 App Cas 203 the existence of inherent jurisdiction to order taxation of part of a bill was, once again, not in dispute. Lord Halsbury LC pointed out that, although the summons had been intended to be under the 1843 Act, this did not bind the court absolutely and continued (at 206):

h '... I think it is quite clear that the *Solicitors Act* did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might therefore order that the costs should be taxed, although not in terms of the *Solicitors Act*, and they might have selected one particular portion of the bill of costs to be taxed. The moment it was taken out of the region of the *Solicitors Act* and brought within the general jurisdiction of the Court, then the Court could exercise its own jurisdiction in the way it might think fit . . .' (My emphasis.)

i That was a case which fell altogether outside the scope of taxation provided for in the 1843 Act because what was sought to be taxed was part only of a bill.

I come to the decision of Cross J in *Re a solicitor* [1961] 2 All ER 321, [1961] Ch 491.

There the issue of jurisdiction was argued and decided. That was an especially hard case, in that the taxation application had been made within 12 months of payment of the bill and, as the judge concluded, the statutory change whereby the crucial cut-off date ceased to be the date of the application, as in the 1843 Act, and became the date of the order, as in the 1932 and 1957 Acts, had not been intended by Parliament. Cross J founded his decision principally on Lord Halsbury LC's speech in *Storer & Co v Johnson & Weatherall*.

Finally, there is the recent decision of this court in *Symbol Park Lane Ltd v Steggle Palmer (a firm)* [1985] 2 All ER 167, [1985] 1 WLR 668. In that case more than 12 months had elapsed after delivery of the bill but there were no special circumstances. Thus the statutory jurisdiction was excluded. The applicants sought to rely on the court's inherent jurisdiction. No argument was advanced to the court that in that case the court had no inherent jurisdiction to make an order. It was assumed that the court had a jurisdiction which it could exercise in that case if it saw fit to do so. It was also assumed that *Re a solicitor* was correctly decided. Hence this is not, strictly, a binding decision on these points. There the argument turned on whether the court should exercise its admitted jurisdiction.

In the result, I accept Mr Tew's contention that authority does not constrain this court to hold that the court has power to order taxation of a bill falling within s 70 of the Solicitors Act 1974 outside the prescribed time limits. Conversely, however, authority does not bind this court to hold the contrary.

The 1974 Act

Against this historical and legislative background, and having regard to the elaborate terms of ss 69 to 72 of the 1974 Act, I am very conscious of the force of Mr Tew's argument that the 1974 Act impliedly excluded the court's inherent jurisdiction to order taxation of a bill outside the time limit prescribed by s 70(4). In the end, however, I have come to the conclusion that Cross J's decision in *Re a solicitor* was correct. The consideration which weighs with me is the difficulty of satisfactorily reconciling Mr Tew's argument on the effect of the 1974 Act with the court's continuing jurisdiction over solicitors in cases of serious professional misconduct. To my mind, the consequence of Mr Tew's argument, in the field of serious professional misconduct, is such that it cannot have been intended by Parliament. The difficulty arises as follows.

Every admitted solicitor is an officer of the Supreme Court (see, now, s 50(1) of the 1974 Act). The court's inherent jurisdiction over solicitors exists because of the need for the court to be able to enforce honourable conduct on the part of its own officers. To that end the court needs to have, and has, a disciplinary jurisdiction over its officers. This jurisdiction is not only punitive. It is also compensatory (see *R & T Thew Ltd v Reeves* (No 2) [1982] 3 All ER 1086, [1982] QB 1283). Under the latter head the court has power to order a solicitor to pay damages to compensate for loss occasioned by professional misconduct on his part (see *Marsh v Joseph* [1897] 1 Ch 213 at 245, [1895-9] All ER Rep 977 at 981 per Lord Russell CJ and *Myers v Elman* [1939] 4 All ER 484 at 508-509, [1940] AC 282 at 319 per Lord Wright).

I can see no justification for thinking that the statutory provisions regarding taxation were, in general, intended to limit the court's inherent jurisdiction in cases of serious professional misconduct. I have already mentioned the position in this regard under the 1843 Act. Under the 1974 Act s 50(2) provides:

'Subject to the provisions of this Act, the High Court, the Crown Court and the Court of Appeal respectively, or any division or judge of those courts, may exercise the same jurisdiction in respect of solicitors as any one of the superior courts of law or equity from which the Supreme Court was constituted might have exercised immediately before the passing of the Supreme Court of Judicature Act 1873 in respect of any solicitor, attorney or proctor admitted to practise there.'

Of course, when exercising the 'punitive' aspect of its jurisdiction, the court will have regard to the existence and powers of the statutory disciplinary tribunal, so that cases in

a which the court will now exercise that jurisdiction will be rare: see *R & T Thew Ltd v Reeves* (No 2) [1982] 3 All ER 1086 at 1088, [1982] QB 1283 at 1286 per Lord Denning MR. And applications made to the court to strike a solicitor off the roll or to require him to answer allegations contained in an affidavit are subject now to the provisions of ss 51 to 54 of the 1974 Act.

Likewise, when exercising the 'compensatory' aspect of its jurisdiction in professional misconduct cases, the court will have regard to all the terms of the 1974 Act including, b where material, the statutory provision regarding taxation.

But where does this leave the court's inherent jurisdiction if the professional misconduct takes the form, as in an exceptional case it may, of overcharging? Clearly, overcharging so gross as to amount to fraud may constitute professional misconduct. For my part, I can, in the first place, see no basis for construing s 50(2) of the 1974 Act as having the effect that the court retains a jurisdiction generally in respect of professional c misconduct but not in respect of one particular manifestation of such misconduct, namely gross overcharging amounting to fraud. I am not attracted by a construction of the 1974 Act which has the consequence that, quite apart from the statutory powers of the solicitors disciplinary tribunal, the court has an inherent jurisdiction, both punitive and compensatory, in all cases of professional misconduct save that, if the misconduct takes the form of fraudulent overcharging by a solicitor, the court has no power itself to d intervene with regard to such a solicitor, whatever the circumstances.

If I am correct in this view, I consider, secondly, that it must follow that, under this retained jurisdiction, and despite ss 69 to 72 of the 1974 Act, the court still has power in cases of professional misconduct where overcharging is in issue to inquire into a solicitor's bill or items in it, in whatever way is most convenient. This will include, if appropriate, e referring the whole bill to taxation. In this regard I have already drawn attention to the observations of Coleridge J in *Doe d Palmer v Roe* (1835) 4 Dowl 95 at 102 regarding misconduct by solicitors in the course of their practices. And Lord Cranworth LJ in *Re Tyther, ex p Pemberton* (1852) 2 De GM & G 960, 42 ER 1147 referred to fraud as an exception.

If I am right so far, and Parliament did not intend that the court's inherent jurisdiction f over solicitors guilty of serious professional misconduct should be any more restricted in a case of misconduct consisting of gross, fraudulent overcharging than in a case involving any other type of misconduct, and if I am also right that taxation, if appropriate, can be ordered by the court in the exercise of that jurisdiction in a case where there is gross overcharging amounting to serious professional misconduct, then, and this is the next step in the reasoning, the difficulty I see is of distinguishing between the cases in which g the court's inherent jurisdiction to order taxation still subsists, as described above, despite s 70 of the 1974 Act, and those in which it does not. I can see no satisfactory definition of the borderline between cases in which the jurisdiction still exists and those in which it does not. Adding an allegation of serious professional misconduct to a claim based on gross overcharging would hardly be a satisfactory distinction between cases in which taxation could be ordered by the court under its inherent jurisdiction and those in which h a taxation could not be so ordered, not least because taxation of a bill or some items in it may be necessary in order to find out whether, indeed, the allegation is well founded.

To my mind, all this leads to the conclusion that, as the inherent jurisdiction still exists in some cases, and as it is impossible satisfactorily to distinguish those cases from others where the argument for the continued existence of the inherent jurisdiction is weak, Parliament must be taken not to have intended impliedly to oust the jurisdiction in any j case. Instead, Parliament must be taken to have left the matter on the footing that the court, although still retaining all its jurisdiction, will pay due regard to the statutory provisions when considering whether or not to exercise its jurisdiction. The alternative conclusion, to which in my view Mr Tew's argument leads, is that the court retains no inherent jurisdiction to order a taxation even in cases where there has been overcharging so gross as to amount to fraud. That is not a conclusion I feel able to accept.

I am much fortified in my conclusion by the authoritative dicta in *Storer & Co v*

Johnson & Weatherall (1890) 15 App Cas 203. Section 41 of the 1843 Act was not in point there, but that case was decided almost 90 years ago, some 45 years after the enactment of the 1843 Act, so that the eminent judges whose dicta I have cited were much better acquainted with the legal setting of the 1843 Act, the forerunner of the 1974 Act, than a present day court. a

Conclusion

When dismissing Mr Tew's appeal against Master Creightmore's order referring the bills in dispute to taxation, and giving directions for the conduct of that reference, Sir Neil Lawson gave Mr Tew leave to appeal only on the point whether s 70(4) of the 1974 Act precludes the ability of the court to order a taxation. Mr Tew made no application to this court for leave to appeal on any other issue. Accordingly, since I have come to the conclusion that s 70(4) does not exclude the court's jurisdiction, it follows that, for my part, I would dismiss this appeal. In doing so I express no view on whether, in exercising their discretion when ordering taxation and dismissing Mr Tew's appeal, the master and the judge respectively applied the right principles. That is not a matter which was pursued in argument on this appeal because it is not a matter raised by this appeal. Accordingly, I express no view regarding the circumstances in which it would or would not be appropriate for the court, having regard to the existence and terms of s 70, to supplement the statutory jurisdiction by exercising the residual jurisdiction which, in my view, the court still retains, beyond saying that the cases in which the court will exercise its residual jurisdiction will be rare. b
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SIR FREDERICK LAWTON. Ever since the late Middle Ages the courts have exercised a disciplinary jurisdiction over attorneys and solicitors as officers of the court (see Holdsworth *A History of English Law* (3rd edn, 1923) vol 3, p 392). By the beginning of the seventeenth century the behaviour of some attorneys and solicitors was such that Parliament decided to impose some degree of regulation of them. It did so by the Act 3 Jac 1 c 7 (attorneys (1605)). The mischief which Parliament wanted to regulate was identified as follows: e

'For that through the abuse of sundry attornies and solicitors by charging their clients with excessive fees and other unnecessary demands, such as were not, ne ought by them to have been employed or demanded, whereby the subjects grow to be overmuch burthened . . .'

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It was enacted that attorneys and solicitors should obtain a 'ticket' (ie a receipt) for any fees paid to specified third parties and render a true bill to their clients. This statute seems to be the origin of the modern practice of delivering bills of costs. In 1729 Parliament intervened again to control attorneys and solicitors. By the Act 2 Geo 2 c 23 (attorneys and solicitors (1729)) provision was made for the regulation of their admission to the rolls and some aspects of their conduct. By s 22, for example, attorneys were required to write their names on any writ, process, execution or warrant for which they had applied. Section 23 provided that attorneys and solicitors were not to commence an action for their fees until one month after delivery of their bill and that there should be taxation without the money being brought into court. Ever since 1729, in a number of statutes regulating the conduct of solicitors, there have been provisions to the like effect. In the Solicitors Act 1974 these provisions are in ss 69(1) and 70(1). In 1843 by the Solicitors Act 1843 Parliament intervened yet again and made detailed provision for the regulation of the activities of attorneys and solicitors, including those relating to the taxation of their costs. By ss 37 and 41 some of the provisions of the 1729 Act were re-enacted, the scope of taxation was widened and for the first time, time limits for applying for taxation were set out. Time limits for taxation have been put into all subsequent statutes regulating the activities of solicitors and are now in s 70 of the 1974 Act. g
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From this 300-year history of the statutory regulation of attorneys' and solicitors' fees I infer that Parliament intended in respect of specified topics that its regulations should

a apply and that henceforth the courts, instead of doing what they thought was the best way of controlling attorneys and solicitors and ensuring justice for their clients, should follow the statutory way and apply the statutory time limits. In my judgment, s 70(4) of the 1974 Act operates as a limitation provision; and from the ordinary and natural meaning of the words used it cannot be construed in any other way. Such inherent jurisdiction as the court may have had in the past to regulate the time for applying for taxation must give way before the statutory provisions which deal with this specific topic: see *Shiloh Spinners Ltd v Harding* [1973] 1 All ER 90 at 102, [1973] AC 691 at 725, per Lord Wilberforce.

b The way I have construed s 70(4) means that Cross J in *Re a solicitor* [1961] 2 All ER 321, [1961] Ch 491 misdirected himself in adjudging that s 69 of the Solicitors Act 1957 (which, save in one respect which caused injustice on the facts of the case before him, was in the same terms as s 70 of the 1974 Act) does not curtail the inherent jurisdiction of the court to consider an application for taxation notwithstanding that it was made after the expiration of 12 months from the payment of the bill.

c The 1961 decision was brought to the attention of this court by counsel in *Symbol Park Lane Ltd v Steggle Palmer (a firm)* [1985] 2 All ER 167, [1985] 1 WLR 668. Counsel on both sides assumed that it had been correctly decided. The court was invited to deal with the case before it under the inherent jurisdiction and it did so without considering whether it had any such jurisdiction. The decision of the court was that the applicants for taxation could not obtain an order to that effect (see [1985] 2 All ER 167 at 172, [1985] 1 WLR 668 at 675). It follows, in my judgment, that *Symbol Park Lane Ltd v Steggle Palmer* is not binding on us in this appeal: see *National Enterprises Ltd v Racal Communications Ltd*, *Racal Communications Ltd v National Enterprises Ltd* [1974] 3 All ER 1010, [1975] Ch 397 and *Pritchard v J H Cobden Ltd* [1987] 1 All ER 300, [1987] 2 WLR 627.

e I agree with Dillon and Nicholls LJ that on the evidence in this case all the bills were paid.

f It is pertinent to remember that this appeal is concerned with an application for taxation made pursuant to s 70 of the 1974 Act. The object of the application was to discover what sums were properly chargeable for the work done by the solicitor. The applicants were alleging that he had overcharged them. They were not alleging that his overcharging amounted to serious professional misconduct. An application for taxation would not be the appropriate way of making such an allegation.

g If an allegation of serious professional misconduct based on excessive and dishonest overcharging is made, the appropriate tribunal, be it the Law Society's disciplinary tribunal or the court, exercising its inherent jurisdiction over solicitors, might have to find out what was the amount of the excessive overcharge. It could do so in whatever way it thought appropriate; and, as a matter of convenience, it might refer the bill in question to a taxing master. Such a reference would be a step in the inquiry about alleged serious professional misconduct, but not an application for taxation pursuant to s 70 of the 1974 Act. It follows, in my judgment, that the solicitor whose conduct was being examined could not plead that there could be no inquiry as to the amount of the alleged excessive overcharge because that bill had been paid more than 12 months before disciplinary proceedings were started against him.

h I would allow this appeal.

Appeal allowed. Leave to appeal to the House of Lords granted.

i Solicitors: *Kingsford Dorman* (for Mr Tew); *Watkins Pulleyn & Ellison* (for the plaintiffs); *John Hayes*, Secretary General (for the Law Society).

Wendy Shockett Barrister.

Maclaine Watson & Co Ltd v International Tin Council (No 2)

CHANCERY DIVISION

MILLETT J

24, 25 JUNE, 9 JULY 1987

Execution – Discovery in aid of execution – Examination of judgment debtor – Body corporate – International organisation set up by treaty – International Tin Council – Default by council – Arbitration award made against council – Judgment entered against council – Council refusing to give judgment creditor information concerning extent and whereabouts of its assets – Whether court having jurisdiction to order examination of officer of council regarding council's assets – RSC Ord 48.

In 1985 the appellants, who were ring-dealing members of the London Metal Exchange, entered into contracts for the sale and purchase of tin with the International Tin Council (the ITC), which was an international organisation established by treaty between a number of sovereign states. When the ITC defaulted on the contracts the dispute was referred to arbitration. The ITC submitted to the jurisdiction of the arbitration. The appellants obtained an arbitration award in their favour and when the award was not satisfied they entered judgment against the ITC. Subsequently, the appellants unsuccessfully applied for the appointment of a receiver by way of equitable execution over the assets of the ITC, which were said to consist of the right to be indemnified by, or demand contributions from, the states comprising its membership in order to satisfy the judgment. The appellants then sought to enforce judgment against the ITC's own assets and accordingly sought information from the ITC as to the extent and whereabouts of those assets. The requests for information were refused and the appellants applied to a master under RSC Ord 48^a for an order that an officer of the ITC be examined regarding, inter alia, property and assets in the possession of the ITC. The application was dismissed and the appellants appealed, seeking relief under either Ord 48 or the inherent jurisdiction of the court to enable them to discover what assets the ITC had. The ITC contended that since it was neither an individual nor a corporate body the court had no jurisdiction to make the order sought under Ord 48. The appellants contended that Ord 48 was to be read with the International Tin Council (Immunities and Privileges) Order 1972, which conferred on the ITC the legal capacities of a body corporate, including the capacity to enter into contracts and incur liabilities, and therefore the capacity to be sued as well as to sue and to be subject to, as well as obtain, judgment, and accordingly to be a judgment debtor and be subjected to the process of execution to the same extent and in the same manner as a body corporate.

Held – (1) Although the 1972 order made the ITC fully competent to be made subject to process such as that envisaged by RSC Ord 48 and specifically conferred on the ITC the legal power of a body corporate, and although there was nothing in Ord 48 to preclude the application of the order to the ITC, the court nevertheless had no jurisdiction to treat the ITC as a body corporate because Ord 48 read alone did not apply to the ITC and the 1972 order did not bring the ITC within the scope of Ord 48 or itself confer the necessary power on the court. Accordingly, although the ITC had been given the capacity to be made liable, the court had no power to make it liable. The appeal against the refusal to make an order under Ord 48 would accordingly be dismissed (see p 890 *b* to *g*, post).

(2) However, since it was the policy of the court, within proper limits, to prevent a defendant removing his assets from the jurisdiction or concealing them within it so as to deny a successful plaintiff the fruits of his judgment, which policy could only be given

^a Order 48, so far as material, is set out at p 888 *h* to p 889 *a*, post

- effect if the defendant could be ordered when necessary to provide information about the nature and whereabouts of his assets, and since the order sought could properly be said to be sought in aid of, or for the purpose of, implementing the judgment previously obtained by the appellants, the underlying policy of that order would be forwarded, not frustrated, by the making of an order under the inherent jurisdiction even though Ord 48 was not available. Furthermore, it would be just and convenient to do so. In the circumstances no order would be made requiring a particular officer of the ITC to attend and give oral evidence but the ITC would be ordered to disclose to the appellants full particulars of the nature, value and location of all its assets within the United Kingdom, such disclosure to be verified by an affidavit to be made on behalf of the ITC by a proper officer (see p 891 j to p 892 b f g, post).

Notes

- c For discovery in aid of execution and examination of the judgment debtor, see 17 Halsbury's Laws (4th edn) para 440, and for cases on the subject, see 21 Digest (Reissue) 327-328, 2140-2152.

For the inherent jurisdiction of the court, see 37 Halsbury's Laws (4th edn) para 14.

Cases referred to in judgment

- d *Ashtiani v Kashi* [1986] 2 All ER 970, [1987] QB 888, [1986] 3 WLR 647, CA.
Bekhor (A J) & Co Ltd v Bilton [1981] 2 All ER 565, [1981] 1 QB 923, CA.
Bonsor v Musicians' Union [1955] 3 All ER 518, [1956] AC 104, [1955] 3 WLR 588, HL.
International Tin Council, Re [1987] 1 All ER 890, [1987] 2 WLR 1229.
Lister & Co v Stubbs (1890) 45 Ch D 1, [1886-90] All ER Rep 797, CA.
Maclaine Watson & Co Ltd v International Tin Council [1987] 3 All ER 787, [1987] 3 WLR 508.
e *Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd* [1985] 3 All ER 747, [1984] 1 WLR 1097.
Stewart Chartering Ltd v C & O Managements SA, The Venus Destiny [1980] 1 All ER 718, [1980] 1 WLR 460.

f Cases also cited

- Interpol Ltd v Galani* [1987] 2 All ER 981, [1987] 3 WLR 1042, CA.
Standard Chartered Bank v International Tin Council [1986] 3 All ER 257, [1987] 1 WLR 641.
Taff Vale Rly Co v Amalgamated Society of Rly Servants [1901] AC 426, HL.
Zoernsch v Waldock [1964] 2 All ER 256, [1964] 1 WLR 675, CA.

g Appeal and motion

- Maclaine Watson & Co Ltd*, appealed against the order made by Master Gowers on 19 February 1987 dismissing their application for an order that Peter Stephen Lai and/or some other officer of the International Tin Council (the ITC) attend before an officer of the court to be examined on the questions (1) whether any, and if so what, debts were owing to the ITC and (2) whether the ITC had any, and if so what, other property or means of satisfying a judgment debt owing to the appellants, and to produce on such examination all books or documents in his possession relevant to the questions at the time and place appointed for his examination. By notice of motion dated 17 June 1987 the appellants applied to the court for an order that the ITC make and serve on the appellants an affidavit by one of its officers answering certain questions put to it in a letter to the ITC from the appellants' solicitors dated 11 December 1986. The appeal and motion were heard together. The facts are set out in the judgment.

Richard McCombe for the appellants.

Nicholas Chambers QC for the ITC.

9 July. The following judgment was delivered.

MILLETT J. The failure of the International Tin Council (the ITC) and the relevant legislative background are by now well chronicled and need not be rehearsed further. a

The appellants, Maclaine Watson & Co Ltd, are ring-dealing members of the London Metal Exchange. In 1985 they entered into contracts with the ITC for the purchase and sale of tin. The ITC defaulted on those contracts. The appellants' claims were referred to arbitration. The ITC submitted to the jurisdiction of the arbitrators and participated in the arbitration. In November 1986 the appellants obtained an award in their favour. The award was not satisfied. The appellants obtained leave to enforce the award in the same manner as a judgment or order to the same effect. On 25 November 1986 the appellants entered judgment against the ITC for a total amount inclusive of interest of £6,024,376.40. The judgment remains unsatisfied. b

On 9 December 1986 the appellants applied for the appointment of a receiver by way of equitable execution over those assets of the ITC which consist of the right which it was said to have to be indemnified by or demand contributions from its members for the purpose of satisfying the judgment. In May 1987 I dismissed that application (see *Maclaine Watson & Co Ltd v International Tin Council* [1987] 3 All ER 787, [1987] 3 WLR 508). Other creditors brought actions in the Commercial Court to enforce their claims directly against the members. Those actions have been struck out on the ground that liabilities arising from contracts entered into by the ITC in its own name are the liabilities of the ITC and not of the members. c

The appellants have now lowered their sights and seek to enforce their judgment against the ITC's own assets. It is common ground that they are entitled to do so. The International Tin Council (Immunities and Privileges) Order 1972, SI 1972/120, it will be recalled, conferred on the ITC the legal capacities of a body corporate. These include the capacity to hold property with the result that such property is distinct from that of its members, so that a judgment obtained against it in its own name is recoverable from, and only from, its own assets (see *Bonsor v Musicians' Union* [1955] 3 All ER 518, [1956] AC 104). The ITC has no immunity from legal process to enforce the arbitration award which the appellants have obtained. What, then, it may well be asked, is the difficulty? The difficulty arises from the lack of information as to the extent and whereabouts of the ITC's assets. In an endeavour to discover what assets, and in particular what bank accounts, the ITC has against which their judgment can be enforced, the appellants have sought information from the ITC, but all requests for such information have been refused. The ITC, it must be said, has behaved more like a disreputable private debtor concerned only to hinder and delay his creditors than the responsible international organisation that it claims to be. As a result the appellants have been compelled to make an application under RSC Ord 48, r 1. Their application was refused by the master, and their appeal from his decision is now before me. In case the language of Ord 48 does not permit the relief sought, the appellants ask in the alternative for the like relief under the inherent jurisdiction of the court. d

Order 48, r 1, so far as is material, is in the following terms: e

(1) Where a person has obtained a judgment or order for the payment by some other person (hereinafter referred to as "the judgment debtor") of money, the Court may, on an application made *ex parte* by the person entitled to enforce the judgment or order, order the judgment debtor or, if the judgment debtor is a body corporate, an officer thereof, to attend before such master, registrar or nominated officer as the Court may appoint and be orally examined on the questions—(a) whether any and, if so, what debts are owing to the judgment debtor, and (b) whether the judgment debtor has any and, if so, what other property or means of satisfying the judgment or order; and the Court may also order the judgment debtor or officer to produce f

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any books or documents in the possession of the judgment debtor relevant to the questions aforesaid at the time and place appointed for the examination . . .

(2) An order under this rule must be served personally on the judgment debtor and on any officer of a body, corporate ordered to attend for examination . . .

The main submission on behalf of the ITC is simplicity itself. The ITC, it is said, is neither an individual nor a body corporate but an unincorporated association. As it is not an individual, it cannot attend before the master personally or be orally examined; and as it is not a body corporate, Ord 48 does not authorise the court to order one of its officers to attend for that purpose. The appellants first sought to meet this submission by adopting a suggestion unwisely proffered from the bench in the course of argument. Pointing out that by virtue of the Interpretation Act 1978 the word 'person' in Ord 48 includes a body of persons corporate or unincorporate, they submitted that the order in terms authorises the court to order any judgment debtor, whether an individual or a body of persons corporate or unincorporate, to attend before the master to be orally examined. Since only an individual can do so personally, this must mean, in the case of a body of persons, that the body should attend by some appropriate officer or member. On this reading of the order, the power to order a specified officer to attend is merely an alternative to the power to order the judgment debtor itself to attend by nominating some appropriate officer or member to do so. Thus the order should be treated as if it read:

' . . . the Court may . . . either order the judgment debtor (*whether an individual or a body of persons corporate or unincorporate, and if a body of persons corporate or unincorporate by some appropriate officer or member which it may nominate*) or, if the judgment debtor is a body corporate, an officer thereof, to attend . . . '

I have been persuaded that this is not a possible construction of Ord 48. It is not only a forced and unnatural construction, but by implying words into the order it renders one of its express provisions pointless. Whatever the position might have been if the words 'or, if the judgment debtor is a body corporate, an officer thereof' were absent, their presence shows that attendance means personal attendance and excludes the possibility that a body of persons could be ordered to attend vicariously. The appellants pointed out that this leaves a lacuna in the case of an unincorporated association; but there is a lacuna anyway, for there is no power to make an order directly against an officer of such an association. The lacuna does not matter if the appellants are right, but it is still there none the less.

Accordingly, the appellants must show that the ITC is a body corporate for the purpose of Ord 48. It is common ground that it is not a body corporate. As I have previously pointed out (see *Re International Tin Council* [1987] 1 All ER 890 at 897, [1987] 2 WLR 1229 at 1238), the ITC is not incorporated in the United Kingdom or anywhere else. It is neither an English nor a foreign corporation but the creation of treaty. Parliament has not granted it the status, but only the legal capacities, of a body corporate; and it has not provided that it should be deemed to be, or should be treated as, a body corporate. If Ord 48 stood alone, it clearly would not confer power on the court to order an officer of the ITC to attend and be orally examined.

But, say the appellants, Ord 48 does not stand alone. It must be read together with the 1972 order, which confers on the ITC the legal capacities of a body corporate. These include the capacity to enter into contracts and to incur liabilities. 'Capacity' in this context means 'competence'; it includes the power to suffer passively as well as to act positively. So the ITC can be sued as well as sue and can suffer judgment as well as obtain it. It has the capacity to be a judgment debtor and to be subjected to the process of execution. Order 48 is part of that process. But the ITC has not been given full legal capacity tout court, or the legal capacities of a natural person, but specifically the legal

capacities of a body corporate. So it has the capacity to incur liabilities and to suffer the legal consequences of doing so, to the same extent and in the same manner as a body corporate. Why, then, the appellants ask, is it not, by force of the 1972 order, amenable to the process of execution, and specifically to the exercise of the court's powers under Ord 48, to the same extent and in the same manner as a body corporate? a

The answer, in my judgment, is that what is missing is not the capacity of the ITC but the power of the court. Potential liability must not be confused with actual liability. The 1972 order, for example, gives the ITC the capacity to pay tax and so makes it a potential taxpayer, but it does not itself impose any liability to pay tax. If a new Act of Parliament were to impose a special new tax on every body corporate residing within the United Kingdom, it would be a question of construction of that Act whether it applied to a body like the ITC which was not a body corporate, and it would not be enough that the ITC had the necessary capacity to pay the tax if it were imposed. In like manner, the 1972 order makes the ITC fully competent to be made subject to process such as that envisaged by Ord 48, but that is not enough. To impose the process requires an order of the court, and the power of the court to make the necessary order must be sought somewhere. Unfortunately for the appellants, the power conferred on the court by Ord 48 to order one of the judgment debtor's officers to attend and be orally examined is confined to the case where the judgment debtor is a body corporate; while the 1972 order is concerned with the competence of the ITC and not that of the court. The ITC has been given the capacity to be made liable, but the court has not been given the power to make it liable. b

Nor, in my view, can the appellants derive any assistance from the fact that the 1972 order confers on the ITC not merely legal capacity tout court, or the legal capacities of a natural person, but specifically the legal power of a body corporate. The ITC has not merely capacity to suffer judgment and execution but specifically the same capacity to suffer judgment and execution that a body corporate has. But the difficulty lies not in any want of capacity on the part of the ITC, but in the absence of any power in the court to make the orders sought. What is needed to bring the ITC within the scope of Ord 48 is not its own capacity to be treated like a body corporate but a power in the court to treat it as such. c

I reach this conclusion with regret, since it is obvious that Ord 48 is not concerned with status. It makes special provision for the judgment debtor which is a body corporate, not because of its status, but because of its physical inability to attend personally and be orally examined. A body corporate combines legal capacity with physical incapacity. So does the ITC. There is therefore nothing in Ord 48 to preclude its application to the ITC. That, however, is not enough for the appellants to succeed. Since Ord 48, read alone, does not apply to the ITC, they must show that the 1972 order either brings the ITC within its scope or itself confers the necessary power on court. In my judgment, it does neither. d

Accordingly, I dismiss the appeal. There remains the appellants' application for similar relief under the inherent jurisdiction of the court. Section 37(1) of the Supreme Court Act 1981 confers jurisdiction to grant an injunction whenever it appears to the court to be just and convenient to do so, and RSC Ord 29, r 1, allows an application for the grant of an injunction to be made at any time before or after the trial of a cause or matter. It is now clearly established that the court has jurisdiction under s 37(1) to grant a Mareva injunction before trial in order to restrain a defendant from removing from the jurisdiction so much of its assets as may be needed to meet the plaintiff's pending claim. The object is to prevent a defendant from frustrating the judgment of the court by removing assets from the jurisdiction or concealing them within it and so rendering execution ineffective. In *A J Behkor & Co Ltd v Bilton* [1981] 2 All ER 565, [1981] 1 QB 923, the Court of Appeal held that the court had power under s 37(1) to make all such ancillary orders, including an order for discovery, as appeared to the court to be just and convenient in order to ensure that the exercise of the Mareva injunction was effective to achieve its purpose. e

a A Mareva injunction can also be granted after final judgment in aid of execution to preserve a judgment debtor's assets until execution can be levied on them (see *Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd* [1985] 3 All ER 747, [1984] 1 WLR 1097; and see *Stewart Chartering Ltd v C & O Managements SA, The Venus Destiny* [1980] 1 All ER 718, [1980] 1 WLR 460). In such a case there is normally no need to support the Mareva injunction with an order for discovery, since resort can be had to Ord 48.

b In this case the appellants rightly do not seek a Mareva injunction. There is no reason to believe that the ITC will remove its assets from the jurisdiction in order to defeat execution. The appellants seek only an order for discovery in aid of execution, the procedure of Ord 48 being unavailable. The ITC contend that there is no jurisdiction to make such an order in the absence of a Mareva injunction. It is, however, fallacious to reason from the fact that an order for discovery can be made as ancillary to a Mareva injunction to the conclusion that it cannot be made except as ancillary to such an injunction. The source of the jurisdiction is the same, and so is the ground for exercising it, viz that it appears to the court to be just and convenient to do so. It is necessary to consider why no such order has been made in the past, and why it is sought now.

c Before judgment, as Dillon LJ pointed out in *Ashtiani v Kashi* [1986] 2 All ER 970 at 977, [1987] QB 888 at 902, the disclosure of foreign assets cannot be regarded as ancillary to the making of a Mareva injunction limited to English assets and cannot stand on its own feet as a primary exercise of jurisdiction if the Mareva exercise is limited to English assets. What is important for present purposes is that Dillon LJ accepted that the exercise must be so limited, unless a tracing claim is involved, in order to confine within proper limits what must be acknowledged to be an exception to the principle of *Lister & Co v Stubbs* (1890) 45 Ch D 1, [1886-90] All ER Rep 797. Given these constraints, it is difficult to see how an order for pre-trial discovery of assets could ever be justified except in aid of a Mareva injunction or where the plaintiff was claiming to trace assets. After judgment, however, as Ord 48 itself shows, these constraints no longer have any force. The court has power to make orders against a judgment debtor's assets by way of execution, and to order discovery of its assets in order to make execution effective. The reason why no such orders have previously been made is that it is normally sufficient to invoke the provisions of Ord 48.

f In *A J Bekhor & Co Ltd v Bilton* [1981] 2 All ER 565 at 586, [1981] 1 QB 923 at 954 Stephenson LJ said:

g 'In my judgment a judge has the duty to prevent his court being misused as far as the law allows, but the means by which he can perform that duty are limited by the authority of Parliament, of the rules of his court and of decided cases. Those means do, however, include what is reasonably necessary to effectively performing a judge's duties and exercising his powers. In doing what appears to him just or convenient he cannot overstep their lawfully authorised limits, but he can do what makes their performance and exercise effective. He has a judicial discretion to implement a lawful order by ancillary orders obviously required for their efficacy, even though not previously made or expressly authorised. This implied jurisdiction, inherent because implicit in powers already recognised and exercised, and so different from any general or residual inherent jurisdiction, is hard to define and is to be assumed with caution. But to deny this kind of inherent jurisdiction altogether would be to refuse to judges incidental powers recognised as inherent or implicit in statutory powers granted to public authorities, to shorten the arm of justice and to diminish the value of the courts.'

j In the present case the order sought may properly be said to be sought in aid of or for the purpose of implementing of the judgment previously obtained by the appellants. It is, within proper limits, the policy of these courts to prevent a defendant from removing

its assets from the jurisdiction or concealing them within it so as to deny a successful plaintiff the fruits of his judgment. This is the policy which underlies the Mareva injunction before and after judgment, pre-trial discovery of assets in aid of the Mareva jurisdiction and Ord 48. That policy can only be given effect if a defendant can be ordered when necessary to provide information about the nature and whereabouts of its assets. It can only be given effect in the present case if the court has power to make the order sought. Although Ord 48 is not available, the underlying policy of that order would be forwarded, not frustrated, by the order. There is no doubt that it is just and convenient to make it. No ground has been put forward why I should exercise my discretion against making the order, and I can see none.

There is, of course, no jurisdiction in the court to invade the privileges and immunities conferred by the 1972 order on the executive chairman and other officers of the ITC. The appellants accept that the executive chairman cannot be required to provide the information sought. Article 15(1) of the 1972 order accords to him the like immunity from suit and legal process as is accorded to a diplomatic agent, and art 31(2) of Sch 1 to the Diplomatic Privileges Act 1964 provides that a diplomatic agent shall not be obliged to give evidence as a witness.

No similar privilege or immunity is accorded to other officers of the ITC. Article 16 of the 1972 order accords them immunity from suit and legal process only 'in respect of things done or omitted to be done by them in the course of the performance of their official duties'. It was submitted on behalf of the ITC that this gives them immunity from legal process to compel them to give evidence in respect of anything known to them by virtue of their official position.

I cannot accept this. An order requiring a person to attend and give evidence is, of course, legal process, but to substitute these words for those in art 16 of the 1972 order, and to treat that paragraph as if it granted the officers immunity from the making of any order requiring them to attend and give evidence in respect of anything done or omitted to be done by them in the course of the performance of their official duties, is likely to give rise to error. It is the process itself, that is to say the order of the court, not the evidence which must be in respect of things done or omitted to be done by the officer in question. The order which the appellants seek does not arise from, and is not in respect of, anything done or omitted to be done by any of the ITC's officers.

In any case, I do not propose to make an order requiring any particular officer of the ITC to attend and give oral evidence. I do not think that it is necessary to do so. I propose to order that the ITC shall disclose to the appellants full particulars of the nature, value and location of all its assets within the United Kingdom, such disclosure to be verified by an affidavit to be made by the ITC by a proper officer thereof whom it may nominate for the purpose and to be served on the appellants' solicitors within seven days from today. I will for the present confine the order to assets within the United Kingdom without deciding that that is the full extent of the jurisdiction. I shall give liberty to both parties to apply.

Appeal dismissed. Order for disclosure of assets confined to United Kingdom without deciding that that was full extent of jurisdiction.

Solicitors: Elborne Mitchell (for the appellants); Cameron Markby (for the ITC).

Jacqueline Metcalfe Barrister.

a **Indian Oil Corp Ltd v Greenstone Shipping SA**
The Ypatianna

b QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

STAUGHTON J

4, 5, 18 MARCH 1987

Carriers – Carriage of goods – Mixture of goods – Carrier mixing own goods with consignee's goods – Goods inextricably mixed and unable to be separated – Ship chartered to carry cargo of oil – Consignee's oil inextricably mixed with oil already on board belonging to shipowner – Whether whole of mixture becoming consignee's property – Whether mixture held in common – Whether consignee only entitled to same quantity of his oil in mixture plus damages.

d The owners' vessel was chartered for the carriage of a cargo of 75,000 tons of crude oil from the Soviet Union to India. At the time when the cargo was loaded the vessel was carrying a residue of Iranian crude left over from its previous voyage and the cargo of Soviet crude was inextricably mixed with the residue. After the cargo had been unloaded at Madras 9,545 barrels of oil remained on the vessel. The consignees of the cargo claimed that the 9,545 barrels had become their property and should have been delivered to them. The dispute was referred to arbitration, where the consignees' claim was dismissed. They appealed to the High Court.

e **Held** – Where one party wrongfully mixed another party's goods with his own so that the original goods could not be separated or identified the whole of the mixture did not become the property of the innocent party. Instead, the mixture was held in common and the innocent party was entitled to receive out of it the same quantity of his goods which went into the mixture. Any doubt as to that quantity was to be resolved in favour of the innocent party, who was also entitled to claim damages from the party in the wrong in respect of any loss suffered, by reason of diminution of quality or otherwise, as the result of the mixing. The consignees were therefore not entitled to the residue remaining after their cargo had been pumped out and the arbitrators had been right to dismiss their claim. The appeal would therefore be dismissed (see p 907 j and p 908 a c d g, post).

g *Anon* (1594) Poph 38, *Lupton v White* [1803–13] All ER Rep 356, *Spence v Union Marine Insurance Co Ltd* (1868) LR 3 CP 427, *Cook v Addison* (1869) LR 7 Eq 466, *Re Oatway*, *Hertslet v Oatway* [1903] 2 Ch 356 and *Sandeman & Sons v Tyrack & Branfoot Steamship Co Ltd* [1911–13] All ER Rep 1013 considered.

Notes

h For intermixture of chattels, see 2 Halsbury's Laws (4th edn) para 1537, and for cases on the subject, see 3 Digest (Reissue) 433–435, 2937–2952.

Cases referred to in judgment

Amoco Oil Co v Parpada Shipping Co Ltd, The George S [1987] 2 Lloyd's Rep 69.

Anon (1594) Poph 38, 79 ER 1156.

j *Armory v Delamirie* (1722) 1 Stra 505, [1558–1774] All ER Rep 121, 93 ER 664.

Buckley v Gross (1863) 3 B & S 566, 122 ER 213.

Colwill v Reeves (1811) 2 Camp 575, [1803–13] All ER Rep 563, 170 ER 1257.

Cook v Addison (1869) LR 7 Eq 466.

Giacomo Costa Fu Andrea v British Italian Trading Co Ltd [1962] 2 All ER 53, [1963] 1 QB 201, [1962] 3 WLR 512, CA.

Jones v De Merchant (1916) 28 DLR 561, Man CA.

Jones v Moore (1841) 4 Y & C Ex 351, 160 ER 1041.

Lupton v White (1808) 15 Ves 432, [1803-13] All ER Rep 356, 33 ER 817, LC. a

Oatway, Re, Hertslet v Oatway [1903] 2 Ch 356.

Panton v Panton (undated) cited in 15 Ves at 435, 440, 33 ER 818, 820.

St John Shipping Corp v Joseph Rank Ltd [1956] 3 All ER 683, [1957] 1 QB 267, [1956] 3 WLR 870.

Sandeman & Sons v Tyzack & Branfoot Steamship Co Ltd [1913] AC 680, [1911-13] All ER Rep 1013, HL. b

Spence v Union Marine Insurance Co Ltd (1868) LR 3 CP 427.

Warde v Eyre (1613) 2 Bulst 323, 80 ER 1157.

White v Lincoln (Lady), Newcastle (Duke) v Kinderley (1803) 8 Ves 363, 32 ER 395.

Originating motion

By notice of motion dated 31 July 1986 the Indian Oil Corp Ltd (the receivers), the consignees of a cargo of 75,000 tons of Soviet export blend crude oil shipped on board the vessel *Ypatianna* owned by Greenstone Shipping SA, a corporation established under the laws of Panama, for a voyage from Novorossisk to Madras, appealed against the award of the arbitrators (Mr Donald Davies, Mr Edward Newcomb, Captain David Spon) dated 9 July which, inter alia, dismissed the receivers' claim for \$US388,000 being damages for 1,300 tons of crude oil remaining on board the vessel after delivery of the cargo which the owners refused to discharge at Madras. The facts are set out in the judgment. c d

Kenneth Rokison QC and *Peter Gross* of the receivers.

Gordon Pollock QC and *Peregrine Simon* for the owners.

Cur adv vult e

18 March. The following judgment was delivered.

STAUGHTON J. Confusio is the Latin word for the mixing of goods belonging to two different owners, so that they cannot be separated. Where they can be separated it is commixtio (see *Buckland Text-Book of Roman Law* (3rd edn, 1963) pp 208-209). The effect in English law was decided as long ago as 1594 in a case described as *Anon Poph* 38, 79 ER 1156 (or sometimes as *Stock v Stock*). There the decision of Popham CJ and the Court of King's Bench was (*Poph* 38, 79 ER 1156 at 1156-1157): f

'... the plaintiff pretending title to certain hay which the defendant had standing in certain land, to be more sure to have the action pass for him, took other hay of his own (to wit, the plaintiff) and mixed it with the defendant's hay, after which the defendant took and carried away both the one and the other that was intermixed, upon which the action was brought, and by all the Court clearly the defendant shall not be guilty for any part of the hay, for by the intermixture (which was his own act) the defendant shall not be prejudiced as the case is, in taking the hay. And now the plaintiff cannot say which part of the hay is his, because the one cannot be known from the other, and therefore the whole shall go to him who hath the property in it with which it is intermixed.' g h

In the present case the claimants mixed crude oil loaded on their vessel at Novorossiysk in the Soviet Union with crude oil which was their own property. At least for practical purposes the mixture could not be separated so it was a case of confusio. When the vessel came to discharge at Madras the receivers claimed delivery of the whole. Hence this dispute. Although the transfer of title to moveable things is in general governed by the laws of the place where they are at the time (see *Dicey and Morris on the Conflict of Laws* (10th edn, 1980) p 555), which in this case would be the Soviet Union, or a Greek ship on the high seas, or the Union of India, it is agreed that I must decide this case in accordance j

with English law, having regard to the decisions of Popham CJ and of other judges since 1594.

On 29 November 1980 the claimants, whom I will call the 'owners', chartered their vessel Ypatianna to the Shipping Corp of India Ltd for the carriage of a part cargo of 75,000 long tons of crude oil from Russia to India. The reason for the restriction to 75,000 tons appears to have been the vessel's draft in the Suez Canal. A bill of lading dated 26 December 1980 recorded that 69,276 metric tons of Soviet export blend had been shipped by V/O Sojuzneftexport at Novorossiysk for carriage to one or more Indian ports. The respondents, Indian Oil Corp Ltd, were as the award finds the receivers of the oil at Madras. Presumably the bill of lading was indorsed to them and (subject to the issues in this case) the title to the crude oil shipped then passed to them, if it was not their property already (as may have been the case). I shall call them 'the receivers'.

On any view there was short delivery at Madras, compared with the bill of lading quantity. For that the arbitrators have awarded the receivers damages in the sum of \$46,014.90. But the receivers' contention is that they are entitled to a much greater sum as damages, that is to say \$388,000 or thereabouts, on the basis that all the pumpable oil on board the vessel at Madras was their property and should have been delivered to them. They also complain that the arbitrators applied a conventional tolerance in calculating the amount of the shortage which was not supported by the facts found.

In point of form it was the owners who were claimants in the arbitration. The remedy which they sought was \$38,000 in respect of over-delivery of crude oil. Even if that claim had been supported by the facts, it is not clear to me how it would have been justified in law; but the point has not been argued, for the owners' claim failed and there has been no appeal by them. This appeal is from the decision of the arbitrators on the receivers' counterclaims, pursuant to leave granted by Leggatt J.

The figures

The quantity loaded, as found in the award, was about 508,000 barrels. The bill of lading quantity is found to have been the equivalent of 507,977 barrels. The crude oil on board before loading was (i) in the cargo tanks no more than 13,262 barrels (this may have included some ballast water; otherwise it comprised about 5,528 barrels of Iranian crude oil from the immediately preceding voyage and the remainder was, in part at any rate, Indonesian crude oil from the third previous voyage), (ii) in the deep tanks 2,371 barrels.

The total quantity on board before loading was thus 15,633 barrels, and the total after loading 523,610 barrels; each figure may have included some water.

The crude oil discharged was 503,896 barrels. Water discharged from the cargo tanks was 6,229 barrels. The pumpable oil remaining on board after discharge was 9,545 barrels. (There are two different figures in the award for the quantity of crude oil remaining on board in terms of weight but somewhat surprisingly they are both said to equal this volume.) The last three figures add up to 519,670. That is somewhat less than the total quantity on board after loading. So far as I can tell the difference can be explained only by evaporation, or because some residues were unpumpable, or more probably in part by one of those causes and in part by the other.

The receivers' smaller claim was for the shortage revealed by comparing the bill of lading quantity (507,977 barrels) with the quantity of crude oil discharged (503,896 barrels). The arbitrators allowed that claim in principle, but deducted a tolerance of 0.55% from the bill of lading figure, or 2,793.87 barrels. Accordingly, they awarded damages for a shortage of 1,287.13 barrels only. That deduction forms the basis of one of the receivers' grounds of appeal.

The larger claim made by the receivers was based on the proposition that all the pumpable oil remaining on board the vessel (9,545 barrels) had become their property and should have been delivered to them. I assume, although the point was not discussed, that if this larger claim succeeded the smaller claim would merge into it. However, the

arbitrators held that the larger claim failed; and that gives rise to the receivers' other grounds of appeal.

Further facts

The bill of lading incorporated all the terms of the charterparty, including the arbitration clause. The carriage was accordingly subject to the Hague Rules for the carriage of goods by sea.

Four topics need further consideration. The first is the nature and quality of the crude oil on board before loading. To the extent that it comprised Iranian or Indonesian or other crude oils, I would infer that its specification was not exactly the same as that of Soviet export blend. But there is no finding that it was either better or worse. The furthest that the award goes is this finding:

'There were no complaints at the time, neither have there been since, in respect of the quality of the crude oil discharged from the vessel at Madras; therefore it has been assumed that the Owners discharged their primary obligation to deliver the Bill of Lading cargo subject to a conventional shortage of 1287·13 barrels.'

Later it is said that there was no contamination of the receivers' crude oil. It does not necessarily follow that the quantity on board before loading was, in point of quality, as good as or better than, Soviet export blend. It would have comprised on average no more than 3% of the cargo discharged, so that a quality claim might well have been difficult to prove or trivial in amount. But there remains a possibility that the owners may have wished to improve the quality of the oil which they already had on board, and for that reason deliberately mixed it with the cargo loaded at Novorossiysk.

In passing I should mention that the crude oil on board before loading was the property of the owners, either because they had paid for it by way of penalties to previous consignees, or because it had been abandoned to them by the true owners.

The award describes the quantity on board before delivery as 'slops'. I am not confident as to the precise meaning of that term, whether it can comprise simply crude oil residues, or necessarily means crude oil mixed with water. The arbitrators say that the slops 'could have included some ballast water'.

In the end, I do not think that the water content of the slops matters, for this reason. It is recorded that a quantity of water was discharged: 6,229 barrels. That is not directly credited to the owners in the calculation of the shortage claim: the claim starts by comparing the bill of lading quantity with the quantity of crude oil discharged. But the arbitrators make an allowance of 0·3% for water and sediment, as part of their total allowance of 0·55%. So far as water is concerned, the notion is that it was entrained in the crude oil loaded but settled out of it during the voyage. That would account for 1,524 barrels. The balance of the water discharged must have come from the slops. There is no reason to believe that they must have contained any greater quantity of water. So I conclude that although the owners may possibly have wished to improve the quality of their crude oil by mixing it with the cargo loaded, there is no evidence that in fact they had that objective or that they achieved it. The inference which I think it fair to draw is that the crude oil loaded, and that already on board, were substantially of the same nature and quality.

The second topic is the conduct of the owners. The award finds that there was inter-connection between the vessel's cargo, ballast and fuel oil systems which was a breach of the International Maritime Organisation and Classification Society rules. I am aware that a number of cases have recently occurred where there has been the transfer of cargo to a vessel's fuel tanks for use on the voyage, thus constituting theft as well as giving rise to the danger of fire on board. So there is a hint here that these owners were going equipped for theft; but it is no more than a hint.

The awards finds that 'during the voyage from Novorossisk to Madras there were many deliberate inter-tank transfers and there were also inter-tank leakages . . .' That too

a is a hint, but no more than a hint, of wrongdoing on the part of the owners. It is sometimes appropriate and necessary to make inter-tank transfers during a voyage, for example to correct the trim of a vessel as bunker fuel is consumed. I decline to infer that deliberate wrongdoing on the part of the owners in that respect is proved. As to events before loading, there is this passage in the award:

b '... the Owners/Master wanted to segregate out the crude oil remaining on board the vessel before she arrived at Novorossisk and were quite open in respect of this; there did not appear to be anything furtive in their approach; they were commercially sensible or so one would think, in wanting to separate the relatively large quantity of crude oil for which some payment had been made so that it did not become mixed with the other cargo. Their failure to segregate the crude oil does not, to our mind, affect the issues in this case albeit that the matter would be much different if contamination of cargo had taken place.'

c In the light of that finding, I should be slow to conclude that the owners by their master deliberately mixed the cargo with their own oil for some commercial motive.

d Thirdly, I must say something about a procedure called 'load on top'. This has been devised in order to avoid pollution from tank washing and ballast water. After successively washing some tanks and ballasting others, the vessel ends up with all oil residues in one tank, no doubt intermingled in some degree with water. New cargo is then loaded on top in the slop tank, as well as in the other cargo spaces which are empty. The effect is described by the arbitrators as follows:

e 'The "load on top" procedure is widely used in the tanker business and had been for many years prior to the voyage in question. It is common usage or commonly understood, in the bulk oil trade that Charterers/Receivers are entitled to all pumpable oil remaining in the vessel's cargo tanks after discharge when the conventional "load on top" procedure has been adopted; this may result in there being a delivery from the vessel of more oil than the Bill of Lading quantity loaded into the vessel although experience suggests that over delivery is not common. There is no common usage or common understanding as far as we are aware, in respect of what is the practice, in circumstances such as those now before us which were of an unusual nature.'

g The usual load on top procedure was not employed in this case. The existing residues were distributed among all or some of the vessel's cargo tanks as well as in the deep tanks, rather than in one cargo tank only. Although this point featured in the owners' skeleton argument, at the hearing it was not contended that the usage found in relation to the load on top procedure is directly applicable here. However, counsel for the receivers seeks to derive some support from that usage. If the receivers are entitled to all pumpable oil when that procedure is adopted, he argues that a fortiori they should be entitled to pumpable residues when it is not. But the arbitrators' finding does not, in my judgment, form a sufficient foundation for any binding custom or practice when the pumpable oil exceeds the quantity loaded by a substantial amount. It seems that the arbitrators recognised this, for they said later in their award:

'... we also shrink from deciding that the conventional "load on top" procedure unequivocally gives title to pumpable oil in the vessel in all circumstances.'

j I agree with the arbitrators that their finding does not establish any custom or practice which would be binding in this case.

Fourthly, there is the question whether the cargo interests consented to the mixing of the crude oil loaded with that already on board. The award finds:

'There was no question of the Receivers expressly assenting to the mixing of the crude oils at the time of loading and/or during the voyage to Madras... there was

no consent between the parties, expressed or implied, to the mixing of the crude oil at the loading port . . .

Those findings are conclusive that the receivers themselves did not consent. But may there have been consent on the part of the shippers, or of whoever owned the cargo as it went into the vessel?

At first sight it seems to me surprising that anyone loading 69,000 tons of crude oil should not sound the ship's tanks first to see what was in them already. But equally it is surprising that the arbitrators did not intend to make any finding as to the knowledge or consent of the shippers or those who owned the oil as it was loaded, since absence of consent was a fundamental premise of the receivers' legal argument. Counsel for the owners observes that there may have been some confusion as to the status of the parties to the arbitration. In the heading of the award Indian Oil Corp Ltd are described as 'Respondents (Charterers)' and in para 3 it is recited that 'the Charterers' appointed Mr Newcomb as arbitrator on their behalf. But according to the charterparty which has been put before me by consent, the charterers were Shipping Corp of India Ltd. There is, moreover, a dispute between counsel as to the extent to which the point was raised in the arbitration. Counsel for the receivers asserts that the case was treated before the arbitrators as one of admixture without consent. If that be right I should not allow the owners now to raise the question whether the shippers or the owners of the oil at the time of loading consented. But junior counsel who represented the owners at the time of the arbitration, says that documents showed and it was common ground, that the shippers knew about the oil already on board the vessel. Junior counsel who represented the receivers disputes that.

The point may be of crucial importance. It is essential to the receivers' argument that admixture took place without consent and that must mean, in my judgment, without consent of those who owned the oil at the time of loading, or of any agent acting on their behalf. It is for consideration whether the award should be remitted to the arbitrators for them to state: (1) whether the case was, as counsel for the receivers says, treated by all as one of admixture without consent; (2) if not, (a) whether it was common ground that the shippers knew of the oil already on board the vessel, and if Yes, (b) whether the shippers owned the oil at the time, or were acting as agents for those who owned it; (3) if not, whether in fact those who owned the oil at the time of loading or any agent acting on their behalf consented to the admixture.

The arbitrators may well be able to answer those questions sufficiently without difficulty; and if the answers are important that seems to me the best way to proceed. Perhaps there never was a snail in the ginger beer bottle. But for the present I assume that there was no relevant consent by anybody.

Whilst on the subject of what was and was not argued in the arbitration, counsel for the owners sought to put forward a case which it is admitted was not before the arbitrators. This was that the receivers must show either that they owned the oil at the time of loading or that the title to the whole contents of the vessel passed to them by some means such as endorsement and delivery of the bill of lading. Seeing that this point might well have been met by further evidence from the receivers, was not raised at the time, and does not have any conspicuous merit about it, I decline to allow it to be raised now.

(1) *The tolerance of 0.55%*

This is a short point. The arbitrators say in their award:

'In assessing this conventional shortage we have, based upon the documentation and expert evidence produced before us, allowed the Owners 0.3% in respect of water and sediment in the crude oil cargo and 0.25% in respect of vapour losses while the cargo was being loaded and discharged. The Owners might in other circumstances have been allowed more than a total tolerance of 0.55% but the inter-tank transfers and leakages during the ocean passage militated for a minimum

allowance for the Owners. The arithmetic regarding the shortage is as follows:

a		barrels
	Bill of lading quantity	507,977
	Tolerance of 0.55%	2,793.87
		<hr/> 505,183.13
b	Received in store tanks	
	[which presumably means shore tanks]	503,896.00
	Shortage	<hr/> 1,287.13

The receivers complain that no tolerance should have been allowed and that they should have been awarded damages on their first claim based on the total shortage of 4,081 barrels. That in money terms would have come to \$145,895.75 instead of the sum of \$46,014.90 which they were in fact awarded by the arbitrators. The receivers contend that there is no finding of any custom which justifies a tolerance of 0.55% or any other figure; and, as there was still crude oil on board when the vessel sailed, it cannot be assumed that 0.55% of the oil loaded was lost as water and sediment or by evaporation.

I agree that there is no finding of custom. But despite their use of the word 'conventional' I do not think that the arbitrators were treating the point as governed by custom. It was said as long ago as *Giacomo Costa Fu Andrea v British Italian Trading Co Ltd* [1962] 2 All ER 53 at 63, [1963] 1 QB 201 at 218, and has been repeated since, that awards of commercial arbitrators are not to be examined with a fine-tooth comb. What the arbitrators were finding, as seems clear to me, is that crude oil cargoes usually lose 0.25% by evaporation on an ocean voyage and that 0.30% of the crude oil loaded was likely to have settled out as water and sediment. I see no reason why they should not have made those findings if they were justified by the documents and expert evidence before them. Only two months ago, in *Amoco Oil Co v Parpada Shipping Co Ltd, The George S* [1987] 2 Lloyd's Rep 69, I arrived at a figure of 0.2% for evaporation on the evidence that was then before me. For all practical purposes it is impossible to measure what loss in fact occurs by evaporation on every tanker voyage. The obvious solution is to act on the evidence of experts as to what loss is likely to have occurred. The difficulty is rather less with water and sediment, which can be measured in a sample of the oil before loading. But I see no ground for rejecting the arbitrators' finding of an apparent loss of 0.3% by water and settlement, settling out of the cargo. The fact that crude oil remained on board after discharge seems to me immaterial on this point. No doubt there was evaporation from the owners' oil as well; and it is plain from the figures that water settled out of it to a much greater extent than from the crude oil loaded.

The owners are not liable for the inevitable loss by evaporation, under the Hague Rules. And the apparent loss by settling out of water and sediment is not a loss of cargo at all, or at any rate not a loss of anything of value. Hence I uphold the arbitrators' conclusion on the tolerance point. The receivers' appeal in respect of their smaller claim fails.

(2) *The admixture claim*

The submission of counsel for the receivers is as follows: where B wrongfully mixes the goods of A with goods of his own, so that the original goods cannot be separated or identified, the whole of the mixture becomes the property of A. So it is a case of 'happy undeserving A', if not also of 'wretched meritorious B'.

The submission of counsel for the owners is this: where a wilful admixture occurs without consent, both parties have a joint interest in the whole and the innocent party is entitled to receive his full contribution from the mixture even if it has been diminished by subsequent accidental loss. Alternatively, he submits that the general rule is as above, but that the innocent party is entitled to the whole if (1) the admixture was deliberately brought about for the purpose of depriving the innocent party of his rights, or making

them difficult of enforcement, and (2) it is impossible to tell with any certainty what the contributing proportions had been.

There are numerous and very distinguished authorities. But it is agreed on both sides that none of them is binding on me. In the circumstances, I do not see that I can refrain from citing all those which were put before me, even if the result is an inordinately long judgment for a case where the argument lasted rather less than two days.

Anon (1594) Poph 38, 79 ER 1156 has already been quoted in part. Even as a record of Tudor law I consider the case to be of very little authority. The reports have been described as a 'mangled and ill-translated edition' (Wallace *The Reporters* (4th edn, 1882) p 207). And, if one accepts that the report of this case is accurate, there is a degree of confusion in it which is not easy to resolve.

Warde v Aeyre (1615) 2 Bulst 323, 80 ER 1157 is reported as follows:

'In an action of trespassse for an assault and battery, & quod cumulum pecuniæ, containing five markes, cepit. The case appeared to be this, the plaintiffe and the defendant, being at play, the plaintiffe thrust his money into the defendants heape, and so intermingled them together; the defendant kept all, and upon this, being striving together for the money, for this the plaintiffe brings his action. Coke Chief Justice. In this case, the law is, that if I. S. have a heape of corn, and I. D. will intermingle his corne with the corne of I. S. he shall here have all the corne, because this was so done by I. D. of his own wrong, and so it was adjudged in a case between Shordish and Moore, and so it is in case of money, if two being at play, and the one of them will intermingle his money in the others heap of money, he shall now have all, for this is so done by him of his own wrong, and this we have so adjudged in one *Sir Richard Martins case*, for that his own proper money, or corn cannot now be known and therefore by this his intermingling, being his own act, and of his own wrong, by the law he shall lose all, for this is so used and done by him, onely as a trick, thinking thereby to deceive the other, and so to gain something by this to himself, but by this his so doing, he hath deceived himself, and shall now by this his tortious act, lose all; and if this should be otherwise, a man should be made to be a trespassser, volens nolens, by the taking of his goods again, and for the avoiding of this inconvenience, the law in such a case is, that he shall now retein all; the whole Court agreed with him herein against the plaintiffe, and for the reason aforesaid, and so the rule of the Court was, quod querens nil capiat per billam.'

That case is consistent both with the argument of counsel for the receivers and also with the qualified proposition of counsel for the owners. The admixture was brought about by a trick in order to deceive, and it seems likely that the proportion which each part had contributed to the mixture could no longer be determined.

In *Colwill v Reeves* (1811) 2 Camp 575, [1803-13] All ER Rep 563 the sidenotes read:

'A shopkeeper may maintain trespass for taking goods sent to him on *sale or return*. If A for a fraudulent purpose mixes his goods with B's, still if they can be distinguished, he retains the property in them, and he may maintain trespass against a person who having a right to take B's goods, ignorantly takes these goods of A as part of B's.'

Lord Ellenbrough CJ said (2 Camp 575 at 576-577, [1803-13] All ER Rep 563 at 563-564):

'If a man puts corn into my bag, in which there is before some corn, the whole is mine; because it is impossible to distinguish what was mine from what was his. But it is impossible that articles of furniture can be blended together so as to create the same difficulty. The goods in question remained distinct, and the messenger might have discovered that they belonged to the plaintiff. He took them at his peril. Whatever fraud there might be in the case, the property was not divested from the

plaintiff, and the stratagem is no defence on the general issue to an action at his suit for taking and converting the goods.'

That case cannot be said to be inconsistent with the qualified proposition of counsel for the owners.

Meanwhile the subject had received much fuller treatment in *Lupton v White* (1808) 15 Ves 432, [1803-13] All ER Rep 356. There a dispute had arisen between the owners of adjoining lead mines and an injunction had been granted. It was dissolved on the defendant undertaking to keep a distinct account of the ore which he might take from the plaintiff's mine. Later it was shown that the ore had been mixed by the defendant 'for the purpose of preventing a discovery of the ore got from the plaintiff's mine; and that the accounts and books had been so kept or contrived as to prevent a true discovery', and that no true estimate could be formed of the quantity of ore got from the plaintiff's mine. Lord Eldon LC said (15 Ves 432 at 436-437, [1803-13] All ER Rep 356 at 357):

'If the result is, that the Master cannot take the account, it is clearly not for him, without a farther direction, to apply the great principle, familiar both at law and in equity, that, if a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must both at law and in equity be taken to be the property of the other, until the former puts the subject under such circumstances, that it may be distinguished as satisfactorily, as it might have been before that unauthorised mixture upon his part.'

The case was reargued. On that occasion Lord Eldon LC said (15 Ves 432 at 439-441, [1803-13] All ER Rep 356 at 358-359):

'If a man by his own tortious act makes it impossible for another to ascertain the value of his property, and that in a transaction, in which the former was, not merely under an implied moral obligation, but pledged by a solemn undertaking in a Court of Justice, that such should not be the state of things between them, by those means preventing the guard, which the Court would have effectually interposed, is the argument to be endured, that, as the party, so injured, cannot distinguish his property, therefore he shall have nothing? That is not the law of this country; as administered in Courts either of Law or Equity. The case (*Armory v. Delamirie* ((1722) 1 Stra 505, [1558-1774] All ER Rep 121)) of the diamond ring, found by a poor boy, proves the contrary. He had not the means of shewing the value. The person who took it from him, by wrong, prevented the jury from ascertaining the value by production of the ring, or other evidence. Therefore, as it was proved, that the Plaintiff's evidence had been destroyed by the act of that person, who ought to have refrained from placing the transaction in that state, the Lord Chief Justice directed the jury to find, that the stone was of the utmost value they could find; upon this principle, that it was the Defendant's own fault, by his own dishonest act, that the jury could not find the real value. The case of *Panton v. Panton* (in the Court of Exchequer) applies to this. A clerk in a banking-house at *Chester* remitted his own money, with that of his employer, to an agent in *London*, to be laid out upon security; and by management the securities were so changed, that the property could not be distinguished. The Court of Exchequer held, that, the confusion being occasioned by him, who so dealt with the property, the distinction lay upon him; and, if he could not distinguish, what was his own, the whole must be considered as belonging to the other. A principle, not dissimilar, though not precisely the same, governed me in the case of *Mr. Jackson's executors* (*White v. Lady Lincoln, The Duke of Newcastle v. Kinderley* ((1803) 8 Ves 363, 32 ER 395). There was no more duty imposed upon him than upon these individuals. He had kept the account, and, as it appeared to me, not incorrectly, upon his own side: but, having kept it only upon his own, though bound to keep it upon the other, side, it was held, that he could not maintain a demand, to which under other circumstances he would have been fairly

entitled. The decision was made, not upon the notion, that strict justice was done, but upon this; that it was the only justice, that could be done; and that no more could be done was the fault of *Jackson* himself; who, if he did not enable those parties to know, what demand they had upon him, could not be heard to say, he had any demand upon them.' a

Then (15 Ves 432 at 442, [1803-13] All ER Rep 356 at 359):

'What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity: but, if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person, mixing them, the other party cannot tell, what was the original value of his property, he must have the whole and the principle goes to the full extent of what is now contended.' b

The analogy with *Armory v Delamirie* (1722) 1 Stra 505, [1558-1774] All ER Rep 121 is striking. If the wrongdoer prevents the innocent party proving how much of his property has been taken, then the wrongdoer is liable to the greatest extent that is possible in the circumstances. That is consistent with the qualified proposition of counsel for the owners, or at any rate with the second part of it. So too are Lord Eldon LC's remarks about corn or flour. If the components are proved to be of equal value, the innocent party is entitled only to the given quantity, which I take to be that which he contributed. It is only if the innocent party cannot tell what was the original value of his property that he is entitled to the whole. c

A footnote to the report of *Lupton v White* refers to Blackstone's Commentaries (2 Bl Com (17th edn, 1830) 404-405): d

'But in the case of *confusion* of goods, where those of two persons are so intermixed, that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares. But if one wilfully intermixes his money, corn or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain, without his own consent.' e

The arbitrators in the present case expressed a preference for the Roman law, in plain terms. For my part I am not convinced that either Blackstone or the arbitrators correctly summarised the Roman law. In the Institutes of Justinian dealing with the case of corn mixed by accident or deliberately by one party, it is said (Just Inst II, 1, 28): f

'... the corn is no more made common property than there would be a common herd of Titius' cattle if Titius' cattle were mixed with yours. And if either of you holds the whole of the corn, the other will have an action in rem for the amount of his grain, it being for the judge to estimate which grain is whose (in rem quidem actio pro modo frumenti cuiusque competit, arbitrio autem iudicis continetur, ut is aestimet quale cuiusque frumentum fuerit).' g

The effect, however, is in economic terms the same. h

It is to be noted that the motive ascribed by Blackstone is 'to guard against fraud'. And counsel for the owners emphasises the words 'is endeavoured to be made uncertain', as indicating an intention to conceal the innocent party's property. i

Before returning to the cases, I refer to another respected commentator. *Stephen's Commentaries on the Laws of England* (12th edn, 1895) vol 2, p 21, after citing Blackstone almost verbatim, continues:

'However, this rule of English law applies only to cases where the confusion is such as to render it impossible to subsequently apportion the respective shares; for if the goods continue to be distinguishable as in the instance of articles of furniture thrown together, the confusion makes no alteration to the property; or if the quality of the articles is uniform, and the original quantities are known, as in the case of £500 of trust money mixed with £300 of the trustee's own money, the party by whose act the confusion took place would still be entitled to claim his proper quantity, subject only to the quantity of the other proprietor being first made good out of the whole mass.'

That, as it seems to me, entirely accords with counsel for the owners' qualified proposition or at least with the second part of it.

In *Spence v Union Marine Insurance Co Ltd* (1868) LR 3 CP 427 bales of cotton belonging to different owners had lost their marks owing to a casualty at sea. The case seems to have been treated as one of accidental mixture and is therefore not directly in point. Bovill CJ said (at 437-438):

'In our own law there are not many authorities to be found upon this subject; but, as far as they go, they are in favour of the view, that, when goods of different owners become by accident so mixed together as to be undistinguishable, the owners of the goods so mixed become tenants in common of the whole, in the proportions which they have severally contributed to it. The passage cited from the judgment of Blackburn, J., in the case of the tallow which was melted and flowed into the sewers, is to that effect: *Buckley v. Gross* ((1863) 3 B & S 566, 122 ER 213). And a similar view was adopted by Lord Abinger in the case of the mixture of oil by leakage on board ship, in *Jones v. Moore* ((1841) 4 Y & C Ex 351, 160 ER 1041). It has been long settled in our law, that, where goods are mixed so as to become undistinguishable, by the wrongful act or default of one owner, he cannot recover, and will not be entitled to his proportion, or any part of the property, from the other owner: but no authority has been cited to shew that any such principle has ever been applied, nor indeed could it be applied, to the case of an accidental mixing of the goods of two owners; and there is no authority nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners, and become bona vacantia.'

The obiter dictum in that passage as to wrongful admixture is direct support for the argument of counsel for the receivers.

Cook v Addison (1869) LR 7 Eq 466 was a case of mixture of trust funds. Stuart V-C said (at 470):

'It is a well-established doctrine in this Court, that if a trustee or agent mixes and confuses the property which he holds in a fiduciary character with his own property, so as that they cannot be separated with perfect accuracy, he is liable for the whole. This doctrine was explained by Lord Eldon in *Lupton v. White* ((1808) 15 Ves 432, [1803-13] All ER Rep 356). In this case it is impossible to say how much of the £250 received by the Defendant *Addison* from *Fowler* for repairs consisted of what was due under the covenant to repair in the underlease. The consequence is, that the whole £250 is liable to the demands of the *cestui que trust* so far as necessary to make up, with the other sums admitted to be part of the trust property, the full amount of the trust fund of £520, with interest at 5 per cent. per annum from the 30th of April, 1865 . . .'

That does not, as I see it, amount to a decision that the whole of the mixed fund belonged to the trust, but rather that it was available so far as necessary to make good the amount lost by the trust. a

Re Oatway, Hertslet v Oatway [1903] 2 Ch 356 was also a trust case. There is a significant passage in the judgment of Joyce J (at 359–360):

'It is a principle settled as far back as the time of the Year Books that, whatever alteration of form any property may undergo, the true owner is entitled to seize it in its new shape if he can prove the identity of the original material: see Blackstone, (2 Bl Com 405) and *Lupton v. White* ((1808) 15 Ves 432, [1803–13] All ER Rep 356). But this rule is carried no farther than necessity requires, and is applied only to cases where the compound is such as to render it impossible to apportion the respective shares of the parties. Thus, if the quality of the articles that are mixed be uniform, and the original quantities known, as in the case of so many pounds of trust money mixed with so many pounds of the trustee's own money, the person by whose act the confusion took place is still entitled to claim his proper quantity, but subject to the quantity of the other proprietor being first made good out of the whole mass: 2 Stephen's Commentaries (13th edn 1899), 20. Trust money may be followed into land or any other property in which it has been invested; and when a trustee has, in making any purchase or investment, applied trust money together with his own, the cestuis que trust are entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase or investment.' b
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That is support for the proposition of counsel for the owners, subject to the second part of his qualification.

In *Sandeman & Sons v Tyzack & Branfoot Steamship Co Ltd* [1913] AC 680, [1911–13] All ER Rep 1013, a consignee of bales of jute claimed that 6 of his bales were missing. It was found that 14 bales, belonging either to that consignee or to others, were missing; and that 11 bales were available without any marks. It was held that the consignee was entitled to claim for his 6 bales not delivered, and was not obliged to accept that any of the unmarked bales belonged to him. The obiter dictum of Lord Moulton is directly in point ([1913] AC 680 at 694–695, [1911–13] All ER Rep 1013 at 1020–1021): e
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'My Lords, if we proceed upon the principles of English law, I do not think it a matter of difficulty to define the legal consequences of the goods of "A." becoming indistinguishably and inseparably mixed with the goods of "B." If the mixing has arisen from the fault of "B.," "A." can claim the goods. He is guilty of no wrongful act, and therefore the possession by him of his own goods cannot be interfered with, and if by the wrongful act of "B." that possession necessarily implies the possession of the intruding goods of "B.," he is entitled to it (2 Kent's Commentaries (10th edn, 1860) 465). But if the mixing has taken place by accident or other cause, for which neither of the owners is responsible, a different state of things arises. Neither owner has done anything to forfeit his right to the possession of his own property, and if neither party is willing to abandon that right the only equitable solution of the difficulty, and the one accepted by the law, is that "A." and "B." become owners in common of the mixed property. Farther than this I do not think that it is safe to go. That the whole matter is far from being within the domain of settled law is shewn by the divergence of opinions as to the relative shares of the participating parties in the case of an accidental commixtio. Blackburn J. in *Buckley v. Gross* ((1863) 3 B & S 566, 122 ER 213) (following Kent's Commentaries) considers that they would be tenants in common in equal shares. In *Spence v. Union Marine Insurance Co.* ((1868) LR 3 CP 427) they were judged to possess the mixed mass in proportion to the probable amounts of their contributions to it. The fact is that the conclusions of the Courts in such cases, though influenced by certain fundamental principles, have been little more than instances of cutting the Gordian knot—reasonable adjustments g
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- a of the rights of parties in cases where complete justice was impracticable of attainment. I doubt whether even the fundamental principles enunciated above would be strictly adhered to in extreme cases where they would lead to substantial injustice. For instance, if a small portion of the goods of "B." became mixed with the goods of "A." by a negligent act for which "A." alone was liable, I think it quite possible that the law would prefer to view it as a conversion by "A." of this small amount of "B.'s" goods rather than do the substantial injustice of treating "B." as the owner of the whole of the mixed mass.'

- b Counsel for the receivers relies on the first part of that passage, on the law as to wrongful admixture. The difficulty that I feel is over the later observation, that those principles might not be strictly adhered to if they would lead to substantial injustice, for example, if the innocent party's contribution had been small. I have difficulty in understanding how a rule of law as to rights of property can be subject to the qualification that it must not cause substantial injustice. Rather than conclude that some rule of equity prevails in such cases, I would suppose that Lord Moulton did not intend to lay down rules of settled law, but instead to offer an opinion as to what the law might turn out to be if such cases arose.
- c The last of the cases cited was *Jones v De Merchant* (1916) 28 DLR 561. The headnote in

- d that case reads:

'Where beaver skins belonging to a wife had been wrongfully taken from among her effects by her husband, who had them made up into a fur coat which he makes a gift of to a third person, the property in the coat is in the wife under the principle of "accession" and the coat may be recovered by her in an action of replevin.'

- e It seems that the coat was made up of 18 skins taken from the plaintiff and another 4 provided by the husband. Nobody suggested that the coat should be severed or dismantled. The case was one of accessio. Apart from the fact that Richards JA cited Blackstone with apparent approval (at 563), the decision is not of assistance in the present case.

- f Other authorities relied on were *Smith's Leading Cases* (1 Smith LC (13th edn, 1929) 396), *Story on Bailments* (9th edn, 1878) pp 41-44, *Holdsworth A History of English Law* (2nd edn, 1937) vol 7, p 501-502, 35 Halsbury's Laws (4th edn) para 1139, 2 *ibid* para 1537. With the possible exception of *Holdsworth*, those support the argument of counsel for the receivers. In modern times there is *Goff and Jones on Restitution* (3rd edn, 1986) p 65:

- g 'At law, as in equity, the plaintiff must be able to identify his property in the hands of the defendant. Where the plaintiff is claiming non-fungible chattels, this important practical limitation will create little difficulty. But the identity of fungibles may become easily lost by their becoming mixed with other fungibles. Consequently if grain has become mixed in a ship or in a warehouse, the common law applies the special rules, akin to those developed in Roman law, of *commixtio* and *confusio*. Where A's property has become inseparably mixed with B's, the resultant mass will belong, in proportion to their contributions, to A and B as tenants in common. But if the mixing has been due to the wrongful act of either A or B, then English law appears to make a significant and punitive departure from the Roman doctrine to give the property in the whole mass to the innocent party.'

- j The arbitrators said of that passage:

'The above erudition exemplifies some uncertainty about the English law on the topic thus allowing us to take our own course.'

Paton on Bailment (1952) pp 156-158 appears to support the qualified argument of

counsel for the owners, although one section has the heading 'Present Law Uncertain'. Birks *Introduction to the Law of Restitution* (1985) p 368 refers to the maxim that everything is presumed against a thief, and continues: 'This is the spirit in which the exercise of identification has been conducted against those who have been guilty of wrongful misappropriation.' Mathews in 'Proprietary Claims at Common Law for Mixed and Improved Goods' (1981) 34 CLP 159 supports the argument of counsel for the receivers. a

Finally, I was referred to the American Law Institute's Restatement of the Law, Restitution (1937) § 209: 'Where a person wrongfully mingles money of another with money of his own, the other is entitled to obtain reimbursement out of the fund.' Section 214 provides: b

'The rules stated in §§ 209-213 are applicable where a person wrongfully mingles things other than money.

Comment: a. Mingling of fungible things. The rule stated in this Section is applicable where a person wrongfully mingles fungible things, such as grain. If a person wrongfully mingles the grain of another with grain of his own in a bin, the other is entitled to receive from the grain in the bin the amount of his grain so mingled, even though a part of the grain has been withdrawn from the bin (compare § 211) ...' c

Two points of significance in my view emerge from the authorities. First, in some cases a decision had to be made 'not upon the notion, that strict justice was done, but upon this, that it was the only justice that could be done' (see *Lupton v White* (1808) 15 Ves 432 at 441, [1803-13] All ER Rep 356 at 359 per Lord Eldon LC). Or as Lord Moulton put it, such cases 'have been little more than instances of cutting the Gordian knot—reasonable adjustments of the rights of the parties in cases where complete justice was impracticable of attainment' (see *Sandeman v Tyzack & Branfoot Steamship Ltd* [1913] AC 680 at 694, [1911-13] All ER Rep 1013 at 1021). Second, if the wrongdoer has destroyed or impaired the evidence by which the innocent party could show how much he has lost, the wrongdoer must suffer from the resulting uncertainty. Thus the jury in *Armory v Delamirie* (1722) 1 Stra 505, [1558-1774] All ER Rep 121 were directed by Pratt CJ to award the plaintiff the value of the finest jewel which the socket would hold, not the finest jewel that had ever been known. d

The combined effect of those principles would justify and require that where it is totally unknown how much of the innocent party's goods went into the mixture, the whole should belong to him. But I do not see that they require or justify the same result where it is known how much was contributed by the innocent party, or even what the maximum quantity is that he can have contributed, being something less than the whole. That would not be the only justice that could be done: it would be injustice. e

As for the reason given by Blackstone, 'to guard against fraud', in my opinion that will be sufficiently achieved if the principle in *Armory v Delamirie* is followed. I do not see that it is the function of civil justice to punish or discourage crime by awarding the victim more than he has lost, unless it be in the special case of an award of exemplary damages. There is the allied principle that the courts will not enforce an illegal contract or one that is tainted with illegality. But that has its limits: see the judgment of Devlin J in *St John Shipping Corp v Joseph Rank Ltd* [1956] 3 All ER 683 at 685, [1957] 1 QB 267 at 279: f

'When the master of the plaintiffs' ship *St. John* was prosecuted at Birkenhead under the [Merchant Shipping (Safety and Lead Line Conventions) Act 1932] and on Nov. 28, 1955, found to have overloaded his ship by more than eleven inches, he was fined the maximum of £1,200. But the amount of cargo by which the ship was overloaded was 427 tons and the extra freight earned was £2,295. So the ship came very well out of this situation; and she and other ships will doubtless continue to come very well out of similar situations until the Merchant Shipping (Safety and g

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a Load Line Conventions) Act, 1932, is amended. I can see that it is a situation that must cause some concern to cargo owners whose property is at risk. The ship was carrying a cargo of about ten thousand tons of grain from Mobile, Alabama, U.S.A., to Birkenhead. The defendants held a bill of lading for about 3,500 tons of this quantity on which the freight due was nearly £19,000. The defendants, apparently in association with the charterers, decided that some additional punishment should be inflicted on the plaintiffs and that it should take the form of withholding the

b £2,295 extra freight. The defendants have withheld £2,000, for which sum they are being sued in this action; and another cargo owner has withheld £295 and is being sued for it in an action that depends on this one. This explains how this dispute has arisen. I have not got to decide whether the defendants are morally justified in trying to make good deficiencies in the criminal law; nor is any justification of that sort put forward in the case.'

c In the present case there is, as I have said, a hint that the owners were engaged in wrongdoing, but on the award as a whole I do not conclude that they mixed the cargo with their own oil for some commercial motive. It would be a severe penalty to impose on them a fine of \$342,000 for their conduct (that being the difference between the receiver's larger claim of \$388,000 and the award in respect of the shortage of some

d \$46,000). The arbitrators, who know a great deal about the business of carriage by sea, did not mention justice in that; and neither do I. But in any event, the rule cannot, unless Lord Moulton's qualification represents the existing law, be altered to suit the circumstances of each particular case. It must be one rule for all cases. Those may vary between one where the shipowner deliberately mixes property with a view to stealing it, to another where he does so purely for convenience of carriage without any intention to

e harm anybody.

The other motive to be found in the cases is that of Coke CJ in *Ward v Ayr* (1615) 2 Bulst 323 at 324, 80 ER 1157: '... otherwise, a man should be made to be a trespasser, volens nolens, by the taking of his goods again...' In theory there may still be cases where that reasoning is sound, for example, if a farmer wished to retake his hay from a heap where it had been wrongly mixed with that of somebody else. In practice, it is not

f likely to arise often and certainly not in the present case: the notion of the Indian receivers boarding the owners' vessel after the conclusion of discharge at Madras in order to retake their oil is implausible. I would not regard that argument as justification for a rule which may work substantial injustice.

In the days when corn and hay were to be found in heaps which could not be measured accurately, when such disputes were tried by jury and witnesses might be illiterate or

g ignorant, a rough and ready rule which *Goff and Jones* describe as punitive may have been the best that the law could find. But a primitive rule is no longer appropriate when modern and sophisticated methods of measurement are available. The measurement of cargoes of oil is, as I learnt in the *Amoco* case [1987] 2 Lloyd's Rep 69, conducted with care and precision. It will not, of course, achieve absolute accuracy. What method of

h measurement ever does? But for all practical purposes the quantity of the innocent party's goods which have gone into the mixture can often be ascertained with a sufficient degree of precision, as it can be in this case. Similarly, there are methods of sampling and analysis which should enable the quality of the innocent party's goods, and of the mixture, to be assessed. If doubt remains as to either quantity or quality, the principle of *Armory v Delamirie* (1722) 1 Stra 505, [1558-1774] All ER Rep 121 provides a solution.

i Seeing that none of the authorities is binding on me, although many are certainly persuasive, I consider that I am free to apply the rule which justice requires. This is that where B wrongfully mixes the goods of A with goods of his own, which are substantially of the same nature and quality, and they cannot in practice be separated, the mixture is held in common and A is entitled to receive out of it a quantity equal to that of his goods

which went into the mixture, any doubt as to that quantity being resolved in favour of A. He is also entitled to claim damages from B in respect of any loss he may have suffered, in respect of quality or otherwise, by reason of the admixture. a

Whether the same rule would apply when the goods of A and B are not substantially of the same nature and quality must be left to another case. It does not arise here. The claim based on a rule of law that the mixture became the property of the receivers fails.

(3) *The bailment claim* b

The submission of counsel for the receivers on this point is that where A is the bailee of B's goods and A fails or refuses to deliver the same to B, then B is entitled to claim those goods or damages in respect of the value of the same.

The cause of action is said to be 'in bailment'. For my part I find difficulty in distinguishing it from the cause of action relied on in part (2) of this judgment; but one point of distinction became clear in the course of the argument. Whilst the claim just considered was for the whole of the pumpable oil on board the vessel, under this head the receivers claim only 97%, being that proportion of it which they say was their property. They give no credit for the fact that, amongst the oil which was delivered to them, 3% was the property of the owners. c

The answer to this point is, as counsel for the owners submits and I agree, that the mixture was held in common by the receivers and the owners. The receivers were entitled to an amount equal to their contribution to the mixture. That has been delivered to them, except for the small shortage in respect of which the arbitrators awarded them damages. What remained in the vessel became the property of the owners alone. I do not consider that the decision in *Sandeman & Sons v Tyzack & Branfoot Steamship Co Ltd* [1903] AC 680, [1911-13] All ER Rep 1013, as opposed to Lord Moulton's observations, requires me to reach any other conclusion. d

It might, I suppose, have been argued that the loss in transit of 0.55% should not have been deducted from the receiver's shortage claim, on the ground that the owner's share is deemed to suffer from accidental loss before the receiver's share. That argument was not put forward, but § 214 of the American Restatement might be said to support it, and the main proposition of counsel for the owners makes provision for accidental loss to be borne by the wrongdoer. In fact, the argument would not apply to the 0.3% apparent loss, by reason of water and sediment settling out of the crude oil. That, as I have said, was not a loss at all, or at any rate, not a loss of anything of value. As to the loss of 0.25% by evaporation, that was not an accidental loss but one by natural wastage. No doubt the oil loaded as cargo, the oil already on board and the mixture all suffered equally from evaporation, or if there were differential rates the oil loaded recently suffered most. If this small point had been raised, I should not have held that the owners' share of the mixture must suffer all loss by evaporation before any is attributed to the receivers' share. e

In those circumstances, no purpose would be served in remitting the case to the arbitrators on the point about consent, at all events, unless either party intends to appeal. This appeal fails and the award is upheld. f

Appeal dismissed. g

Solicitors: *Ince & Co* (for the receivers); *Williamson & Westlake* (for the owners). h

K Mydeen Esq Barrister.

a Smith and others v Croft and others (No 2)

CHANCERY DIVISION

KNOX J

29, 30, 31 OCTOBER, 3-7, 10, 11, 13, 14, 17-21 NOVEMBER, 19 DECEMBER 1986

b *Company – Minority shareholder – Action against directors – Ultra vires acts – Minority shareholders' standing to bring action on behalf of company against directors – Views of independent shareholders – Plaintiffs alleging directors had received excessive remuneration and made unauthorised payments – Whether plaintiffs having locus standi to bring action on behalf of company – Whether court should have regard to views of majority of independent shareholders.*

c The main shareholders of a company were the defendants, who held shares carrying 62.5% of the voting rights, and the plaintiffs, who, together with other shareholders who supported them, held shares carrying 14.44% of the voting rights. The defendants were (i) the executive directors of the company, (ii) companies associated with the executive directors (the associated companies) and (iii) the chairman, who was nominated to the board by WT Ltd, which was controlled by a large financial institution holding shares carrying 19.66% of the voting rights in the company. The plaintiffs commenced a minority shareholders' action against the defendants alleging (i) that the executive directors had paid themselves excessive remuneration, (ii) that the associated companies had received payments intended to benefit the executive directors rather than the company and that those payments were a dishonest breach of the directors' fiduciary duties and constituted a fraud on the minority shareholders, (iii) that the company's moneys were used to enable the associated companies illegally to purchase the company's shares, and (iv) that payments made to the executive directors supposedly to reimburse expenses were in substance gifts and therefore ultra vires and made in fraudulent breach of the executive directors' fiduciary duties. WT Ltd opposed the plaintiffs' action. The company and one of the executive directors applied to have the action struck out on the ground that the plaintiffs were not entitled to bring it. The issues arose (i) whether the plaintiffs had established a prima facie case that the company was entitled to the relief claimed and (ii) whether the plaintiffs were barred from bringing a minority shareholders' action by the rule that the proper plaintiff in an action in respect of a wrong done to the company was the company itself and not a shareholder or (iii) whether the plaintiffs fell within the exception to that rule which allowed a minority shareholder to bring an action where the wrong done to the company amounted to fraud and the wrongdoers were in control of the company and thus able to prevent the company suing.

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Held – (1) The plaintiffs had failed to establish that the company had a prima facie case with respect to the remuneration paid to the executive directors, the payments made to the associated companies or the payments made to the directors as reimbursement of expenses, since it had not been shown that any of those transactions was either ultra vires or excessive and therefore in breach of duty. However, a prima facie case had been established that there had been a breach with respect to payments made to the associated companies for the purpose of acquiring the company's shares, since the defendants had not shown that those payments were properly made in connection with a liability likely to be incurred by the company, namely the remuneration of the executive directors connected with the respective associated companies. Since such a transaction was both ultra vires and illegal, and therefore unratifiable, the plaintiffs had established that the company was prima facie entitled to the relief claimed (see p 937 *e h* to p 938 *a*, p 940 *c* to *g* and p 941 *j* to p 942 *b*, post); *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 and dictum of Slade LJ in *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1985] 3 All ER at 85 applied.

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(2) However, the plaintiffs were not the proper plaintiffs and were therefore barred from bringing their action, for the following reasons—

(a) even though a shareholder was enforcing a personal right when he sought to prevent a company from entering into an ultra vires transaction, any loss caused by the transaction was a wrong done to the company and a minority shareholder was not entitled as of right to bring an action on behalf of the company to recover payments made in the course of the transaction. Instead, it was the company which had the right of redress and accordingly, if there was any reason why the company could not sue, that would preclude the shareholder from suing (see p 945 d to j, post); a

(b) since the shareholder could not sue as of right to recover the payments, he had to show, if he himself wished to bring the action, not only that he had locus standi and was not disentitled for personal reasons from suing but also that the company was not barred from suing; furthermore, although the circumstances in which a company could be barred from suing in respect of a wrong done to it under an ultra vires transaction were limited because, for example, such a transaction could not be ratified by the shareholders so as to prevent the company from suing, there was no reason in principle why the shareholders who were independent of the wrongdoers could not abandon or compromise a right of action arising out of an ultra vires transaction, and if they did so a minority shareholder would be precluded from suing on behalf of the company (see p 947 b to f, post); b

(c) furthermore, the court would have regard to the views of the majority of the independent shareholders as to whether the action should proceed, since in determining whether a minority shareholder should be prevented from suing on behalf of the company the ultimate question was whether the plaintiff was being improperly prevented from bringing the proceedings, which would not be the case if the plaintiff was prevented from bringing his action by an appropriate independent organ of the company (see p 955 e, p 956 b to d j to p 957 d, post); c

(d) in deciding whether a shareholder, such as WT Ltd, was independent for the purpose of having regard to his views whether the plaintiffs' minority shareholders' action should be allowed to proceed, the general test was whether his vote would be exercised bona fide for the benefit of the company as a whole. However, in the case of WT Ltd the appropriate test was whether the court was satisfied that WT Ltd would cast its votes with a view to supporting the defendants rather than securing benefit to the company or that there was a substantial risk of WT Ltd doing so. Applying that test, it had not been shown that WT Ltd had, or that there was a substantial risk that it had, opposed the plaintiffs' action in order to support the defendants rather than to secure the benefit of the company. WT Ltd would accordingly be treated as an independent shareholder and, taking into account its views, which constituted the views of the majority of the independent shareholders, the plaintiffs' action would be dismissed (see p 957 j to p 958 c and p 960 b to d, post); *Allen v Gold Reefs of West Africa Ltd* [1900-3] All ER Rep 746 and dictum of Walton J in *Smith v Croft* [1986] 2 All ER at 560 applied. d

Notes

For minority shareholder's actions, see 7 Halsbury's Laws (4th edn) paras 714, 767, and for cases on the subject generally, see 9 Digest (Reissue) 746-750, 4430-4493. e

Cases referred to in judgments

Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656, [1900-3] All ER Rep 746, CA. f

Atwool v Merryweather (1867) LR 5 Eq 464.

Bagshaw v Eastern Union Rly Co (1849) 7 Hare 114, 68 ER 46; *affd* (1850) 2 Mac & G 389, 42 ER 151, LC. g

Baillie v Oriental Telephone and Electric Co Ltd [1915] 1 Ch 503, CA.

Bamford v Bamford [1969] 1 All ER 969, [1970] Ch 212, [1969] 2 WLR 1107, CA.

Birch v Sullivan [1958] 1 All ER 56, [1957] 1 WLR 1247.

Brown v British Abrasive Wheel Co Ltd [1919] 1 Ch 290, [1918-19] All ER Rep 308. j

- Burland v Earle* [1902] AC 83, PC.
- a** *Clinch v Financial Corp* (1868) LR 5 Eq 450; *aff'd* LR 4 Ch App 117, LC and LJJ.
Cyclists Touring Club v Hopkinson [1910] 1 Ch 179.
Daniels v Daniels [1978] 2 All ER 89, [1978] Ch 406, [1978] 2 WLR 73.
Drummond-Jackson v British Medical Association [1970] 1 All ER 1094, [1970] 1 WLR 688, CA.
- b** *East Pant Du United Lead Mining Co Ltd v Merryweather* (1864) 2 Hem & M 254, 71 ER 460.
Edwards v Halliwell [1950] 2 All ER 1064, CA.
Estmanco (Kilner House) Ltd v Greater London Council [1982] 1 All ER 437, [1982] 1 WLR 2.
Foss v Harbottle (1843) 2 Hare 461, 67 ER 189.
Gray v Lewis, Parker v Lewis (1873) LR 8 Ch App 1035, LJJ.
Halt Garage (1964) Ltd, Re [1982] 3 All ER 1016.
- c** *Hellenic and General Trust Ltd, Re* [1975] 3 All ER 382, [1976] 1 WLR 123.
Hogg v Cramphorn Ltd [1966] 3 All ER 420, [1967] Ch 254, [1966] 3 WLR 995.
Hubbuck & Sons Ltd v Wilkinson Heywood & Clark Ltd [1899] 1 QB 86, [1895-6] All ER Rep 244, CA.
Lawrance v Lord Norreys (1890) 15 App Cas 210, [1886-90] All ER Rep 858, HL.
MacDougall v Gardiner (1875) 1 Ch D 13, CA.
- d** *McKay v Essex Area Health Authority* [1982] 2 All ER 771, [1982] QB 1166, [1982] 2 WLR 890, CA.
Mason v Harris (1879) 11 Ch D 97, CA.
Menier v Hooper's Telegraph Works (1874) LR 9 Ch App 350, LJJ.
Mozley v Alston (1847) 1 Ph 790, 41 ER 833, LC.
National Funds Assurance Co, Re (1878) 10 Ch D 118.
- e** *Newman (George) & Co, Re* [1895] 1 Ch 674, CA.
North-West Transportation Co Ltd v Beatty (1887) 12 App Cas 589, PC.
Pavrides v Jensen [1956] 2 All ER 518, [1956] Ch 565, [1956] 3 WLR 224.
Prudential Assurance Co Ltd v Newman Industries Ltd [1979] 3 All ER 507, [1981] Ch 229, [1980] 2 WLR 339.
- f** *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1980] 2 All ER 841, [1981] Ch 257, [1980] 3 WLR 543; *rvsd in part* [1982] 1 All ER 354, [1982] Ch 204, [1982] 2 WLR 31, CA.
Ridge Securities Ltd v IRC [1964] 1 All ER 275, [1964] 1 WLR 479.
Rolled Steel Products (Holdings) Ltd v British Steel Corp [1985] 3 All ER 52, [1986] Ch 246, [1985] 2 WLR 908, CA.
- g** *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474.
Salomons v Laing (1850) 12 Beav 377, 50 ER 1105.
Seaton v Grant (1867) LR 2 Ch App 459, LJJ.
Sidebottom v Kershaw Leese & Co Ltd [1920] 1 Ch 154, CA.
Simpson v Westminster Palace Hotel Co (1860) 8 HL Cas 712, 11 ER 608.
Smith v Croft [1986] 2 All ER 551, [1986] 1 WLR 580.
- h** *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573, [1891-4] All ER Rep 246, CA.
Taylor v National Union of Mineworkers (Derbyshire Area) [1985] BCLC 237.
Towers v African Tug Co [1904] 1 Ch 558, CA.
Viscount of the Royal Court of Jersey v Shelton [1986] 1 WLR 985, PC.
Wallersteiner v Moir (No 2) [1975] 1 All ER 849, [1975] QB 373, [1975] 2 WLR 389, CA.
Wenlock v Moloney [1965] 2 All ER 871, [1965] 1 WLR 1238, CA.
- j** *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] 1 All ER 129, [1986] AC 368, [1986] 2 WLR 24, HL; *aff'g* [1985] 2 All ER 619, [1986] AC 368, [1985] 3 WLR 501, CA; *aff'g* [1985] 2 All ER 208, [1986] AC 368, [1985] 3 WLR 501.
Willis v Earl Howe [1893] 2 Ch 545, CA.
Windsor Refrigerator Co Ltd v Branch Nominees Ltd [1961] 1 All ER 277, [1961] Ch 375, CA.

Cases also cited

- A-G v Nissan* [1969] 1 All ER 629, [1970] AC 179, HL. a
- Australian Coal and Shale Employees' Federation v Smith* (1937) 38 SR(NSW) 48, NSW SC.
- Barron v Potter* [1914] 1 Ch 895.
- Burt v British National Life Assurance Association* (1859) 4 De G & J 158, 45 ER 62, LJJ.
- Carter v Comr of Police for the Metropolis* [1975] 1 All ER 33, [1975] 1 WLR 507, CA.
- Clemens v Clemens Bros Ltd* [1976] 2 All ER 268.
- Const v Harris* (1824) Turn & R 496, [1824-34] All ER Rep 311, 37 ER 1191, LC. b
- Cook v Deeks* [1916] 1 AC 554, [1916-17] All ER Rep 285, PC.
- Cotter v National Union of Seamen* [1929] 2 Ch 58, [1929] All ER Rep 342.
- Davidson v Tulloch* (1860) 2 LT 97, HL.
- Devlin v Slough Estates Ltd* [1983] BCLC 497.
- Dominion Cotton Mills Co Ltd v Amyot* [1912] AC 546, PC.
- Electrical Development Co of Ontario v A-G of Ontario* [1919] AC 687, PC. c
- Foster v Foster* [1916] 1 Ch 532, [1916-17] All ER Rep 856.
- Goodson v Grierson* [1908] 1 KB 761, CA.
- Greenhalgh v Arderne Cinemas Ltd* [1950] 2 All ER 1120, [1951] Ch 286, CA.
- Gregory v Patchett* (1864) 33 Beav 595, 55 ER 499.
- Heyting v Dupont* [1964] 2 All ER 273, [1964] 1 WLR 843, CA.
- Hoole v Great Western Rly Co* (1867) LR 3 Ch App 262, LJJ. d
- Horsley & Weight Ltd, Re* [1982] 3 All ER 1045, [1982] Ch 442, CA.
- Isaacs (M) & Sons Ltd v Cook* [1925] 2 KB 391.
- London Corp v Horner* (1914) 111 LT 512, CA.
- Lord v Governor & Co of Copper Miners* (1848) 2 Ph 240, 740, 41 ER 1128, LC.
- Marshall's Valve Gear Co Ltd v Manning Wardle & Co Ltd* [1909] 1 Ch 267, CA.
- Morris v Sandess Universal Products* [1954] 1 All ER 47, [1954] 1 WLR 67, CA. e
- Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] 2 All ER 563, [1983] Ch 258, CA.
- National Real Estate and Finance Co Ltd v Hassan* [1939] 2 All ER 154, [1939] 2 KB 61, CA; *rvsg* [1939] 1 All ER 712, [1939] 2 KB 61.
- Payne v Cork Co Ltd* [1900] 1 Ch 308.
- Peel v London and North Western Rly Co* [1907] 1 Ch 5, CA. f
- Pender v Lushington* (1877) 6 Ch D 70.
- Pickering v Stevenson* (1872) LR 14 Eq 322.
- Quin & Axtens Ltd v Salmon* [1909] AC 442, HL.
- Radstock Co-op and Industrial Society Ltd v Norton-Radstock UDC* [1968] 2 All ER 59, [1968] Ch 605, CA.
- Richards v Naum* [1966] 3 All ER 812, [1967] 1 QB 620, CA. g
- Shuttleworth v Cox Bros & Co (Maidenhead) Ltd* [1927] 2 KB 9, [1926] All ER Rep 498, CA.
- Spokes v Grosvenor Hotel Co Ltd* [1897] 2 QB 124, CA.
- Studdert v Grosvenor* (1886) 33 Ch D 528.
- Tilling v Whiteman* [1979] 1 All ER 737, [1980] AC 1, HL.
- Turquand v Marshall* (1869) LR 4 Ch App 376, LC.
- Wall v London and Northern Assets Corp* [1898] 2 Ch 469, CA. h
- Ward (Alexander) & Co Ltd v Samyang Navigation Co Ltd* [1975] 2 All ER 424, [1975] 1 WLR 673, HL.
- Western Steamship Co Ltd v Amaral Sutherland & Co Ltd* [1914] 3 KB 55, CA.

Motions

By a writ indorsed with a statement of claim dated 7 February 1985 the plaintiffs, Nora Smith, Lucienne Crane and the Rt Hon Felim O'Neill Baron Rathcavan, brought an action against the defendants, (1) William Alan Croft, (2) Richard Martin Francis Soames, (3) David Alexander Korda, (4) Michael Lewis Carr, (5) Mannergrand Services Ltd, (6) Cushingham Ltd, (7) Bellwedge Ltd, (8) Brindeel Ltd, and (9) Film Finances Ltd (the company) claiming payment to the company of certain specified sums of money together j

a with interest. By separate motions the fourth defendant and the company applied for orders pursuant to RSC Ord 18, r 19 or under the inherent jurisdiction of the court for orders striking out the statement of claim. The facts are set out in the judgment.

David Oliver QC for the fourth defendant.

Charles Aldous QC and Caroline Hutton for the company.

b Robin Potts QC and Daniel Serota for the plaintiffs.

13 November.

c **KNOX J.** I have to give a ruling in relation to two motions that are before me. The first is a motion by the ninth defendant, Film Finances Ltd, which I will call 'the company', for an order pursuant to RSC Ord 18, r 19, or under the inherent jurisdiction of the court, that this action be struck out as being frivolous or vexatious or an abuse of the process of the court on the ground that, being purportedly brought by the plaintiffs on behalf of the company, the plaintiffs are in fact not entitled to bring or continue the same, and then there is an application with regard to costs.

d The other notice of motion is one by the fourth defendant, Mr Michael Lewis Carr, in very similar terms as to the first half, for an order pursuant to Ord 18, r 19, or under the inherent jurisdiction of the court, that this action be struck out as being frivolous or vexatious or an abuse of the process of the court on the grounds that, being purportedly brought by the plaintiffs on behalf of the company, the plaintiffs are in fact not entitled to bring or continue the same, and then there is an additional ground: 'alternatively that the same is obviously unsustainable against the Fourth Defendant.' I am not concerned e in relation to this ruling with that second ground in the second notice of motion.

f The ruling which I have to make falls really into two parts. First, is the procedure, which it will be seen has been adopted by those two defendants, an application under Ord 18, r 19 and the inherent jurisdiction, appropriate at all to this type of proceeding? and, second, if that question is answered in the affirmative should these two applications be dismissed because the questions raised thereby do not have plain and obvious answers? It is not disputed but that difficult questions of law arise. If the right test to apply is that the applications should be dismissed unless the court is satisfied that the plaintiffs are bound to fail in the action without going in detail into the legal issues raised, then it is not disputed but that that test is not satisfied. It is common ground between the parties, and those familiar with the complications of the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 will not find this a matter of surprise, that difficult questions do arise.

g I have not heard full argument from the respondents to the notices of motion, the plaintiffs in the action, on these issues of law, or on the issue of fact which I will mention in a moment, and in those circumstances I do not propose to say anything about such preliminary views as I may have formed regarding those issues, whether of law or of fact. The action is one brought by the three plaintiffs who are minority shareholders in the h company in respect of payments that have been made out of the company's funds and which for a variety of reasons the plaintiffs claim were improperly paid and should be recouped to the company. The action has in fact been before the court already and is the subject of a decision by Walton J on 27 January 1986: see *Smith v Croft* [1986] 2 All ER 551, [1986] 1 WLR 580. By that decision Walton J discharged some earlier orders that were made by Master Chamberlain. The first of those earlier orders authorised the j plaintiffs to bring these proceedings down to the conclusion of discovery and inspection of documents on terms that the company should indemnify the plaintiffs against the costs, putting it shortly. The master's later order was ancillary to that earlier one, and authorised the plaintiffs to have periodic taxation and for a payment of the proportion of the costs thereby certified by the taxing master. Those orders were made on the authority of the Court of Appeal's decision in *Wallersteiner v Moir* (No 2) [1975] 1 All ER 849, [1975] 1 QB 373.

On 3 July 1986 leave to appeal from Walton J's order was granted by a single judge of the Court of Appeal, May LJ, and after doing that he said:

'I think I had better direct that this appeal [that is the appeal from Walton J's decision] not be heard until after the application to strike out [which is the application before me] because if it is struck out then, as I have said, the question does not arise and this appeal falls naturally by the wayside. To the extent that it is struck out [it] may affect the exercise of the Court of Appeal's discretion if they come to the conclusion that the judge below exercised his discretion wrongly, so that they have the opportunity of exercising their own.'

It is therefore necessary that this application be disposed of, at least unless there is some serious delay for external reasons, before the appeal which is pending in the Court of Appeal from that decision of Walton J is heard.

The issues in the action need not be analysed in any detail for the purposes of this judgment but it is desirable that I should state briefly what seem to me to be the issues that arise in the application to strike out, assuming of course that it proceeds. There are two issues of law and one of fact. The first issue of law can perhaps be stated in this way: are actions to recover money paid away ultra vires by the company outside the rule in *Foss v Harbottle* altogether so that even one shareholder as of right can bring such actions? I interpose to mention that it is not disputed but that actions to restrain threatened ultra vires acts fall within that category of cases outside the rule in *Foss v Harbottle*. But the issue that does arise between the parties is how far that state of affairs obtains in relation to past and completed transactions. The second issue arises if the first is answered in the negative, and can be stated in this way: should the views of an independent majority of shareholders on the question whether the action should proceed prevail if all the votes either controlled or exercised or influenced by those accused of wrongdoing are excluded from the computation, so that only independent votes are counted? If that question is answered in the affirmative, then the question of fact would arise, namely whether the votes of one particular shareholder, Wren Trust Ltd, should be treated as being independent for the purposes of that exercise.

The procedure which has been sought to be followed by the two defendants who issued notices of motion is based firmly, and indeed I think exclusively, on what fell from the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries (No 2)* [1982] 1 All ER 354, [1982] Ch 204. I do not propose to read the very lengthy headnote in that case, which was also concerned with the rule in *Foss v Harbottle*, but which was in fact concerned with a case where there was quite clearly no voting control. That is different from this case, where equally clearly the defendants in these proceedings do have voting control, and also it was a case where there was no allegation of ultra vires as such as a principal issue in the action. But the Court of Appeal said, after an examination of what the rule in *Foss v Harbottle* was about ([1982] 1 All ER 354 at 364, [1982] Ch 204 at 219):

'It is commonly said that an exception to the rule in *Foss v Harbottle* arises if the corporation is "controlled" by persons implicated in the fraud complained of, who will not permit the name of the company to be used as plaintiffs in the suit: see *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474 at 482. But this proposition leaves two questions at large. First, what is meant by "control", which embraces a broad spectrum extending from an overall absolute majority of votes at one end to a majority of votes at the other end made up of those likely to be cast by the delinquent himself plus those voting with him as a result of influence or apathy. Second, what course is to be taken by the court if, as happened in *Foss v Harbottle*, in the *East Pant Du* case [*East Pant Du United Lead Mining Co Ltd v Merryweather* (1864) 2 Hew G & M 254, 71 ER 460] and in the instant case, but did not happen in *Atwool v Merryweather* (1867) LR 5 Eq 464, the court is confronted by a motion on the part of the delinquent or by the company seeking to strike out the action? For at the time of the application the existence of the fraud is unproved. It is at this point that

a a dilemma emerges. If, on such an application, the plaintiff can require the court to assume as a fact every allegation in the statement of claim, as in a true demurrer, the plaintiff will frequently be able to outmanoeuvre the primary purpose of the rule in *Foss v Harbottle* by alleging fraud and "control" by the fraudster. If on the other hand the plaintiff has to prove fraud and "control" before he can establish his title to prosecute his action, then the action may need to be fought to a conclusion before the court can decide whether or not the plaintiff should be permitted to prosecute it. In the latter case the purpose of the rule in *Foss v Harbottle* disappears. b Either the fraud has not been proved, so *cadit quaestio*; or the fraud has been proved and the delinquent is accountable unless there is a valid decision of the board or a valid decision of the company in general meeting, reached without impropriety or unfairness, to condone the fraud. We think that this brief look at the authorities is sufficient for present purposes. For it so happens that this court cannot properly on c [this] appeal decide the scope of the exception to the rule in *Foss v Harbottle*.' (The Court of Appeal's emphasis.)

And then the Court of Appeal goes on to explain the reason why that was so, which is special to that case, and put quite briefly it was that the company decided to adopt the action at the end of the day. Passing over those two paragraphs I continue ([1982] 1 All ER 354 at 365-366, [1982] Ch 204 at 220): d

'It was in the light of these considerations that we declined to hear any argument from counsel for the Prudential on the topic of *Foss v Harbottle*. However desirable it might be in the public interest that we should express our conclusions on the judge's analysis of the rule in *Foss v Harbottle* and what he saw as the exception to it, e it was necessary for us to bear in mind that the rule had ceased to be of the slightest relevance to the case. It would have been a grave injustice to all parties to increase the already horrendous costs of this litigation by allowing time for argument on an interesting but irrelevant point. Such considerations of the law as appears in this judgment is, apart from a few submissions made by [the second defendant], merely a reflection of our own thoughts without the benefit of sustained argument. In the result it would be improper for us to express any concluded view on the proper scope of the exception or exceptions to the rule in *Foss v Harbottle*. We desire f however to say two things. First, as we have already said, we have no doubt whatever that the judge erred in dismissing the summons of 10 May 1979. He ought to have determined as a preliminary issue whether the plaintiffs were entitled to sue on behalf of Newman by bringing a derivative action. It cannot have been right to have subjected the company to a 30-day action (as it was then estimated to be) in order to enable him to decide whether the plaintiffs were entitled in law to subject the company to a 30-day action. Such an approach defeats the whole purpose of the rule in *Foss v Harbottle* and sanctions the very mischief that the rule is designed to prevent. By the time a derivative action is concluded, the rule in *Foss v Harbottle* can have little, if any, role to play. Either the wrong is proved, thereby establishing conclusively the rights of the company, or the wrong is not proved, so *cadit quaestio*. g In the present case a board, of which all the directors save one were disinterested, with the benefit of the Schroder-Harman report, had reached the conclusion before the start of the action that the prosecution of the action was likely to do more harm than good. That might prove a sound or an unsound assessment, but it was the commercial assessment of an apparently independent board. Obviously the board would not have expected at that stage to be as well informed about the affairs of the company as it might be after 36 days of evidence in court and an intense examination of some 60 files of documents. But the board clearly doubted whether there were sufficient reasons for supposing that the company would at the end of the day be in a position to count its blessings, and clearly feared, as counsel said, that it might be killed by kindness. Whether in the events which have happened Newman (more exactly the disinterested body of shareholders) will feel that it has all been well h j

worth while, or must lick their wounds and render no thanks to those who have interfered in their affairs, is not a question which we can answer. But we think it is within the bounds of possibility that, if the preliminary issue had been argued, a judge might have reached the considered view that the prosecution of this great action should be left to the decision of the board or of a specially convened meeting of the shareholders, albeit less well informed than a judge after a 72-day action. So much for the summons of 10 May. The second observation which we wish to make is merely a comment on the judge's decision that there is an exception to the rule in *Foss v Harbottle* whenever the justice of the case so requires. We are not convinced that this is a practical test, particularly if it involves a full-dress trial before the test is applied. On the other hand we do not think that the right to bring a derivative action should be decided as a preliminary issue on the hypothesis that all the allegations in the statement of claim of "fraud" and "control" are facts, as they would be on the trial of a preliminary point of law. In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a *prima facie* case (i) that the company is entitled to the relief claimed and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v Harbottle*. On the latter issue it may well be right for the judge trying the preliminary issue to grant a sufficient adjournment to enable a meeting of shareholders to be convened by the board, so that he can reach a conclusion in the light of the conduct of, and proceedings at, that meeting.'

There is there, of course, a reference to the summons of 10 May, and it appears from the report of the decisions at first instance, the first of the two, by Vinelott J what the nature of that summons was (see *Prudential Assurance Co Ltd v Newman Industries Ltd* [1979] 3 All ER 507, [1981] Ch 229). In the same case, one finds ([1981] Ch 229 at 233):

'In those circumstances [that is the circumstances that obtained at the beginning of the proceedings] the second and third defendants took out a summons asking for an order under R.S.C., Ord 33, r. 3, that it be determined as a preliminary issue whether as a matter of law the plaintiff was entitled to maintain the action against them. A similar application was made by [the fourth defendant].'

There is therefore, as it seems to me, no doubt but that counsel for the plaintiffs is right in submitting that what was before the Court of Appeal was a summons under Ord 33. There was in fact no appeal on that summons, but it was that summons that they were concerned with in making the references to preliminary issue so far as those proceedings were concerned.

Counsel for the plaintiffs further submitted that the fact that the onus of proof is clearly cast, in that passage which I have read from the Court of Appeal, on the plaintiffs of showing a *prima facie* case on those two matters indicates that it was a reference to the procedure under Ord 33, r 3 rather than that under Ord 18, r 19 that the Court of Appeal had in mind. The two rules read as follows, so far as material. Order 18, r 19:

'(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—(a) it discloses no reasonable cause of action . . . or (b) it is scandalous, frivolous or vexatious; or (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a) [that is that it discloses no reasonable cause of action or defence as the case may be] . . .'

The whole of Ord 33 is preceded by the heading 'Place and mode of trial' and r 3, under a heading 'Time, etc. of trial or questions or issues', provides:

- a 'The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.'

- b Counsel for the company and counsel for the fourth defendant have submitted to me that the proper procedure in such a case as this, where minority shareholders are seeking to bring an action to recover for the benefit of the company in which they are shareholders sums paid away and the defendants wish to challenge that on the basis that the rule in *Foss v Harbottle* prevents such a proceeding, is for there to be an application by way of striking out, mainly on the ground that this is the appropriate relief in relation to a challenge to the locus standi of a plaintiff, and that it is the inevitable result if the application succeeds. Secondly, they submit that the Court of Appeal has given clearly considered views of the procedure which it was submitted to me by them was not intended to refer to Ord 33, r 3, and in support of that they pointed to the reference to striking out in a passage which I have in fact read ([1982] 1 All ER 354 at 364, [1982] Ch 204 at 219), the actual sentence being:

- d 'Second, what course is to be taken by the court if, as happened in *Foss v Harbottle*, in the *East Pant Du* case and in the instant case, but did not happen in *Atwool v Merryweather*, the court is confronted by a motion on the part of the delinquent or by the company seeking to strike out the action?'

- e And at that point they submit that the Court of Appeal was clearly contemplating what must at its lowest be a possible form of procedure. Equally they point to an earlier passage which I have not read but which is quite short, which shows the sort of procedure that the Court of Appeal contemplated. The passage reads as follows ([1982] 1 All ER 354 at 359, [1982] Ch 204 at 212):

- f 'The assertion by Newman's counsel that the independent board "was powerless to prevent Prudential from pursuing the action" may have been based on the supposition that Prudential had on the facts alleged in the statement of claim a personal cause of action for damages against [the second and third defendants] independently of Newman's cause of action for damages. This supposition, if it existed, was erroneous for reasons which we explain later. It would have been open to Newman to have issued their own summons before the trial in order to test the right of Prudential to pursue a derivative action, and to have supported it with evidence proving the objectiveness of the board's view and explaining the potential injury to Newman which would be caused by the proceedings.'

- g That, they say, indicates the sort of procedure which the Court of Appeal envisaged as a possibility.

- h There has been a decision of the House of Lords reported in connection with the interrelationship between Ord 33, r 3 and Ord 18, r 19. The decision is *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] 1 All ER 129, [1986] AC 368, and there is a passage in the speech of Lord Templeman which reads as follows ([1986] 1 All ER 129 at 138-139, [1986] AC 268 at 435):

- j 'In *Hubbuck & Sons Ltd v Wilkinson*, *Heywood & Clark Ltd* [1899] 1 QB 86, [1895-9] All ER Rep 244 Lindley MR pointed out the distinction between Ord 18, r 19 (then Ord 25, r 4), which dealt with striking out and Ord 33, r 3 (then Ord 25, r 2), which enables a point of law to be set down and argued as a preliminary issue. He said ([1899] 1 QB 86 at 91, [1895-9] All ER Rep 244 at 247): "Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Order xxv., r 2; the other is to apply to strike out the statement of claim under Order xxv., r 4. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is

only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks." The observations of Lindley MR directed to striking out a statement of claim apply equally to applications to strike out a defence or part of a defence. There has been recently a difference of judicial approach to the construction of Ord 18, r 19. In *McKay v Essex Area Health Authority* [1982] 2 All ER 771, [1982] QB 1166 the majority of the Court of Appeal (Stephenson and Ackner LJJ) cited with approval the observations of Sir Gordon Wilmer in *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094 at 1105, [1970] 1 WLR 688 at 700 where he said: "The question whether a point is plain and obvious does not depend on the length of time it takes to argue. Rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result." On the other hand, Griffiths LJ dissented on the point in *McKay v Essex Area Health Authority* [1982] 2 All ER 771 at 789, [1982] QB 1166 at 1191 and said: "If on an application to strike out as disclosing no cause of action a judge realises that he cannot brush aside the argument, and can only decide the question after a prolonged and serious legal argument, he should refuse to embark on that argument and should dismiss the application unless there is a real benefit to the parties in determining the point at that stage. For example, where striking out the cause of action will put an end to the litigation a judge may well be disposed to embark on a substantial hearing because of the possibility of finally disposing of the action. But even in such a case a judge must be on his guard that the facts as they emerge at the trial, may not make it easier to resolve the legal question." My Lords, if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself. In the present case, the general rule would seem to require a refusal by the judge to embark on the problems of international law involved in the present appeal, leaving those problems to be solved at the trial if they became material. If at the trial the appellants were cleared of any impropriety in their management of the affairs of the Rumasa group, then the problems of international law would not arise. Moreover, even if those problems did arise I do not believe that the length of time, namely seven days, occupied by the judge in deciding to strike out the pleadings would have been added to the time required to decide other issues. But there are special circumstances which, in my view, made it right for the judge to proceed and to make the order which he made. If the appellants' pleading and particulars had not been struck out, the appellants would have proceeded to demand discovery before trial and to lead evidence at the trial, harassing to the respondents and embarrassing to the court and designed to support the allegations and insinuations of oppression and bad faith on the part of the Spanish authorities which appear in the amended defences and particulars. These allegations are irrelevant to the trade marks action and the banks' action and are inadmissible as a matter of law and comity and were rightly disposed of at the first opportunity.'

In my judgment it appears from what fell from Lord Templeman in that case that even in the type of case where the issue in the preliminary application is one of the issues in the action there may be circumstances which overall justify the use of Ord 18, r 19 where equally Ord 33, r 3 might serve. It depends in my judgment on the particular facts of the particular case.

A further point which was relied on by counsel for the fourth defendant and counsel for the company was that the parties were in this case armed and prepared both with leading counsel and a multitude of books to argue the issues which were clear to them some time before the proceedings came before me, and that it was only at the last

a moment that an objection to the form of procedure was made. I do not regard that as a determinant factor in any sense since either the point is a good one or it is not, and the lateness with which it was in fact taken does not impinge on that. On the other hand, it is capable of being relevant that the issues were sufficiently defined for the parties to prepare themselves, and that the matter was organised for trial by earlier applications on the notices of motion when the time of trial was estimated without doubts being raised as to the propriety of the procedure.

b I am satisfied that the statements which I have read in the Court of Appeal as to the procedure to be adopted in these matters, although plainly obiter as was in fact conceded, should be regarded by me as a guide to be followed as faithfully as possible. In my judgment, as a matter of procedural law, either Ord 18, r 19 or Ord 33, r 3 is a potentially possible vehicle for such an application as is involved in the present case to decide whether a plaintiff minority shareholder has the necessary locus standi. But for present purposes c it is sufficient for my decision to hold, as I do, that the procedure under Ord 18, r 19 is not of itself an impossible procedure which leads to an application made under that rule or under the inherent jurisdiction to be struck out as being evidently improper. It seems to me that, although the Court of Appeal undoubtedly had Ord 33 procedure before it in the form of the summons in relation to which it was discussing the propriety of what had happened below, its guidance was intended to be general in relation to minority d shareholders' actions, and on that basis I find that the procedure is not inherently defective.

That leads me to the second of the two issues with which I am faced, and that is the effect of the answer to the problems that are raised not being plain or obvious. Counsel for the plaintiffs has relied on two separate lines of very well-established authority, one e on Ord 18, r 19 which is summarised conveniently in *The Supreme Court Practice 1985* vol 1, para 18/19/3 under the rubric 'Exercise of powers under this rule', where the text reads as follows:

f 'It is only in plain and obvious cases that recourse should be had to the summary process under this rule [and then authority is given.] The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" . . . The summary remedy under this rule is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable . . . It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action . . .'

g As a typical example of this type of authority he cited, along with other cases, the decision in *Wenlock v Moloney* [1965] 2 All ER 871, [1965] 1 WLR 1238, where the headnote reads as follows ([1965] 1 WLR 1238):

h 'By his writ and statement of claim the plaintiff claimed damages against the three defendants for conspiring to oust him from the business of a company. His original statement of claim was a long, inartistic and wandering document to which the defendants refused to plead. He, accordingly, remodelled it and delivered a second statement of claim in which he alleged the conspiracy and set out four stages of the conspiracy at various times between January, 1961, and January, 1964, as a result of which he alleged, inter alia, that he had been deprived of his shares and interest in the company. The defendants delivered defences denying the allegations made against them in the statement of claim, and sought further and better particulars of the statement of claim which the plaintiff gave. After the pleadings were closed the plaintiff issued a summons for directions in the ordinary way, but before it was heard the defendants applied to the master under R.S.C., Ord. 18, r. 19, alternatively under the inherent jurisdiction of the court, to strike out the pleadings and dismiss the action on the grounds that the pleadings disclosed no reasonable j

cause of action, were frivolous and vexatious, and an abuse of the process of the court. On the hearing of the applications to strike out, ten affidavits were filed, five by the defendants in support of the applications and five by the plaintiff in opposition thereto. The master read the affidavits, the documents exhibited thereto, and considered the issues of fact raised by the affidavits in a four-day hearing. There was no cross-examination on the affidavits or oral evidence. In his reserved judgment, which occupied 22 pages, the master held that the plaintiff's action was most unlikely to succeed and he, accordingly, struck out the pleadings and the action. The plaintiff appealed to the judge in chambers, who dismissed his appeal. On appeal to the Court of Appeal, which refused to look at the affidavits:—*Held*, allowing the appeal, that the trial by the master of issues of fact on affidavits to ascertain whether the plaintiff had a case was a usurpation of the functions of the trial judge and was a wholly improper procedure . . . and that since the pleadings on their face disclosed a reasonable cause of action and raised issues of fact which required to be determined on oral evidence by a judge, the action would not be struck out but would proceed to trial.'

Danckwerts LJ said ([1965] 2 All ER 871 at 874, [1965] 1 WLR 1238 at 1243):

'The practice under the former rule, R.S.C., Ord. 25, r. 4, and under the inherent jurisdiction of the court, was well settled. Under the rule it had to appear on the face of the plaintiff's pleading that the action could not succeed or was objectionable for some other reason. No evidence could be filed. In the case of the inherent power of the court to prevent abuse of its procedure by frivolous or vexatious proceedings or proceedings which were shown to be an abuse of the process of the court, an affidavit could be filed to show why the action was objectionable. The commonest case was where a plaintiff was seeking to bring an action on a point which had already been decided or was obviously wholly imaginary. An example of that is *Willis v. Earl Howe* ([1893] 2 Ch 545); but, as the procedure was of a summary nature, the party was not to be deprived of his right to have his case tried by a proper trial, unless the matter was clear.'

And he went on to quote Lord Herschell in *Lawrance v Lord Norreys* (1890) 15 App Cas 210 at 219, [1886–90] All ER Rep 858 at 863, where he said:

'It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases.'

That was one line of authority on which counsel for the plaintiffs relied. The other line of authority is concerned with the trial of preliminary issues, but counsel for the plaintiffs relied on that as being equally applicable, and in that context I cite again as an example of the numerous cases that were cited, the decision of *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] 1 All ER 277, [1961] Ch 375. I need not read the headnote, but Lord Evershed MR summed up the principle involved at the end of his judgment saying ([1961] 1 All ER 277 at 283, [1961] Ch 375 at 396):

'For the reasons that I have stated, I conclude that the answer to this case is that on the assumptions of fact which I have indicated—which can be determined only in the action—this instrument would be capable of being a writing as contemplated by the appointment taking effect on the date (Feb. 28) when it was in fact, according to the defendants, passed over to Mr. Greenwood after a demand had been made by Mr. Inkin with the authority of the debenture holder. I would, therefore, order accordingly, and set aside the judgment of Cross, J., though, as I say, I do not express any view on the matter with which he expressly dealt, viz., whether the document took effect in the circumstances (or was capable of taking effect) as a deed. I repeat what I said at the beginning, that the course which this matter has taken emphasises as clearly as any case in my experience the extreme unwisdom—save in very

a exceptional cases—of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the short cut so attempted inevitably turns out to be the longest way round.'

Harman LJ said ([1961] 1 All ER 277 at 283, [1961] Ch 375 at 396):

b 'I concur, and find myself doing so with particular heartiness, with reference to the last observations my Lord has made. The number of conditions which he has found it necessary to use to fence in the expression of this court's opinion shows at once the undesirability of this kind of procedure. It is highly undesirable that the court should be constrained to tie itself in so many knots, and in the end merely say: "Well, if this was thus, then that was so".'

c That highlights, in a typically trenchant way, the proposition that it is often profoundly unsatisfactory for a court to give a decision as a preliminary matter in an action on an individual issue on various hypothetical bases of fact, the plain objection being that the hypothetical bases may prove not to be bases and illusory, and in those circumstances the decision of the court is so much air.

d Both those lines of authority were distinguished by counsel for the fourth defendant and counsel for the company on one single basis, and that is that they were without exception concerned with the interlocutory disposal of an issue which was going to form part of the issues in the action, and they submit that that is a piecemeal way of carrying on which is inherently open to objections both under the inherent jurisdiction and under Ord 18, r 19, where there has to be a very obvious case before the issues can in effect be short-circuited, and to the preliminary trial of issues on assumed facts under Ord 33, r 3. In the present case they submit that we have a fundamentally different situation, namely e one where what has to be done is not to decide an issue in the action itself but an issue which the Court of Appeal has described in the way which I have read, namely whether a prima facie case on those two points has in fact been established by the plaintiffs, and it is at least possible, and in many cases probable, and they would submit in this case near certain, that the issue there is not one which would occupy the court at the final trial of the action.

f They support their argument by further submissions that it is plain from the passage which I read from Danckwerts LJ's decision in *Wenlock v Moloney*, and indeed from many other passages, that questions of fact can be gone into under Ord 18, r 19, and in exceptional cases cross-examination can be permitted on affidavits. In this particular case the principal affidavit on which the defendants rely in relation to the issue of fact which I have mentioned as the third of the potential issues in these applications is one sworn by

g Mr Baldock (who is the managing director of Gresham Trust plc and a director of Wren Trust, its subsidiary) and cross-examination was in fact offered during the course of the hearing on a number of different occasions but never applied for by counsel for the plaintiffs, and it would not be in accordance with the practice of this court to direct a cross-examination without an application for it. My conclusion is that it is the question stated by the Court of Appeal that has to be decided as a preliminary matter, that it is a h special form of procedure concerned with giving sensible operation to the rule in *Foss v Harbottle*, and which is concerned with avoiding the Scylla and Charybdis, on the one hand, of having a preliminary issue which effectively requires one to try the whole action where the rule serves no useful purpose and, on the other side of the strait, of assuming that everything that the plaintiffs allege is necessarily correct as a matter of fact, which is of course the technique the court adopts when it has what was called a strict demurrer.

j The Court of Appeal, it seems to me, has laid down a halfway house for this very special type of case, one in which the legal issues in this particular case are sufficiently well defined for the parties to be able to argue them. Further, I am satisfied that they will determine the result of the action completely if answered in one particular way (not if answered in the other way, but that is seldom obtainable).

As regards the factual issue which I have sought to outline, that is to say the independence of Wren Trust Ltd, in my judgment that lies within a sufficiently small

compass and is sufficiently independent of what I take to be the issues in the action itself for it to fall outside the lines of authority that counsel for the plaintiffs has cited and whose validity inside their scope is unchallenged. I do not propose to analyse the evidence in relation to the independence or otherwise of Wren Trust Ltd. It would be both impracticable and undesirable for me to do so not having had the benefit of submissions from counsel for the plaintiffs in relation to the evidence that is at present before the court. I therefore confine my observations exclusively to the question whether the existence of that issue of fact is a fatal obstacle to the adoption of the procedure which has in fact been chosen by the two defendants who have moved these motions before me, and to that extent I am not satisfied that there is any such fatal objection. a

Although, therefore, I view with mounting apprehension the escalation of authority which seems inevitably attendant on the difficult questions that arise in this case, I have reached the firm conclusion that it would not be right for me to stop these applications at this stage, and I so rule. b

Order accordingly. c

The hearing of the motions to strike out then continued.

Cur adv vult d

19 December. The following judgment was delivered.

KNOX J. I have before me two notices of motion. The first is on behalf of the ninth defendant (the company) for an order pursuant to RSC Ord 18, r 19, or under the inherent jurisdiction of the court, that this action be struck out as being frivolous or vexatious or an abuse of the process of the court on the grounds that being purportedly brought by the plaintiffs on behalf of the company the plaintiffs are in fact not entitled to bring or continue the same, and the second, on behalf of the fourth defendant for an order in similar terms, with an alternative ground, 'alternatively that the same is obviously unsustainable against the Fourth Defendant', 'the same' being this action. e

I have earlier ruled that the procedure thus adopted is not so defective that the application should in any event fail. In the course of giving that ruling I expressed the view that the task for the court was to seek to follow the guidance given by the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 at 366, [1982] Ch 204 at 221, where the following passage from the judgment of the court appears: f

'In our view, whatever may be the properly defined boundaries of the exception to the rule [that is the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189], the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v Harbottle*.' g

That I now proceed to attempt to assess. h

Much of the factual background to these proceedings is not in issue and the dispute is far more concerned with the mental element in what was done and the manner in which it was done than with what happened.

The present voting position among the single class of ordinary shareholders is as follows. The three plaintiffs, Nora Smith, Lucienne Crane and Lord Rathcavan, are the holders of 13,400, 1,000 and 4,000 shares respectively in the company, Film Finances Ltd, out of the issued share capital of 155,100 fully paid shares. Together they therefore hold 18,400 shares, which is 11.86% of the voting rights. The defendants against whom claims are made in the statement of claim are between them the holders of 97,000 shares, i

ie 62.54% of the voting rights. These defendants fall into three groups. The first, second and third defendants, William Alan Croft, Richard Martin Francis Soames and David Alexander Korda (the executive directors), form one group. It is against them primarily that charges are brought. The fifth, sixth, seventh and eighth defendants, Mannergrand Services Ltd (Mannergrand), Cushingham Ltd (Cushingham), Bellwedge Ltd (Bellwedge) and Brindeel Ltd (Brindeel), form the second group; I shall refer to them together as 'the associated companies'. They are controlled or closely associated with one or more of the executive directors, Mannergrand with the first defendant, Mr Croft, Cushingham with the second defendant, Mr Soames, Bellwedge with the third defendant, Mr Korda, and Brindeel with all three of the executive directors. Finally there is the fourth defendant, Michael Lewis Carr. He is the chairman and a non-executive director of the company. He is a director of Wren Trust Ltd (Wren Trust) and nominated by it to the board of the company. That leaves 39,700 shares unaccounted for which fall into the following groups.

(i) 4,000 are held by Messel Nominees Ltd, a company whose shares are owned by another company, Defester Ltd, the shares in which are owned by Stephen Richard Hill and Peter Welsford, both of whom have been active in promoting the plaintiffs' claims. The votes attached to these shares are clearly in the plaintiffs' camp, bringing up their voting strength to 22,400 or 14.44% of the whole.

(ii) Two other shareholders, Georgian Investments Ltd, which holds 2,000 shares, and Sir Reginald Sheffield, who owns 50 shares, are not under the control or closely associated with the defendants against whom claims are made and have unequivocally stated their opposition to the further prosecution of this action. They account for 1.32% of the voting rights.

(iii) Film Finances Pension Fund holds 2,950 shares or 1.9% of the voting rights. It is common ground that it is under the control of the second and third defendants and is to be treated for present purposes as on a par with the executive directors so far as voting is concerned.

(iv) Wren Trust holds 30,500 shares, ie 19.66% of the votes in the company. This company is a wholly-owned subsidiary of Gresham Trust plc, which is a member of the Eagle Star group of companies. Wren Trust is thus owned and controlled by a large outside financial institution. One of the issues canvassed before me has been whether it should be regarded for the purposes of this application as independent or disinterested so far as the question whether or not these proceedings should continue is concerned. The boards of Wren Trust and of Gresham Trust plc have both expressed the view that the proceedings should not continue.

(v) Finally there are two holders of 100 shares each who have not committed themselves. This shareholding is so small as not to be of practical significance.

The following conclusions can be drawn from these shareholdings. (1) The executive directors with the associated companies have overall voting control. (2) If one excludes the votes of the executive directors, the associated companies and Film Finances Pension Fund, the votes of Georgian Investments Ltd, Sir Reginald Sheffield and Wren Trust totalling 32,550 (or 20.99% of the whole) comfortably exceed those of the plaintiffs and Messel Nominees Ltd, totalling 22,400 (14.44% of the whole) but not so comfortably as to give a 75% majority of the votes excluding those mentioned above. The majority is in fact about 59.24%. Such a majority can carry an ordinary but not a special resolution. (3) If the votes of Wren Trust are excluded as well as those of the executive directors, the associated companies and Film Finances Pensions Fund, then the plaintiffs and Messel Nominees Ltd with 22,400 votes have a very large majority over Georgian Investments Ltd and Sir Reginald Sheffield with 2,050 votes. That majority would be one of 91.62% and sufficient to pass either an ordinary or a special resolution.

The factual background is as follows. It will be appreciated that I am not making findings of fact at the end of an action and I am therefore limiting this account of the facts to that which seem to me necessary to explain the reason for my decision on the

questions I have to answer and which appear from the quotation at the outset of this judgment from the Court of Appeal decision in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354, [1982] Ch 204. a

The company was incorporated on 24 February 1950 with an initial paid up capital of £7,500. Throughout its history its trade has been the unusual one (it appears its only significant competitors are overseas companies) of guaranteeing the completion of films on time and within budget. It is obvious that this is a specialised business requiring for its successful operation both wide contacts in the film-making world and skill and experience in the production of films. It is also a business which requires a very small number of highly skilled personnel. The number of executives has not exceeded ten. It is the absolute antithesis of mass production. b

The founder of the business retired in 1959, and a Mr Robert Garrett became chairman and managing director. He had for a number of years a joint managing director, Mr Bernard Smith, who died in 1977. The first plaintiff is his widow. Mr Soames, the second defendant, joined the company as an employee in 1971, became a director in 1975 and managing director in 1977 in place of Mr Bernard Smith and Mr Robert Garrett, who continued as chairman. Mr Croft, the first defendant, has been a director since well before October 1979. He is a chartered accountant and deals with the financial side of the business such as investments. This is very important more especially as it is from the income from premiums received by the company and invested that its profit is largely derived. In this it resembles many insurance companies which suffer underwriting losses but remain profitable because of their invested income. A Mr Aikin, a solicitor, became an executive director in 1978 but resigned in September 1981 and Mr Carr, the fourth defendant, was appointed director in October 1979 as the nominee of Wren Trust. Mr Korda, the third defendant, became an executive director in July 1981. He ceased to be an executive director in January 1985 when he became managing director of RKO Film Group International at a very large salary but remained a non-executive director of the company. So from October 1979 until October 1982, Mr Garrett was chairman, the directors who were executives were Mr Croft, Mr Soames and Mr Aikin or Mr Korda, there being a short period in 1981 when both were on the board, and Mr Carr was a non-executive director. c

At the beginning of 1982 the executive directors only had shares carrying about 20% of the voting rights and the associated companies had none, but Mr Aiken had 7.5% of the voting rights. During the course of 1982 the executive directors and the associated companies acquired enough shares to give them, together with Wren Trust, overall voting control. Those acquisitions include transactions which the plaintiffs seek to impeach in the proceedings as having been effected by means of financial assistance from the company in breach of s 42 of the Companies Act 1981. Specifically Bellwedge bought 2,400 shares, Mannergrand bought 3,050 shares, as did Cushingham, and Brindeel bought 19,900. Bellwedge's purchase is not challenged in the statement of claim while those of Mannergrand, Cushingham and Brindeel are, but it was the latter that counsel for the plaintiffs placed in the forefront of his argument on s 42 of the 1981 Act. d

The purchase of 19,900 shares by Brindeel with money borrowed from the bank, the fact that Brindeel was acquired by the executive directors on or about 11 June 1982 with a view to the purchase of the 19,900 shares, that each of Mannergrand, Cushingham and Bellwedge received £33,000 from the company in early August and lent £28,000 to Brindeel thereafter, and that these sums were used by Brindeel to discharge its bank indebtedness are all admitted. What is denied is that the payments by the company to those three associated companies constituted financial assistance within s 42(2) of the 1981 Act. The defendants contend that these payments were in satisfaction of anticipated liabilities by way of salary or bonus payable to the executive directors and that on that basis there was no reduction of the net assets of the company for the purposes of s 42(2). I shall return to this later. e

By 1982 there had been dissension for some time on the board of the company between Mr Garrett, the chairman, who had been involved with the company from very early f

- a** days and who was by then 70 years or so old, and the executive directors, who were younger and had adopted a policy of expanding the company's business overseas, a project to which Mr Garrett was opposed. Matters came to a head in 1982 when the executive directors had completed their share purchases, which were not revealed in advance to Mr Garrett, and Mr Garrett was forced to resign as a director in October 1982 and received a £60,000 ex gratia payment. This caused a good deal of bitterness. One consequence was that Mr Garrett consulted Mr Hill to advise him about the executive
- b** directors' and Mr Carr's activities and Mr Garrett provided Mr Hill with a good deal of documentary material from the company's office. This continued after Mr Garrett's departure through Mr Garrett's secretary, a Mrs Byford, who clearly disapproved of the way Mr Garrett was forced to resign and continued unbeknown to the executive directors for some time to provide Mr Hill with documentary material from the company's offices.
- c** Armed with this material Mr Hill launched a sustained campaign of criticism of the conduct of the affairs of the company by the executive directors and Mr Carr, in particular at the amounts drawn out of the company by the executive directors and the associated companies. Here again there is no dispute about the amounts drawn out. I ignore sickness benefits, pension scheme payments and small fixed directors' fees. In other payments were made as follows:

d	1980	1981	1982	1983	1984
	£	£	£	£	£
Mr Soames					
Salary	42,000	50,000	53,333	67,500	70,000
Bonus	29,800	40,000	40,000	70,000	100,000
Cushingham	15,000	18,500	61,000	—	—
e Mr Croft					
Salary	8,500	15,000	15,000	—	—
Bonus	24,300	20,600	10,000	—	—
(Associated companies)					
Billsons & Co	5,650	15,150	15,150	15,150	55,150
f Mannergrand	7,500	27,500	29,000	50,000	30,000
Mr Korda					
Salary	—	8,751	—	—	—
Bonus	—	—	—	—	—
Bellwedge	—	—	76,169	93,750	131,867
g Mr Garrett					
Salary	21,000	25,000	25,000	8,333	—
Bonus	51,000	70,750	—	—	—

- The ex gratia payment of £60,000 mentioned above was also paid to him. Mr Aiken's payments I need not detail. Finally, in relation to Mr Carr, there were payments of
- h** £1,500 made to Gresham Trust plc in the years 1980, 1981 and 1982, £7,595 in 1983 and £5,028 in 1984.

Before the annual general meeting of the company called for 10 December 1982 Mr Hill's solicitors wrote a letter dated 7 December 1982 to Mr Carr:

'STRICTLY PRIVATE AND CONFIDENTIAL

- j** Re: *Film Finances Ltd.*

We are writing to you in your capacity as Chairman and nominee of a minority shareholder in the above company. We are instructed by Mr. S. R. Hill, F.C.A., who has been appointed to act as adviser to a number of minority shareholders in the company holding in total over 40% of the issued share capital, including the executors of Patrick Garrett for whom we also act. We understand that Mr. Hill—

informed you last week that: 1. The 1982 published accounts of the company are

grossly misleading, indicating as they do a profit before tax of over £500,000 whereas compliance with current accounting standards and the usual statutory requirements would result in showing a loss of over £500,000. 2. The amounts proposed in the accounts as directors' remuneration are excessive, unreasonable and so out of all proportion as to cause very considerable doubt as to the collective bona fides of the executive directors. 3. There is firm evidence that the Managing Director of the company earlier this year approached a merchant bank (not your own of course) to seek advice on how to employ the company's funds to enable the executive directors to obtain 100% control of the company. It would appear that the advice given was based upon an incomplete explanation of the provisions of Sections 42 to 44 of the Companies Act 1981 which sections also impose criminal penalties for failure to comply with their provisions. We understand that Mr. Hill did not inform you of this aspect of item 3 above as he would have preferred to have told you this in person and shown to you the evidence. However, Mr. Hill did inform you that there is evidence that the executive directors have partially adopted this misleading advice in the current year, in that there are accounting irregularities in respect of items passing through the bank pass sheets not entered in the cash book of the company. (Mr. Hill, of course, only has detailed information up to mid-October when Mr. Garrett retired from chairmanship of the company.) In view of the prima facie evidence of fraud, the minority shareholders' group requires that further investigations be carried out to enable this evidence to be substantiated or refuted and the available remedies pursued if necessary. It would be preferable that you use your position as Chairman of the company to effect this, as the alternatives would be a Department of Industry or Fraud Squad investigation which could result in very far-reaching consequences including exposure damaging to the company. 4. There is evidence of other financial irregularities that are not of such pressing importance as points 1 to 3 above and which may be regulated in due course following the full and early investigation that must be carried out into the affairs of the company . . .

There are two further paragraphs which it is not necessary for me to read.

At the annual general meeting of the company on 10 December 1982 at which the accounts for the year ending 30 June 1982, approved by the directors on 18 November 1982, were to be laid for approval, there were angry scenes and allegations of accounts incorrect by £1m. Mr Carr adjourned the meeting and forthwith instructed Messrs Peat Marwick Mitchell & Co to investigate and report on Mr Hill's complaints. Initial instructions were by telephone but the formal instruction was in a letter from Mr Soames dated 14 December 1982. It is addressed to Peat Marwick Mitchell & Co for the attention of Tom Allen Esq, and reads as follows:

Dear Sirs,

I write to confirm the Board's instructions to you to carry out an investigation of the affairs of this Company in respect of its accounting period to 30th June, 1982, the following period and any preceding period or periods you may think necessary in relation to the allegations set out in Points 1. to 4., inclusive of the letter from Wood Nash & Winters dated 7th December, 1982 addressed to Michael Carr. [Pausing there, that letter is the one which I have just read.] In view of the seriousness of the allegations you are requested to commence and complete the investigation as soon as possible and make a full report to the Board at the earliest possible date. While the Board's instructions are to investigate specific points referred to, it is not their intention to prevent or restrict you from extending the investigation where you believe it to be necessary in the cause of establishing the truth or in the event that other irregularities are revealed. I confirm that instructions have been given to all the Executives and Employees of the Company and to its Solicitors and Auditors to co-operate with you to the fullest extent and to give you such information as you may require.'

That is signed on behalf of the company by Mr Soames.

- a* Mr Allen of Peat Marwick Mitchell interviewed the company's staff and directors, met Mr Hill and his helper Mr Welsford twice, and had access to the company's books. His report was produced on 11 March 1983. It contains the following passage, after having set out the circumstances of the investigation being instituted:

- b* 'We have decided that it would be appropriate for us to submit a report at this stage, which addresses the matters set out above and summarises our comments in relation to the work we have so far carried out. The directors will then be in a position, having considered this report and received any representations which shareholders think fit to make to them, to consider whether or not we should be asked to pursue any of the matters discussed, or any other matters.'

- c* The report is therefore not to be regarded as necessarily definitive. A substantial part of the report was concerned with criticisms made by Mr Hill and set out in his solicitor's letter of 7 December 1982 which I have read concerning the accountancy deficiencies in the preparation of the company's accounts. These criticisms were effectively rejected in the report. No claims are made in this action about this and I pass over that part of the report. Under the heading 'DIRECTORS' REMUNERATION AND ALLIED MATTERS', the report said:

- d* 'The Company's Articles of Association provide that the directors may appoint one or more of their body to be holder of any executive office. The Articles of Association also provide that a director appointed to any such office shall receive, in addition to any remuneration to which he may be entitled by way of fees, such additional remuneration by way of salary, lump sum, commission or participation in profits as the directors may determine, and he or his dependants may receive from the Company such a pension or other gratuity, benefit or retiring allowance as the directors think fit. The remuneration paid, or payable, to Mr. Croft has been paid, or shown as payable to, Billsons & Co., his professional firm. This is a quite normal arrangement and the amount of Mr. Croft's remuneration has been properly included in the published accounts under the heading of directors' emoluments. In addition to the amounts paid in respect of directors' emoluments, amounts have been paid, or shown as payable to, companies or firms owned or controlled by certain of the directors, or in which they have an interest ("the connected companies"). These arrangements were disclosed in the notes forming part of the accounts for the year ended 30th June, 1982. It was not necessary (for reasons discussed below) for these arrangements to be disclosed in earlier accounts, provided that no part of the amounts so paid or payable could be regarded as directors' emoluments requiring disclosure under Section 196, Companies Act 1948. Section 196(2)(a) requires disclosure of amounts paid "... in respect of his services as a director of the company or ... in connection with the management of the affairs of the company or any subsidiary thereof ...". The amounts paid to the connected companies (which were disclosed in the accounts for the year ended 30th June, 1982 as a result of the requirements of Section 54 of the Companies Act 1980, as amended by Schedule 3, Companies Act 1981) relate to amounts paid or payable in the year ended 30th June, 1982 as follows:

	£
<i>j</i> Mr. Croft, Mannergrand Services Limited and Billsons & Co; accountancy and secretarial fees	44,150
Mr. Korda, Bellwedge Limited; film investigation fees	76,169
Mr. Aikin, consultancy fees	10,856

The services rendered by the connected companies, as described above, are services which do not appear to fall within the definition referred to above in Section 196 of the Companies Act, 1948; they could have been provided whether or not the directors with interests in the connected companies had been directors of the Company. It has been observed that the amounts paid to the connected companies were disclosed in the accounts for the year ended 30th June, 1982, but not in the accounts for the previous year. The requirement for disclosure of contracts with directors and other was introduced by the Companies Act 1980, Section 54, but subsection 6 specified that disclosure was not required in respect of a transaction, arrangement or agreement which was not entered into during the relevant period for the accounts in question or which did not subsist at any time during that period. On the basis that the arrangements (which at that time concerned Mr. Croft's and Mr. Aikin's firms) had been entered into in an earlier period, disclosure was not required in the accounts for the year ended 30th June, 1981. The Companies Act 1981 (enacted on 30th October, 1981) introduced, in Schedule 3, an amendment to the 1980 Act so that the word "or" (italicised above) was deleted and the word "and" was substituted. As a result it became necessary to disclose arrangements even if they had been entered into in an earlier period. The accounts for the year ended 30th June, 1981 had already been issued and adopted by the members prior to the amendment introduced by the Companies Act 1981. In the accounts for the year ended 30th June, 1982 the necessary disclosures were made, and comparative information given in respect of the previous year. We are satisfied that, in respect of the above matters, the appropriate disclosures were made in the relevant accounts of the Company. There is, however, a further matter which, in our opinion, requires disclosure and which has been disclosed in the revised accounts sent to members for the year ended 30th June, 1982. One of the headings of expenditure incurred by the Company is "Investigation Fees" and included under this heading are the following amounts invoiced by a company called Cushingham Limited:

<i>Year ended 30th June</i>	<i>£</i>
1980	15,000
1981	18,500
1982	61,000

The shareholders in Cushingham Limited are shown by the Companies House file to be Mrs. D. H. Cushingham (98 shares) and two other persons (one share each). We are informed that none of the directors of the Company has any beneficial interest in the shares of Cushingham Limited. In response to our questions regarding these payments, we have been informed in a note submitted by the Company's solicitors—"... that during the years ended 30th June 1980 and 1981 and 1982 advisory and introductory services were supplied by Cushingham Limited, a theatrical and entertainment company, which has rendered invoices in respect of its services during these years for £15,000, £18,500 and £61,000 respectively. During the same years Mr. Soames was in principle entitled to be voted remuneration of £86,950, £108,650 and £154,483 respectively. However, he limited his remuneration to £71,950, £90,150 and £93,483 respectively being amounts equal to his total entitlement in principle in each year after the deduction in each year of the total amounts invoiced by Cushingham Limited. The directors have not formed a view as to the total value of the services of Cushingham Limited not deeming this to be necessary since even if the company did not receive services to the invoice value it did not suffer any loss on the basis that if the amounts invoiced by Cushingham Limited had not been paid Mr. Soames would have drawn further remuneration." Although we understand that services (by way of introductions) were provided to the company by Mrs. Cushingham, and therefore by Cushingham Limited, it is not necessarily claimed that the services were of substantial value. The

a rationale for the Company accepting the charges from Cushingham Limited is as set out in the note quoted above and it will be seen that this was on the basis that the Company did not suffer any loss because, if the amounts invoiced by Cushingham Limited had not been paid Mr. Soames would have drawn further remuneration. In our view, on this basis, the amounts paid to Cushingham Limited constitute disclosable emoluments as defined by Section 196 of the Companies Act 1948. In effect, it would appear that Mr. Soames was instructing the Company to pay amounts, which would otherwise have been paid to him as remuneration, to Cushingham Limited and, in these circumstances, the amounts involved would seem to constitute emoluments of Mr. Soames for the purpose of the disclosure requirements of Section 196, Companies Act 1948. On the foregoing basis, the total emoluments paid or payable to the directors, and the total amounts paid or payable to companies in respect of each of the latest three years are as follows [and then there are set out in tabular form figures for emoluments and payments to connected firms or companies which correspond, so far as the figures are concerned, with the figures in the statement of claim].

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Two things appear from the extract of the report quoted above. The first is that it was Mr Allen's view that the payments to Cushingham in the years ending 30 June 1980, 1981, 1982 of £15,000, £18,500 and £61,000 should have been disclosed as part of Mr Soames's emoluments because in the circumstances they did fall within the requirements of s 196 of the Companies Act 1948. The inclusion in the note on directors' salaries of the £61,000 for 1982 in the revised 1982 accounts which were presented to and passed by the adjourned annual general meeting on 30 March 1983 and the inclusion therein of the £18,500 for 1981 in the comparative figures in those accounts constitute a major difference between those accounts and the original 1982 accounts which were approved by the directors on 18 November 1982 and laid or intended to be laid before the annual general meeting on 10 December 1982.

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The second is that if the only basis on which the payments to Mannergrand, Billsons and Bellwedge could be justified was that of remuneration for acting as a director or in connection with the management of the affairs of the company the same conclusion as that reached regarding Cushingham would have applied. But Mr Allen took the view that these payments were for services rendered by the organisations to which payments were made and were exempt from disclosure under s 196 of the 1948 Act because the services could have been provided whether or not Mr Croft and Mr Korda had been directors of the company. In relation to Mr Korda there is a later reference in the report to 'the technicality that Mr Korda works for Bellwedge Limited which provides his services to the Company'. The amounts involved are not limited to those mentioned for the year ending 30 June 1982 with which the report was primarily concerned but also so far as Mr Croft is concerned £13,150 and £42,650 for the years ending 30 June 1981 and 1982.

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The report went on to deal with some matters which I need not discuss because they are not in issue in this action, such as Mr Carr's consultancy fees paid to Gresham Trust plc, the taxation treatment of director's emoluments and the relevance of dividend waivers, and continued as follows:

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'Mr. Carr, who became Chairman of the Company in October 1982, was previously a non-executive director and is now non-executive Chairman. Mr. Soames and Mr. Korda are both engaged full time in working for the Company (ignoring the technicality that Mr. Korda works for Bellwedge Limited which provides his services to the Company). Mr. Croft is in practice as a chartered accountant, but spends at least two full days a week at the Company's offices and we understand that he is available to the Company at all times for such other time as is needed. The Company operates in an industry where the risks and rewards are high. The levels of remuneration, and standards of living, enjoyed by prominent people in the industry are often high in relation to those enjoyed by prominent people in

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many other industries. In their business relationships with companies in the industry, the directors are dealing with prominent people in the companies concerned. It has been indicated to us that the time devoted by Mr. Garrett to the affairs of the Company in recent years was substantially less than full time. However, Mr. Garrett had, in the past, been active in the Company's affairs and continued to be identified with the Company as a prominent member of the industry. In forming a view as to whether the level of emoluments and charges paid or payable to the directors and/or the connected companies is reasonable, there are no absolute yardsticks and, while members will no doubt want to form their own views they may wish to have regard to our general comments, as set out above. The arrangements for the determination of the levels of remuneration, and the acceptance of charges from connected companies, would appear to have been conducted with very little formality. We understand that the present directors do not have service agreements. Mr. Garrett had a service agreement which was not due to expire until 31st March, 1985; this was terminated on his resignation in October 1982. As a consequence of the termination of his service contract, the Company made an ex gratia payment of £60,000 to Mr. Garrett and agreed to indemnify him against liabilities arising out of claims or proceedings brought against the Company or himself relating to the term of his employment (excluding liability for taxes for which Mr. Garrett might be personally assessable). There is some reference in the minutes to agreed salary levels, but a substantial part of the total remuneration has been by way of bonus and, for the most part, it is not possible to point to specific memoranda or minutes of directors meetings confirming the levels of remuneration and charges from connected companies. The view has probably been taken that, because of the very few people involved, the frequent overseas travel which is necessary (making formal meetings difficult to arrange) and the ability of the directors to deal with matters on an informal basis, there is no need for formal confirmation of matters discussed informally between the directors. In any event, it can be argued that the approval of the Company's accounts by the directors for submission to members constitutes implicit approval of all the amounts included in the accounts. This is not, however, a company in which all the shares are owned by the directors, nor is it a company in which all the directors have been, or have remained, in agreement with one another. In our view it is most important that there should be a proper record of directors' meetings and confirmation of approval by the directors of their remuneration, amounts payable to companies with which they are connected and other significant matters. We do not think that the lack of formal confirmations affects the validity of the changes accepted by the Company but, not least in the directors' own interests, we strongly recommend that in future these matters should be properly recorded.

Counsel for the plaintiffs attacked the adequacy of the report regarding payments thus dealt with, principally on the ground that Mr Allen had failed entirely to address himself to the question of the characterisation of the disputed payments, and had not satisfied himself on the question whether there was or was not a contractual obligation on the company to the several associated companies, and whether the latter ever did actually render any services to the company.

As regards another area of complaint by Mr Hill and other shareholders, that of directors' expenses, the report reads as follows:

EXPENDITURE

We have made enquiries about all significant items of expenditure incurred by the Company in the year ended 30th June, 1982. In addition we have enquired into certain items of expenditure in the two previous years which were selected for enquiry following a brief review of payments by the Company in those years.

Travelling and promotion

- a* Many of the guarantees issued by the Company relate to films which are being produced by overseas companies, and much of the filming and other work takes place overseas. It is therefore inevitable that the directors, in particular Mr. Soames and Mr. Korda, need to be involved in a substantial amount of travel on the Company's behalf. We understand that during the year ended 30th June, 1982, Mr. Soames was abroad for periods totalling 137 days, and Mr. Korda was abroad for periods totalling 98 days. The Company operates in a competitive and international environment, and in an industry where it is not unusual for significant entertaining expenditure to be incurred. When the directors are abroad, we understand that significant expenditure is incurred by them on telephone calls; with Mr. Soames being abroad for extended periods he has to continue to manage the Company's affairs from hotels. It is therefore to be expected that the travel and promotion costs will represent significant amounts. We have analysed the expenditure incurred on travelling and promotion for the year ended 30th June, 1982, and particulars are set out in Appendix II. Having regard to the foregoing comments regarding the inevitably high levels of travel and entertainment costs, and to the periods spent abroad, we have no reasons to query the total levels of expenditure on travelling and promotion incurred by the Company in the year ended 30th June, 1982. The procedures for recording the expenditure are, however, lax. Although many accounts are settled by American Express or Diners Club cards, there is inevitably a significant amount of cash expenditure. When cash is needed by the directors for travelling and entertaining, amounts are drawn from the Company, but no attempt has been made to itemise and summarise the expenditure and to relate this to the amounts drawn. [And they then went on to recommend a particular system for the future.]
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- c*
- d*
- e*

- f* In relation to the impeached share transactions and the complaints made under s 42 of the 1981 Act the report reads as follows. It first of all sets out the transfers in question which I have already mentioned and states that the transfers were approved by a directors' meeting of 19 October 1982, that the payments for the three parcels of shares bought by Brindeel were made on 1 and 14 July and 7 September 1982, which was the date when the transfers were lodged for stamping with the Inland Revenue. The report then continues:

'In August 1982 three cheques, each for £37,950 (£33,000 plus 15% VAT) were paid to Bellwedge Limited, Mannergrand Services Limited and Cushingham Limited. The total of these cheques, including the VAT, was therefore £113,850.'

- g* It has been suggested that:
- the payments made to Bellwedge Limited, Mannergrand Services Limited and Cushingham Limited directly or indirectly enabled the transferees to acquire the shares listed above and that the payments made to the three companies constituted financial assistance within the meaning of, and as prohibited by, Section 42, Companies Act 1981.
- h*

—the payments and the share transfers had been concealed from Mr. Garrett.

- i* If the payments made to Bellwedge Limited, Mannergrand Services Limited and Cushingham Limited were properly made by the Company in discharge of obligations to those companies, then the payments would not constitute financial assistance within the meaning of Section 42, Companies Act 1981. If the payments were not so made, then the likelihood would be that they were improper payments by the Company, in which event Section 42, Companies Act 1981 and possibly other considerations would be relevant. The first question which we have considered is therefore whether the payments were properly made by the Company. In relation to the second matter (the suggestion that the payments and the share transfers had

been concealed from Mr. Garrett), we have approached this by considering the consequences if the matters were indeed concealed from Mr. Garrett (which it may not now be possible to substantiate or disprove). a

Payments made in August 1982

The accounts for the year ended 30th June, 1982 have the following amounts included in creditors as at that date:

	£	
Cushingham Limited—investigation fees	36,000	b
Mannergrand Services Limited—secretarial fees	29,000	
Bellwedge Limited—investigation fees	39,500	

In addition, there are further amounts included in creditors as at 30th June, 1982 in respect of directors and/or the connected companies:

	£	
Directors' remuneration		c
Mr. R. M. Soames	37,615	
Mr. W. A. Croft	17,000	
Billsons & Co.—accountancy services	52,000	

So far as the amount due to Billsons & Co. is concerned, this represents an accumulation over several years, the amount brought forward at 1st July, 1981 being £37,000 with £15,000 being added in respect of the year ended 30th June, 1982. All the other amounts listed above are accruals relating to the year ended 30th June, 1982. Prima facie, the amounts paid to Cushingham Limited and Bellwedge Limited, being less than the amounts included in creditors as at 30th June, 1982, might be assumed to be in reduction of those liabilities. In the case of Mannergrand Services Limited, the amount paid exceeded the liability to that company and, for the whole amount to be a proper payment by the Company, it would be necessary to treat the excess (£4,000 plus VAT) as being a part payment of the amount due to Billsons & Co., on the basis that Mannergrand Services Limited and Billsons & Co. are both controlled and/or owned by Mr. Croft. At the time the three payments were made, however, they were not supported by invoices, or payment requests, from the companies involved nor was there a formal request from Billsons & Co. to pay £4,000 of the amount due to that firm to Mannergrand Services Limited in discharge of the liability to Billsons & Co. We have already commented on the absence of formal procedures for the approval of expenditure and we have not seen any evidence, in the form of internal memoranda, board minutes, or other documentation, which would confirm that the amounts payable to Cushingham Limited, Mannergrand Services Limited and Bellwedge Limited, as set out above, were formally considered and approved by the directors in August 1982 or, for that matter, at a later date. However, the approval of the accounts of the Company, for submission to members by the directors, on 18th November, 1982, effectively constituted implicit approval of all the items included in the accounts and, as discussed earlier, it may therefore be said that the necessary formal approval of various charges relating to the directors and connected companies was implicit in the approval by the directors of the accounts of the Company. It nevertheless remains the position that the implicit approval was not until 18th November, 1982 whereas the payments were made in August 1982. It is not unusual for companies who provide services to seek payments on account in advance of a final account being rendered, and the period to which the services related had already elapsed in August 1982. If, therefore, it could be established that there was a clear obligation on the Company to pay the amounts which were subsequently included as creditors as at 30th June, 1982, then, in our view, it would not be improper for the Company to make payments on account of these liabilities in August 1982. In that the present directors of the Company certainly approved these charges in respect of the year ended 30th June, 1982 when the accounts were being finalised in November 1982, d
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- a they would presumably have accepted them as proper charges had the matter been formally considered in August 1982. At that time Mr. Garrett was also a director, but we understand that he was not consulted regarding the payments. We do not know, if he had been consulted, whether he would have agreed that the Company should accept the charges. We have already criticised the lack of formal procedures for the approval of expenditure and we think it is particularly unfortunate that the payments in question in August 1982 were not formally approved by a meeting of
- b all the directors. The question of whether the payments made in August 1982 were properly made by the Company must, in our opinion, depend on whether or not the charges from the companies in question were proper charges for the Company to accept. Legal advice has been received that, on the assumption that the charges were proper, payments in respect of services rendered in the year ended 30th June, 1982 made in August 1982 before invoices or payment requests were received
- c would not constitute financial assistance within S. 42 of the Companies Act 1981 on the ground that such payments did not reduce the net assets of the Company to a material extent: the net assets were already reduced by the obligation which arose, on services being rendered, to pay for them.'

- d The report does not in terms say that the charges made by the associated companies were proper charges. That was in a sense left for shareholders to make up their minds about in the light of the general considerations set out in the earlier passage in the report which I have already quoted. Here too counsel for the plaintiffs criticised the report on the following grounds.

- e The reliance on the accounts for the year ending 30 June 1982 was, he submitted, misplaced because those accounts, even in the first edition, were not approved by the directors until 18 November 1982 and were therefore not in existence in August 1982 when the three cheques for £33,000 plus value added tax were signed in favour of the associated companies. Everything hinged, he submitted, on whether there was at that date an obligation to pay, a question which was assumed rather than decided in the report. So far as the executive directors were concerned the only liability of the company was under such service contracts as existed.

- f As to service contracts there is no dispute on the facts. Mr Soames had a service agreement dated 27 May 1975 which by cl 4 provided for him to receive a fixed salary of £10,000 per annum with such bonuses as the directors might determine with a proviso that in no event should the salary and bonus payable in any one year exceed £20,000. That agreement has not been terminated. Various resolutions have been passed by the board resolving that cl 4 of the service agreement should be varied by increasing Mr
- g Soames's salary to figures in excess of £20,000, or that his basic emoluments or salary should be increased to figures in excess of £20,000. With effect from 1 July 1980 the operative figure under the latest such resolution is £50,000. Mr Korda too had a letter dated 15 April 1981 setting out the terms of his employment as a full-time executive of the company at a salary of £35,000 per annum. So far as Mr Croft is concerned there was no formal service contract but there have from time to time been board resolutions
- h increasing his salary. The amounts paid to the executive directors and the associated companies in respect of services rendered have at all material times exceeded the amounts provided for by the relevant service agreement or board resolution and the justification for this is claimed to reside in the board's powers under the articles, and if necessary that of the company in general meeting.

- i The relevant articles provide as follows. Article 10 reads:

'The first sentence of Clause 76 of Part I of Table "A" shall be deemed to be deleted. Each of the Directors shall be paid out of the funds of the Company by way of remuneration for his services as a Director, at the rate of £150 per annum and the Chairman shall also be paid additional remuneration for his services as Chairman at the rate of £100 per annum. Such rates of remuneration may be increased by an Ordinary Resolution of the Company.'

Article 17 reads:

(A) The Directors may from time to time appoint one or more of their body to be holder of any executive office, including the office of Chairman, Deputy Chairman, Managing or Joint Managing Director or Manager, on such terms and for such period as they may determine . . .

(C) A Director appointed to any such office as is mentioned in sub-paragraph (A) of this Article shall receive in addition to any remuneration to which he is or may become entitled under Clause 76 of Part I of Table A hereof such additional remuneration by way of salary, lump sum, commission or participation in profits as the Directors may determine, and he or his dependents may receive from the Company such pension or other gratuity benefit or retiring allowance as the Directors shall think fit.'

Article 76 of Table A in Sch 1 to the Companies Act 1948 provides:

'The remuneration of the directors shall from time to time be determined by the company in general meeting. Such remuneration shall be deemed to accrue from day to day. The directors may also be paid all travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.'

I mention in passing that art 80 of Table A is not modified or excluded, and thus the business of the company is to be managed by the directors.

Purely as a matter of construction it is in my judgment clear that the exclusion of the first sentence in art 76 of Table A contained in art 10 relates only to remuneration for activity as a director, and does not operate to exclude the residual power of the company in general meeting to approve remuneration for executive services. Even on that basis, however, the actual right to remuneration over and above what any relevant service agreement provided in relation to services rendered in the year ending 30 June 1982 would not have arisen on any view before the directors' meeting approving the accounts for that year in October 1982 and therefore after August 1982 when the impeached payments to the associated companies were made. So, if counsel for the plaintiffs is right in his submission that only actual liabilities counted for the purpose of testing the propriety of a payment by a company in relation to s 42 of the 1981 Act, a breach of the section would be established at least *prima facie*. I shall return to this later.

Once the report was issued a revised version of the accounts for the year ending 30 June 1982 was prepared and the annual general meeting, which had been adjourned on 10 December 1982 and once again, was later completed on 30 March 1983. At that meeting those accounts as thus revised were approved by a majority of the shareholders but there is no undisputed evidence of how the majority was made up. There were many criticisms voiced at that meeting, mainly by Mr Hill. In general terms they were principally directed either at accounting questions concerning the calculation of profits or at the level of remuneration which the executive directors were receiving. There were also criticisms, not only from Mr Hill, of the payment of £61,000 to Cushingham and its treatment in the accounts and in the report. It is not, however, now claimed in the action that any of the matters now complained of regarding the year ending 30 June 1982 were not, at least in general terms, matters of which the ordinary shareholders were made aware through the report and the revised accounts for that year.

In the last two years in which there are payments which are impeached (that is the years ending 30 June 1983 and 1984) Mr Soames received the whole of the payments made in connection with his services and nothing was paid to Cushingham. On the other hand apart from the fixed director's fee of £150 and the relatively trivial payments for sickness insurance neither Mr Croft nor Mr Korda received salary or bonus but Billsons and Mannergrand between them received £65,150 in the first of those years and £85,150 in the second, while Bellwedge received £93,750 and £131,867 in those years respectively.

a There is no allegation that these sums were not revealed in the company's accounts for those years and those accounts were passed at an annual general meeting of the company as regards one year with one dissentient voice (that of a representative of Messel Nominees Ltd) and as regards the other without dissent.

b During 1984 the company, in accordance with the relevant provision of the 1981 Act, purchased 44,900 issued shares, principally from members of the family of Mr Garrett, who had died on Christmas Eve 1982, and the executive directors purchased other shareholdings from one or more of the vendors to the company totalling 12,350 shares at the same price of £9 per share. Other minority shareholders were offered the same price but save for a Mr Travis who sold 4,000 shares in July 1984 to Mr Soames and Mr Korda, again at £9 per share, no further shares changed hands, leaving the voting position as I described it as the outset.

c Over the years while the executive directors have had control of the management of the company the trend both of profits, net assets and dividends have all followed a general upward course. In the year ending 30 June 1977 there was a loss before taxation of £237,257, net current assets of £6,439 and no dividend was declared, while for the year ending 30 June 1984 the accounts show group profit on ordinary activities before taxation of £1,244,185, net current assets of £4,090,518 and a dividend of £1.50 per share was declared. On any view the business has expanded and is very substantial. This has been reflected by the trend in the price paid for shares in the company, which has risen from £3 in early 1982 to £9 in 1984. The plaintiffs' complaint is that the profits should have been larger still if the executive directors had behaved with the same commercial enthusiasm so far as the company's earnings are concerned but with greater legal and accountancy propriety and honesty so far as payments out by the company are concerned.

e The writ was issued on 7 February 1985 with the statement of claim indorsed on it. The claims made in the very lengthy statement of claim can be placed in four categories.

(1) There are claims of excessive remuneration in the strict sense of excessive payments direct to the person who is alleged to be overpaid. For example, para 32 of the statement of claim avers that Mr Soames was paid £170,239 in respect of the year ending 30 June 1984 in addition to his fixed £150 under the articles, that these payments purported to be by way of salary and bonus, that it is not admitted that any of these sums were duly paid to him save in so far as they were authorised by his service agreement and that at least to the extent to which £170,239 exceeded £93,543 (viz what Mr Soames was paid in the year ending 30 June 1982) that was in excess of a commercially fair, reasonable and proper remuneration. The conclusion is drawn that to the extent of not less than £76,696 there was an ultra vires gift by the company, that the executive directors and Mr Carr in procuring such payments did not act in good faith or for the benefit of the company but with a view to benefiting Mr Soames, were in breach of their fiduciary duties and guilty of a fraud on the minority shareholders, that those breaches were dishonest and that the executive directors and Mr Carr were guilty of a conspiracy in so acting.

h (2) The second category of claims made relates to payments made to one or other of the associated companies or Billsons which are claimed also to be in whole or in part payments not authorised by the board or otherwise and constituting an ultra vires gift by the company made otherwise than in good faith or for the benefit of the company but rather with a view to benefiting the executive director concerned and made in dishonest breach of fiduciary duties by way of fraud on the minority shareholders and the product of conspiracy.

j I take as an example a claim to a sum of £55,300 referred to in para 31(iii) of the statement of claim. In relation to that it is pleaded by para 31(i) that in respect of the financial year ending 30 June 1984 the executive directors and Mr Carr procured the payment out of the company's funds of £85,150 to Mannergrand and/or Billsons, that none of those payments was authorised by the company either by virtue of any resolution of its board of directors or otherwise and that in relation to those payments to the extent of not less than £55,300 they were received by Mannergrand and/or Billsons purportedly

in respect of services allegedly rendered to the company by Mannergrand and/or Billson during that financial year but that in reality the company received no consideration or benefit of any kind for any of those payments to that extent but they amounted in substance to a gift out of the funds of the company and were ultra vires the company. That figure of £55,300, which is the part of the total of £85,150 paid out to Mannergrand and Billsons, and is claimed to be thus vitiated, is arrived at by deducting from the total payments of £85,150, £29,850 which is what Mr Croft received from the company in respect of the financial year ended 30 June 1983 and with regard to which the plaintiffs, while not admitting that they ever became payable to Mr Croft except to the extent that a fixed salary was payable to Mr Croft in accordance with the resolutions of the board, the last of which was that Mr Croft's existing salary be increased to £15,000 per annum, nevertheless do not raise a claim of an ultra vires gift or make a claim for repayment to the company. Similar claims are raised in relation to payments made to Bellwedge such as a claim to £86,868 in respect of the financial year ending 30 June 1984, being the excess over £45,000 described as the maximum total sum which Bellwedge was properly entitled to receive in respect of that year in respect of Mr Korda's employment as a full-time executive of the company.

(3) The third category of claim is that based on infringements of s 42 of the 1981 Act (now s 151 of the Companies Act 1985), more especially in relation to Brindeel's purchase of 19,900 shares in the company.

(4) The fourth and last category of claim relates to expenses of the executive directors in respect of which it is alleged that the sums in question were not paid in respect of any expenses which the executive director concerned had ever incurred in rendering any services to the company. As regards those payments it is similarly alleged that they were in substance gifts, either to the executive director concerned or other persons, and therefore ultra vires the company and made by the executive directors concerned in fraudulent breach of fiduciary duties which constituted a fraud on the minority shareholders. Here again the issue is not whether the payment was made, for that is conceded, but whether it was a proper expense of the director concerned.

Finally as regards all the claims made, the payments which it is sought to impeach were all made out of profits available for distribution. There is no question raised at any stage of an improper return of capital or potential fraud on creditors.

There have been earlier proceedings in this court in this action. Walton J on 27 January 1986 discharged orders made the previous year by Master Chamberlain, notably an order made on 28 March 1985 on an ex parte application by the plaintiffs whereby the master gave liberty to the plaintiffs to continue the action until the conclusion of discovery and inspection of documents on terms that the company should pay the plaintiffs' costs on a common fund basis down to that stage of the action and indemnify the plaintiffs against any liability for costs down to that stage: see *Smith v Croft* [1986] 2 All ER 551, [1986] 1 WLR 580. It is primarily concerned with the costs aspects of the matter with which I am not concerned, but Walton J observed of the application before him ([1986] 2 All ER 551 at 560, [1986] 1 WLR 580 at 591):

'This is, of course, not an application to strike out the action on the grounds that it cannot be justified as a minority shareholders' action, but quite clearly the same kind of considerations apply.'

Similarly it is my view that there is a very large degree of overlap in the material to be evaluated in the two applications.

Both parties agreed in submitting to me that I was not in any way bound by Walton J's findings or his view of the matter in that decision but not surprisingly the plaintiffs submitted that Walton J's approach was wrong and not one which I should follow, whereas the fourth defendant and the company invited me to reach similar conclusions to those which he reached and for the same reasons. The situation is not simplified for me by the facts that Walton J refused leave to appeal and May LJ subsequently gave leave to appeal on 3 July 1986, directing that the appeal be not heard until the application to

strike out, that is the application before me, was dealt with. It would be wrong for me to liken the Court of Appeal to the deep blue sea and even more wrong for me to liken my brother Walton J to the devil but there is very clearly rather more scope than usual for any view I express to be in conflict with more authoritative ones. However, I have come to the conclusion that I should express my own views.

I adopt the same fourfold classification as that which I have used above in setting out the nature of the claims made by the plaintiffs in the statement of claim. I emphasise that in assessing whether or not the plaintiffs have established a prima facie case that the company is entitled to the relief claimed I am not deciding anything conclusively. In these circumstances it is undesirable for me to say more than is strictly necessary to give my reasons for the view I have formed. In particular I propose to deal differently with the questions of law which are involved in the determination of the first question which I have to answer, namely whether the plaintiffs have established a prima facie case that the company is entitled to the relief claimed, from those which are involved in the determination of the second question which I have to answer, whether the plaintiffs have established a prima facie case that the action falls within the proper boundaries of the exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189. The former are bound to arise in the action if it proceeds and are in some cases dependent on findings of fact to be made in the action. The latter are unlikely to arise in the action, and in so far as questions of fact arise they are collateral to the issues in the action. I therefore propose only to give my prima facie view with regard to the former but to decide the latter, more especially as they were very fully argued by counsel on both sides.

I return to the four categories of claim.

(1) *Payments made to an executive director purportedly by way of remuneration*

No arguable ultra vires claim arises here in my view. I take as the fundamental rule in considering the scope of what is properly called ultra vires, by which I mean beyond the capacity of the company as opposed to that of its officers, the following passage in the judgment of Slade LJ in *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1985] 3 All ER 52 at 85, [1986] Ch 246 at 295:

‘... if a particular act (such as each of the transactions of 22 January 1969 in the present case) is of a category which, on the true construction of the company’s memorandum, is capable of being performed as reasonably incidental to the attainment or pursuit of its objects, it will not be rendered ultra vires the company merely because in a particular instance its directors, in performing the act in its name, are in truth doing so for purposes other than those set out in its memorandum. Subject to any express restrictions on the relevant power which may be contained in the memorandum, the state of mind or knowledge of the persons managing the company’s affairs or of the persons dealing with it is irrelevant in considering questions of corporate capacity.’ (Slade LJ’s emphasis.)

On that basis, whereas the excessive remuneration of a director may well be an abuse of power where, as here, the power to decide on remuneration is vested in the board, it cannot be ultra vires the company. *Re George Newman & Co* [1895] 1 Ch 674 in my judgment supports that view.

Secondly, my impression on the evidence as to quantum is that the plaintiffs are more likely to fail than to succeed. In common with Walton J, I find the uncontradicted evidence of the very special field in which the company operates and the very high level of remuneration which obtains in that field very much more impressive than the statistics about general levels of professional remuneration which the plaintiffs adduced.

I therefore do not find a prima facie case that the company is entitled to the relief claimed in this category of claim.

(2) *Payments to associated companies or Billsons*

The question whether these transactions can properly be claimed to be ultra vires is

less clear cut than in relation to payments made to an executive director purportedly by way of remuneration but my prima facie view is that the question should be answered similarly, that is to say that this is not an ultra vires claim at all. a

On this aspect the defendants' case was primarily based on the necessity for a proper characterisation of the payments made to the associated company or Billsons. The evidence of no invoices having been rendered by the company or firm for 'services rendered', coupled with the absence of proper board resolutions of the company authorising such payments, and the absence of any evidence of a contractual link between the company and the relevant associated company or Billsons, showed, it was argued, that there was no legal obligation whatever on which the impeached payments could be based. In addition they were not shown in the company's accounts as directors' remuneration. Therefore they did not pass the characterisation test and qualify as remuneration so as to be intra vires the company, whether or not proper as to quantum. Counsel for the plaintiffs relied on *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016. That was a case where a liquidator of a company compulsorily wound up challenged the validity of payments purportedly by way of remuneration to both a husband and a wife, a Mr and Mrs Charlesworth. The two of them were at all material times the only shareholders and directors. The impeached drawings were mainly made out of capital as opposed to profits and those in favour of the wife were made when, because of illness, she took no active part at all in the business. Oliver J said this in relation to the payments made to the husband (at 1038): b

'I accept entirely the submission of counsel for the liquidator that a gratuitous payment out of the company's capital to a member, qua member, is unlawful and cannot stand, even if authorised by all the shareholders. What I find difficulty in accepting is that, assuming a sum to be genuinely paid to a director-shareholder as remuneration under an express power, it becomes an illegal return of capital to him, qua member, if it does not satisfy some further test of being paid for the benefit of the company as a corporate entity. If he genuinely receives the money as a reward for his directorship, the question whether the payment is beneficial to the company or not cannot, as I see it, alter the capacity in which he receives it: see, for instance, *Cyclists' Touring Club v Hopkinson* [1910] 1 Ch 179 at 188.' c

Then further on he said (at 1039): d

'What I think counsel's submission comes to is this, that while the company has divisible profits remuneration may be paid on any scale which the shareholders are prepared to sanction within the limits of available profits, but that, as soon as there cease to be divisible profits, it can only lawfully be paid on a scale which the court, applying some objective standard of benefit to the company, considers to be reasonable. But assuming that the sum is bona fide voted to be paid as remuneration, it seems to me that the amount, whether it be mean or generous, must be a matter of management for the company to determine in accordance with its constitution which expressly authorises payment for directors' services. Shareholders are required to be honest but, as counsel for the respondents suggests, there is no requirement that they must be wise and it is not for the court to manage the company. Counsel for the liquidator submits, however, that if this is right it leads to the bizarre result that a meeting of stupid or deranged but perfectly honest shareholders can, like Bowen LJ's lunatic director, vote to themselves, qua directors, some perfectly outlandish sum by way of remuneration and that in a subsequent winding up the liquidator can do nothing to recover it. It seems to me that the answer to this lies in the objective test which the court necessarily applies. It assumes human beings to be rational and to apply ordinary standards. In the postulated circumstances of a wholly unreasonable payment, that might, no doubt, be prima facie evidence of fraud, but it might also be evidence that what purported to be remuneration was not remuneration at all but a dressed-up gift to a shareholder out of capital, like the e

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a "interest" payment in the *Ridge Securities* case [*Ridge Securities Ltd v IRC* [1964] 1 All ER 275, [1964] 1 WLR 479] which bore no relation to the principal sums advanced. This, as it seems to me, is the real question in a case such as the present. I do not think that in circumstances such as those in the instant case the authorities compel the application to the express power of a test of benefit to the company which, certainly construed as *Plowman J* held that it should be construed, would be largely meaningless. The real test must, I think, be whether the transaction in question was b a genuine exercise of the power. The motive is more important than the label. Those who deal with a limited company do so on the basis that its affairs will be conducted in accordance with its constitution, one of the express incidents of which is that the directors may be paid remuneration. Subject to that, they are entitled to have the capital kept intact. They have to accept the shareholders' assessment of the scale of that remuneration, but they are entitled to assume that, whether liberal or c illiberal, what is paid is genuinely remuneration and that the power is not used as a cloak for making payments out of capital to the shareholders as such.'

His conclusion on the facts as regards the husband was as follows (at 1040):

d 'Turning now to the facts of the instant case, it seems to me that the question which I have to determine is whether, on the evidence before me, I can say that the payments made to Mr Charlesworth and to Mrs Charlesworth were genuinely exercises of the company's power to pay remuneration . . .'

And he concluded that it was, and he said (at 1041):

e 'But I do not think that, in the absence of evidence that the payments made were patently excessive or unreasonable, the court can or should engage on a minute examination of whether it would have been more appropriate or beneficial to the company to fix the remuneration at £X rather than £Y, so long as it is satisfied that it was indeed drawn as remuneration. That is a matter left by the company's constitution to its members. In my judgment, a general meeting was competent to sanction the payments which he [that is Mr Charlesworth] in fact drew and the claim in misfeasance against Mr Charlesworth under this head must fail.' f

Oliver J said in connection with the wife (at 1042):

g 'But of course what the company's articles authorise is the fixing of "remuneration", which I take to mean a reward for services rendered or to be rendered; and, whatever the terms of the resolutions passed and however described in the accounts or the company's books, the real question seems to me to be whether the payments really were "directors' remuneration" or whether they were gratuitous distributions to a shareholder out of capital dressed up as remuneration. I do not think that it can be said that a director of a company cannot be rewarded as such merely because he is not active in the company's business.'

And the rest of that paragraph was concerned with refuting that proposition. Going on

h Oliver J said (at 1042-1043):

j 'The difficulty that I felt about this at first was that there is, in relation to the misfeasance claim, which is the only claim with which I am concerned, no allegation of fraud or mala fides in relation to these payments. The liquidator's case has been argued on the footing that they were payments of remuneration but were also payments which could not be sanctioned by a general meeting because it was not for the benefit of the company to resolve on payments on this scale. For the reasons which I endeavoured to state, I think that in circumstances such as exist in this case, where payments are made under the authority of a general meeting acting pursuant to an express power, the matter falls to be tested by reference to the genuineness and honesty of the transaction rather than by reference to some abstract standard of benefit. I do not, however, think that bona fides (in the sense of absence of fraudulent

intention) and genuineness are necessarily the same thing. It is not suggested here that there was any intent to defraud, but that cannot be conclusive. As Jessel MR remarked in *Re National Funds Assurance Co* (1878) 10 Ch D 118 at 128, to say that something is done bona fide is not the same thing as merely to say that the actor had no intention to commit a fraud. The real question is, were these payments genuinely director's remuneration? If your intention is to make a gift out of the capital of the company, you do not alter the nature of that by giving it another label and calling it "remuneration".

As a matter of fact he concluded that the payments to the wife were not genuine exercises of the power to remunerate at all. He said (at 1043):

'I find it really impossible on the facts to hold that the whole of these sums, amounting to £1,500 per annum, drawn during the years 1968-69 and 1969-70, can be treated as genuine director's remuneration in any real sense of the term.'

On the question whether the plaintiffs establish a prima facie case that these payments are ultra vires the company my finding is that they do not. For the reasons already given I state my reasons shortly. First, I am far from convinced that payments at the request of an executive director to an outside entity such as one of the associated companies or Billsons is not capable of being a payment in respect of services physically rendered by the executive director concerned within the meaning of the test quoted above from the judgment of Slade LJ in *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1985] 3 All ER 52 at 85, [1986] Ch 246 at 295. Second, the fact that in some instances part only of a series of payments is attacked as ultra vires by the plaintiffs seems to me to lend strong support to this view. There are formidable difficulties in classifying any transaction as partly ultra vires. The analogy with the curate's egg seems to me compelling. Third, *Re Halt Garage (1964) Ltd* was concerned with remuneration out of capital and not with the principle to be found in *Re George Newman & Co*, but in any event it is to be noted that, of the payments which were found to be ultra vires, those to the wife were all ultra vires and there could scarcely have been, on Oliver J's reasoning, a finding that payments to the husband were partly ultra vires. Finally, if the payments to the associated companies are found to be shams, as counsel for the plaintiffs contends, the reality thus discovered is one of the executive directors drawing remuneration for themselves or at their direction and although that is perfectly capable of being excessive and improper it is not in itself ultra vires. In short counsel's argument in my judgment places far too much weight on the label attached to the transaction for characterisation purposes.

As to quantum the same considerations apply as did to the claims about direct remuneration which I dealt with earlier, but there is no doubt but that the plaintiffs are on stronger ground in criticising the mechanics of what was done. In particular as regards the payments to Cushingham in the years ending 30 June 1981 and 1982 I find there was a prima facie case shown of irregularity not fully cured by the subsequent adoption of the accounts by the annual general meetings at which the accounts which should have disclosed those payments were adopted.

(3) Claims under s 42 of the 1981 Act

That section provides as follows:

'(1) Subject to the following provisions of this section and sections 43 and 44 of this Act, where a person is acquiring or is proposing to acquire any shares in a company it shall not be lawful for the company or any of its subsidiaries to give financial assistance directly or indirectly for the purpose of that acquisition before or at the same time as the acquisition takes place.

(2) Subject to the following provisions of this section and sections 43 and 44 of this Act, where a person has acquired any shares in a company and any liability has been incurred (by that or any other person) for the purpose of that acquisition it shall not be lawful for the company or any of its subsidiaries to give any financial

assistance directly or indirectly for the purpose of reducing or discharging the liability so incurred . . .'

It is in relation to the latter subsection that it is claimed that financial assistance was given to Brindeel to the extent of the £28,000 loans made by associated companies to it. Financial assistance is defined by sub-s (8):

'In this section "financial assistance" means—(a) financial assistance given by way of gift . . . (d) any other financial assistance given by a company the net assets of which are thereby reduced to a material extent or which has no net assets. In this subsection "net assets" has the same meaning as it has for the purposes of the 1980 Act.'

The references to the purposes of the Companies Act 1980 is something of a trap for the unwary because it is a reference to the purposes of the 1980 Act as amended by the 1981 Act. Section 87(4) of the 1980 Act as originally enacted and so far as relevant read:

'For the purposes of this Act . . . (c) the net assets of a company are the aggregate of its assets less the aggregate of its liabilities; and in paragraph (c) above "liabilities" includes any provision (within the meaning of Schedule 8 to the 1948 Act) except to the extent that that provision is taken into account in calculating the value of any asset of the company.'

But para 62(b) of Sch 3 to the 1981 Act provided for the substitution for the words from '(within the meaning of' to the end of s 87(4) the words 'for liabilities or charges (within the meaning of paragraph 88 of Schedule 8 to the 1948 Act)'. It will come as no surprise that Sch 8 to the 1948 Act only acquired a para 88 at all by the operation of the 1981 Act, itself, but if one assembles all the pieces of the jigsaw the result is I think as follows:

'For the purposes of this Act . . . (c) the net assets of a company are the aggregate of its assets less the aggregate of its liabilities; and in paragraph (c) above "liabilities" includes any amount retained as reasonably necessary for the purpose of providing for any liability or loss which is either likely to be incurred, or certain to be incurred but uncertain as to amount or as to the date on which it will arise.'

There was some discussion in argument why this circuitous definition of 'liabilities' was adopted in preference to the apparently identical definition of 'liabilities' in s 42(11), which only applies for the limited purposes of s 42(7). It appears that the difference between the two subsections, sub-ss (8) and (11), in relation to net assets resides in the different definitions to which they lead as regards 'net assets' rather than 'liabilities', but I am not directly concerned with that, there being no doubt but that s 42(7), which only applies to public companies, is irrelevant to the company here.

The question which therefore emerges is whether the admitted payments to the associated companies of £33,000 plus value added tax thereon were payments of amounts retained as reasonably necessary for the purpose of providing for a liability likely to be incurred, that is to say the remuneration of the relevant executive director. The time at which this has to be assessed is early August. That was after the end of the financial year in relation to which it is claimed that the remuneration was paid (viz that ending 30 June 1982), so that the general financial picture of the result of the previous year's activities would be available but well before the accounts for that year were drawn up, let alone approved by the directors, an event which in relation to the first edition of these accounts did not occur until November 1982. I find that a *prima facie* case of infringement of s 42 of the 1981 Act is established primarily because it does not seem to me to be shown that these were amounts retained as reasonably necessary for the purpose of providing for the liability likely to be incurred of paying directors' remuneration. I say no more than that because I am not deciding the point.

On that footing there is no doubt that the claim is one in respect of an *ultra vires*

transaction, for it is conceded that a transaction in breach of s 42 of the 1981 Act is ultra vires as well as illegal and not capable of ratification. a

(4) *Claims in relation to directors' expenses*

I do not consider that there is an ultra vires claim established prima facie here. My reasons are similar to those in relation to direct remuneration, the first category, and as to quantum I regard the report as rebutting a prima facie case in relation to matters arising before the date of the report, for in this instance, unlike the claims under s 42 of the 1981 Act, the report does seem to me to state a definite opinion which is based on wide experience and which I am content to adopt for the purposes of a prima facie view. For that limited purpose I would also be prepared to regard the report as a general guide, even as regards expenses incurred after the time covered by the report itself. b

The question now arises, more especially in relation to claims under s 42 of the 1981 Act, whether the plaintiffs have established a prima facie case that the action falls within the proper boundaries of the exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189. The same question would arise if the view I have expressed regarding the other three categories of claim is wrong. c

In my judgment the arguments addressed to me on this aspect of the case raise two questions of law and one of mixed law and fact before an answer that the action does not fall within the proper boundaries of the exception to the rule in *Foss v Harbottle* could be given. The questions of law can be formulated as follows. d

(1) Is a minority shareholder always entitled as of right to bring and prosecute an action for the company to recover money paid away in the course of a transaction which was ultra vires the company or is the prosecution of such an action susceptible of coming within the rule in *Foss v Harbottle* so that there can be circumstances in which the court will not allow it to continue? e

(2) If the latter view is the correct one in relation to those categories of claims based on ultra vires transactions, and also in all cases of minority shareholders' actions to recover money for the company in respect of acts which constitute a fraud on the minority, will the court pay regard to the views of the majority of shareholders who are independent of the defendants to the action on the question whether the action should proceed? f

This process of ascertaining the views of the shareholders who are independent of the defendants to the action was described by counsel for the plaintiffs as a secondary counting of heads, an expression which did not much commend itself to counsel for the company but goes some way towards explaining what is involved. In terms of the present case the question is whether the court should have regard to the views of Wren Trust, Georgian Investments Ltd and Sir Reginald Sheffield, who do not want the action to continue, or is it conclusive that the defendants have voting control so that if the plaintiffs show a prima facie case of fraud on the minority they have a right to prosecute to the end an action for the company to recover in respect of the loss it has suffered, regardless of the views of the rest of the minority? Another way of putting the question is to ask whether, if a minority has been the victim of a fraud entitling the company in which they are shareholders to financial redress, the majority within that minority can prevent the minority within that minority from prosecuting the action for redress. The usual reason in practice for wanting to abandon such an action is that there is far more to lose financially by prosecuting the right to redress than by abandoning or not pursuing it, and that view will be reinforced in the minds of those who wish to abandon the claim if their opinion is that it is a bad claim anyway. g

The third question which arises is whether in this case Wren Trust should be treated as independent if the views of an independent majority are relevant. That is a question of fact. But it involves a question of law, namely what constitutes independence for this purpose. h

On the first question of law which arises, in my judgment the solution is to be found by a correct analysis of the rights which the minority shareholder is seeking to exercise j

or enforce in relation to the result of an ultra vires transaction. There was no dispute before me but that any individual shareholder, be he in a minority or not, has a personal right to apply to the court to restrain a threatened action which if carried out would be ultra vires. Neither the right to object to such an action nor the shareholder's locus standi to bring proceedings admits of any doubt. The rule in *Foss v Harbottle* poses no obstacle because neither of the two bases for the rule is applicable, that is to say the matter is by definition not a mere question of internal management nor is the transaction capable of ratification by or on behalf of the company. I was referred to two general statements of the rule. The first is in *Burland v Earle* [1902] AC 83 at 93-94 where Lord Davey said:

'It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v. Harbottle* ((1843) 2 Hare 461, 67 ER 189) and *Mozley v. Alston* ((1847) 1 Ph 790, 41 ER 833), and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier v. Hooper's Telegraph Works* ((1874) LR 9 Ch App 350). It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish L.J. in *MacDougall v. Gardiner* ((1875) 1 Ch D 13 at 25). There is yet a third principle which is important for the decision of this case. Unless otherwise provided by the regulations of the company, a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstances of his having a particular interest in the subject-matter of the vote. This is shewn by the case before this Board of the *North-West Transportation Co., Ltd. v. Beatty* ((1887) 12 App Cas 589). In that case the resolution of a general meeting to purchase a vessel at the vendor's price was held to be valid, notwithstanding that the vendor himself held the majority of the shares in the company, and the resolution was carried by his votes against the minority who complained.'

The other general statement is in *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] 1 All ER 354 at 357-358, [1982] Ch 204 at 210, where a slightly condensed version of a passage from Jenkins LJ's judgment in *Edwards v Halliwell* ([1950] 2 All ER 1064 at 1066-1067) reads as follows:

'The classic definition of the rule in *Foss v Harbottle* is stated in the judgment of Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064 at 1066-1067 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, *prima facie*, the corporation. (2) Where the alleged wrong is a

transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, *cadit quaestio*; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is *ultra vires* the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.'

I was also referred by both sides to two articles by Mr Wedderburn on 'Shareholders' Rights and the Rule in *Foss v Harbottle*' [1957] CLJ 194, [1958] CLJ 93, to which I should like to acknowledge my indebtedness.

I should also say at this stage that I have not in this judgment used the expressions 'derivative' or 'corporate' actions, terms which are often used to describe certain categories of minority shareholders' actions. There seemed to me to be a risk of apparent prejudging of issues by the use of such terminology.

The difficulty arises in this case when one considers not the restraint of a fraudulent or *ultra vires* transaction, but the recovery on behalf of the company of money or property which the company is entitled to claim as the result of the *ultra vires* transaction. The submissions made to me were as follows. Counsel for the company with the support of counsel for the fourth defendant drew a distinction between those cases on the one hand where individual shareholders, despite the rule in *Foss v Harbottle*, can bring a personal or representative action to enforce contractual rights that the memorandum and articles be observed, such rights not being removable by simple majority votes, and on the other hand those cases where what is sought to be done is to bring an action in respect of loss already sustained by a company where the right of action is vested in the company and an individual shareholder has, it is submitted, no personal right of action at all but can start an action on behalf of the company if, but only if, he can bring himself within one or other of two well-established exceptions to the rule in *Foss v Harbottle*. These are (i) where the loss is attributable to an illegal or *ultra vires* act and (ii) where the transaction complained of constitutes a fraud on the minority shareholders.

They further submitted that, even where there is a right to start an action to enforce a right of the company because one or other of the exceptions to the rule in *Foss v Harbottle* is applicable, a company acting either through an independent board of directors or pursuant to a resolution passed by a majority of independent shareholders can always compromise or waive the cause of action vested in it so long as the decision in question to compromise or waive is taken by the persons concerned *bona fide* and for reasons genuinely believed to be in the best interests of the company. If such a decision is taken, any action started on behalf of the company by a minority shareholder should not be allowed to proceed.

Counsel for the plaintiffs, on the other hand, drew a distinction between those cases where the minority shareholder on behalf of the company was seeking to rescind a transaction carried out *ultra vires* and those where, without seeking to rescind the *ultra vires* transaction, the minority shareholder was seeking to recover damages or other compensation on behalf of the company. In the former counsel submitted the minority shareholder was entirely outside the rule in *Foss v Harbottle* and had an indefeasible right

a to bring and prosecute the proceedings. There was, he submitted, no difference in principle between his right to bring such proceedings for rescission and recoupment and his right to restrain a threatened ultra vires transaction: both were personal rights vested in the individual shareholder which it was entirely within his power to bring or not. He also added that, in cases where the plaintiffs rely on ultra vires transactions, it is not necessary to prove that the defendants have control of the company.

b This latter point I can dispose of at once by accepting it. By itself, it does not advance the matter much. Counsel for the plaintiffs did not contend that it was never possible for a company validly to abandon, compromise or decide temporarily not to pursue a right of action for damages vested in it as a result of an ultra vires transaction effected on its behalf, but he submitted that the arguments advanced by the defendants involved denying the ultra vires doctrine altogether and that exactly the same wrong was involved in relation to a past ultra vires transaction as in relation to a prospective one, so that, if c the defendants' arguments based on a company's ability to release its cause of action in respect of a past ultra vires transaction were well founded, the same arguments would apply to a prospective ultra vires transaction, where it is common ground the minority shareholder has a right of action which the company cannot control.

d Treating the matter as a question of principle for the moment, when a minority shareholder seeks to enforce a right of the company to claim compensation for a past ultra vires transaction, there are two quite separate rights involved. First, there is the minority shareholder's right to bring proceedings at all and, second, there is the right of recovery which belongs to the company but is permitted to be asserted on its behalf by e the minority shareholder. The passage I have quoted from Lord Davey's speech in *Burland v Earle* [1902] AC 83 at 93 makes it clear that the bringing of an action in the name of the company is a mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress. That is an echo of what was said in one of the two cases often cited as the foundation for these doctrines, namely *Mozley v Alston* (1847) 1 Ph 790 at 801, 41 ER 833 at 837, where Lord Cottenham LC said of a bill alleging that a large majority of the shareholders were of the same opinion as the plaintiffs:

f '... to allow, under such circumstances, a bill to be filed by some shareholders on behalf of themselves and others, would be to admit a form of pleading which was originally introduced on the ground of necessity alone, to a case in which no such necessity exists.'

True it is that the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] 1 All ER 354 at 366, [1982] Ch 204 at 221 said that they were not g convinced that it was a practical test to adopt to hold, as Vinelott J had done at first instance (see [1980] 2 All ER 841, [1981] Ch 257), that there was an exception to the rule in *Foss v Harbottle* wherever the justice of the case so requires. But the fact that such a yardstick would or might be unsatisfactory because it does not give a practical guide to the limits of the rule and its exceptions does not detract from the fact that the whole doctrine whereby a minority shareholder is permitted to assert claims on behalf of the h company is rooted in a procedural expedient and adopted to prevent a wrong going without redress. Where what is sought is compensation for the company for loss caused by ultra vires transactions the wrong, in my judgment, is a wrong to the company, which has the substantive right to redress. Where the minority shareholder is seeking to prevent an ultra vires transaction or otherwise seeking to enforce his personal substantive rights, the wrong which needs redress is the minority shareholder's wrong.

i The peculiar status of the minority shareholder in such actions is also illustrated by the judgments in the Court of Appeal in *Towers v African Tug Co* [1904] 1 Ch 558, where a company had declared and paid illegally a dividend out of capital, and two shareholders who had themselves received their portion of the illegal dividend were held to be disentitled to bring an action on behalf of the company for repayment by the directors. Vaughan Williams LJ said (at 566–567):

'In that state of things, what ought to be done with this action? There is no doubt that the payment of this interim dividend was an ultra vires payment. I start with the assumption one is bound to make, that if an act is done by a company which is ultra vires, no confirmation by shareholders—not even by every member of the company—can convert that which was ultra vires into something intra vires: it always must be ultra vires. As is pointed out in one or two of the cases, the result of that is that if the company are plaintiffs, no amount of acquiescence or resolutions by the shareholders can form an answer to the action by the company for the reinstatement of things in the position in which they would have been but for the ultra vires act complained of. But, to my mind, it is a different thing where the action is brought by a shareholder on behalf of himself and other shareholders. I am assuming this case to be one of those in which the facts have been such that an individual shareholder ought to be able to sue in a representative action for the purpose of preventing acts being done in reference to the company in which the shareholders are interested, and which might damnify the company by reason of those acts being ultra vires. I assume that an action not only to prevent ultra vires acts in the future but also to remedy acts that have been done ultra vires is an action which can be brought in the form in which this action is brought. But although that is so, my own opinion is that this is a kind of action which has to be brought by a plaintiff personally. It is an action which he cannot bring unless he has an interest; it is an action which a stranger could not bring.'

Stirling LJ said (at 569–570):

'It is proved beyond all contradiction by documents under the hand of Mr. Towers that he was perfectly well aware of the circumstances in which the dividend was paid. It is true that Mr. Wedlake was not in the same position as Mr. Towers; but I think, having regard to the admissions which he made by not denying the allegation in the counter-claim—that he received his dividend “with full notice of all the facts relating thereto”—and to the fact of his having submitted to judgment against himself on that footing, and also having regard to the high probabilities of the case, that, inasmuch as he did not choose to go into the box and deny it, we ought to assume that he, like his partner Mr. Towers, knew the circumstances in which the dividend was declared. Now the action is one by the plaintiffs on behalf of themselves and all other shareholders against the company; originally all the shareholders were not made parties, but the other shareholders were afterwards, at their own request, made defendants, so that now we have here all the shareholders of the company. I think this is a form of action which in certain circumstances may be maintained. That a shareholder who had received a dividend, without knowing anything of the illegality of it, might maintain such an action I do not doubt. Whether in some circumstances a shareholder so suing ought not to return what he had received in respect of dividend is another question. Why is it that this form of action is allowed? *Primâ facie* the proper plaintiff, where it is sought to bring back the property of the company into its own coffers, is the company itself. But there are exceptions to that rule; and what is the reason of the exceptions? Sir George Jessel, in the case which has been referred to of *Russell v. Wakefield Waterworks Co.* ((1875) LR 20 Eq 474 at 480), says this: “The exceptions turn very much on the necessity of the case; that is, the necessity for the Court doing justice.”'

Cozens-Hardy LJ said (at 571):

'An action in respect of or arising out of an ultra vires transaction ought properly to be brought by the company; but it has long been well established that there are cases in which such an action may be maintained by a shareholder suing on behalf of himself and all other shareholders against the company as defendants. I will not

- a pause to consider under what particular circumstances such an action may be maintained, but I assume that this is one of those cases in which such an action may be maintained—I mean in point of form. But I think it is equally clear that the action cannot be maintained by a common informer. A plaintiff in an action in this form must be a person who is really interested. When you get that fact clearly established it seems to me impossible to avoid taking the next step—that all personal objections against the individual plaintiff must be gone into and considered before relief can be granted.’
- b

- That decision illustrates the dual nature of the rights involved. The minority shareholder’s locus standi as someone with a real interest greater than that of a common informer is defeasible by showing a personal disability to sue such as was present in *Towers v African Tug Co*. But as Lord Davey said in *Burland v Earle* [1902] AC 83 at 93, the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff. And from that it follows in my judgment that, if there is a valid reason why the company should not sue, it will equally prevent the minority shareholder from suing on its behalf. He is therefore liable to be defeated on two points, first by any ground preventing him from exercising his procedural remedy and second by any ground preventing the company from exercising its substantive right. Conversely, however, he is able to assert a cause of action which arose before he became a shareholder because it is the company’s and not his substantive right that is being enforced: see *Seaton v Grant* (1867) LR 2 Ch App 459.
- c
- d

- Where ultra vires transactions are involved the number of grounds on which the company can be debarred from suing is limited. In particular it was not argued that ratification of the ultra vires transaction, by however large a majority of shareholders, could prevent the company from suing. There is, however, a clear difference in principle between ratifying what has been invalidly done in the past and abandoning, compromising or not pursuing rights of action arising out of a past ultra vires transaction, and I see no reason in principle why in appropriate circumstances the latter should not intervene to prevent the prosecution of a suit on behalf of the company in relation to such rights of action.
- e

- f Conversely, I am not persuaded of the validity of the criterion suggested by counsel for the plaintiffs for separating actions brought by minority shareholders to recover property for the company into those where it is sought to rescind the relevant ultra vires transaction or otherwise have it set aside on the one hand and those where that transaction is not sought to be set aside but damages or other compensation is claimed on the other hand. The former according to counsel’s argument fall entirely outside the rule in *Foss v Harbottle*, while the latter are, he accepts, within its potential ambit. This distinction in my judgment places too much emphasis on the nature of the remedy sought rather than the substantive right and the legal person in whom it is beneficially vested.
- g

- So much for the principles which seem to me to apply to the first legal question which falls for determination. Is there any authority which precludes me from giving effect to the view which I have expressed? I was referred to a very large number of authorities and I see no useful purpose in going through them all. There are certain discernable categories.
- h

- (1) One category is where articles of association require a particular type of majority such as a special resolution and it has been held that a simple majority incapable of constituting such a majority cannot achieve indirectly what it is forbidden to achieve directly. An example is *Baillie v Oriental Telephone and Electric Co Ltd* [1915] 1 Ch 503 at 511, where in the course of argument counsel for the respondents said: ‘If the majority wish an action to be brought and it is found that the special resolutions were improperly obtained, then they would be nullified’, and Swinfen Eady LJ interposed: ‘It might be opposed by a bare majority, with the result that a bare majority might supersede the necessity for a special resolution.’ In his judgment Swinfen Eady LJ said (at 518):
- j

'It was then contended that the plaintiff is not entitled to sue. The plaintiff's counsel urged that if this as a special resolution was invalidly passed, how is it to be impeached if the plaintiff cannot sue; how can the question of illegality be raised? Suppose he called a meeting and the majority of the shareholders were to say "We are content with the present position, and we will not raise any question," can it be said that by a side wind as it were, not being able to pass a valid special resolution, they could pass an invalid one and then by a bare majority say we will not allow any proceedings to be taken? In my opinion they cannot do that.'

That type of case is concerned with preventing the indirect achievement of an unlawful object which raises different considerations from the recovery of compensation for past illegalities.

(2) Another category consists of cases of demurrer, mostly in the middle and last part of the nineteenth century but including *Birch v Sullivan* [1958] 1 All ER 56, [1957] 1 WLR 1247, although that case was concerned with misfeasance rather than ultra vires. Cases on demurrer are necessarily concerned with the locus standi of the plaintiff to bring the proceedings in question rather than the question whether a properly constituted action should be allowed to proceed. The cases principally relied on by counsel for the plaintiffs in this category included *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 itself, where there were in fact two complaints made by the plaintiffs, one based on improper intra vires acts and the other on ultra vires activities described by Wigram V-C as mortgaging in a manner not authorised by the powers of the relevant Act, and of which he said (2 Hare 461 at 493, 67 ER 189 at 203): 'This, being beyond the powers of the corporation, may admit of no confirmation whilst any one dissident voice is raised against it.' The first complaint is the context for the very famous statement of basic principle which has given the name of the case to the rule which has been applied on innumerable subsequent occasions.

Counsel for the plaintiffs relied on this decision as supporting his submission that where there is no claim for rescission of an ultra vires transaction a minority shareholder may be debarred from bringing an action on behalf of the company and that Wigram V-C did not deal with what his position would have been had such a claim been made. I accept that submission which seems to me substantiated by the following passage (2 Hare 461 at 504-506, 67 ER 189 at 208):

'The case made with regard to these mortgages or incumbrances is, that they were executed in violation of the provisions of the act. The mortgagees are not defendants to the bill, nor does the bill seek to avoid the security itself, if it could be avoided, on which I give no opinion. The bill prays inquiries with a view to proceedings being taken aliunde to set aside these transactions against the mortgagees. The object of this bill against the defendants is to make them individually and personally responsible to the extent of the injury alleged to have been received by the corporation, from the making of the mortgages. Whatever the case might be, if the object of the suit was to rescind these transactions, and the allegations in the bill shewed that justice could not be done to the shareholders without allowing two to sue on behalf of themselves and others, very different considerations arise in a case like the present, in which the consequences only of the alleged illegal acts are sought to be visited personally upon the directors. The money forming the consideration for the mortgages was received, and was expended in, or partly in, the transactions which are the subject of the first ground of complaint. Upon this, one question appears to me to be, whether the company could confirm the former transactions, take the benefit of the money that has been raised, and yet, as against the directors personally, complain of the acts which they have done, by means whereof the company obtains that benefit which I suppose to have been admitted and adopted by such confirmation. I think it would not be open to the company to do this; and my opinion already expressed on the first point is, that the transactions which

a constitute the first ground of complaint may possibly be beneficial to the company, and may be so regarded by the proprietors, and admit of confirmation. I am of opinion that this question, the question of confirmation or avoidance, cannot properly be litigated upon this record, regard being had to the existing state and powers of the corporation, and that therefore that part of the bill which seeks to visit the directors personally with the consequences of the impeached mortgages and charges, the benefit of which the company enjoys, is in the same predicament as
b that which relates to the other subjects of complaint. Both questions stand on the same ground, and, for the reasons which I stated in considering the former point, these demurrers must be allowed.'

The decision shows quite clearly that similar considerations are capable of applying to an action based on an ultra vires transaction as to a claim based on breach of duty, so that the rule in *Foss v Harbottle* can apply to the former. It is not in any way conclusive on the
c nature of the minority shareholder's right to bring proceedings in respect of compensation for an ultra vires transaction.

In *Salomons v Laing* (1850) 12 Beav 377, 50 ER 1105 the sidenote reads:

d 'The Directors of one incorporated Railway Company paid over its funds to another Railway Company, for purposes wholly unauthorised; and the latter received them with knowledge of the breach of trust. Held, on demurrer, that the second company were properly made parties to a suit to bring back the fund; and, secondly, that, in such a case, an individual shareholder in the first company might sue the second company "on behalf" &c., without alleging that the corporation of which he was a member had refused to sue.'

e The plaintiff's right to sue the directors and the South Coast Railway Co, the first company referred to, was conceded and the only matters on which issue was joined on demurrer was whether the Portsmouth Railway Co, the second company referred to, could properly be joined as defendant and whether the plaintiff could sue it direct without proving that he had previously attempted to get the concurrence of the South Coast Railway Co to sue, both of which were answered in the affirmative. At its highest
f the case proves no more than that a minority shareholder has a locus standi to bring an action for recovery of property paid out of a company in an ultra vires transaction and is not obliged to prove that an unsuccessful attempt to get the company to sue has been made. Neither of these is disputed.

Bagshaw v Eastern Union Rly Co (1849) 7 Hare 114, 68 ER 46 was another case on demurrer but, contrary to the sidenote, was concerned not only with a threatened ultra
g vires application of funds but also with a past misapplication. Here again though, in my judgment, all that was decided was the plaintiff's locus standi to sue in respect of both past and threatened ultra vires activities. Wigram V-C said (7 Hare 114 at 129-130, 68 ER 46 at 52-53):

h 'No majority of the shareholders, however large, could sanction the misapplication of this portion of the capital. A single dissenting voice would frustrate the wishes of the majority. Indeed, in strictness, even unanimity would not make the act lawful. This appears to me to take it out of the case of *Foss v. Harbottle*, to which I was referred. That case does not, I apprehend, upon this point, go further than this: that if the act, though it be the act of the directors only, be one which a general meeting of the Company could sanction, a bill by some of the shareholders on behalf of
j themselves and others, to impeach that act, cannot be sustained, because a general meeting of the Company might immediately confirm and give validity to the act of which the bill complains.'

Counsel for the plaintiffs submitted that the passage showed that the rule in *Foss v Harbottle* was not concerned with ultra vires transactions. That, in my judgment, is far

too wide a proposition. In *Foss v Harbottle* itself, as counsel rightly pointed out, Wigram V-C himself dealt in the same way with claims based both on intra vires but improper transactions and on ultra vires transactions. Certainly *Bagshaw's* case is authority for the proposition that a minority shareholder can in appropriate circumstances have a sufficient interest to bring an action for relief with regard to past as well as future apprehended ultra vires transactions. The fact that both past and future acts were involved might well constitute appropriate circumstances.

Russell v Wakefield Waterworks Co (1875) LR 20 Eq 474 was a decision of Jessel MR that was concerned with recovery of some £5,500 claimed by plaintiff minority shareholders to have been paid out ultra vires to the promoters of a competing undertaking to dissuade them from promoting a bill in Parliament in competition with the company's undertaking. In terms the decision allowed a demurrer on the grounds that ultra vires was inadequately pleaded and there was no sufficient allegation that there was a reason preventing the company itself from suing. Jessel MR also examined what he describes as the exceptions to the rule laid down in *Foss v Harbottle*, and said that the exceptions depend very much on the necessity of the case, that is the necessity for the court doing justice (at 480). He identified two such exceptions. One he describes as cases in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something which is beyond the powers of the corporation (at 481). He goes on to point out that this may involve the joinder of a non-corporator who is a party to the ultra vires transaction, and that in turn may lead to the action embracing the recovery from that third party of the money paid under such an ultra vires agreement. He continued (at 481-482):

'If the detainer or holder of the money or property, that is, the second corporation or other person, is already a party, and a necessary party, to the suit, it would be indeed a lame and halting conclusion if the Court were to say it could do justice in a suit so framed by ordering the money to be returned or the property restored.'

It is perfectly clear that the word 'nor' has dropped out between 'could' and 'do', so that it should read: '... it would be indeed a lame and halting conclusion if the Court were to say it could not do justice in a suit so framed by ordering the money to be returned or the property restored.' The judgment continues:

'It is a necessary incident to the first part of the relief which can be obtained by individual corporators, and will do complete justice on each side, and that has always been the practice of the Court. Therefore, in a case so framed there is no objection to a suit by an individual corporator to recover from another corporator, or from any other persons being strangers to this corporation, the money or property so improperly obtained. But that is not the only case. Any other case in which the claims of justice require it is within the exception.'

If anything that decision seems to me to assist the defendants, because in relation to the ultra vires aspect of the matter it emphasises the necessity of flexibility to attain justice rather than the imposition of hard and fast rules.

In my judgment the above cases on demurrer establish that a minority shareholder can, as counsel for the plaintiffs argued, have a locus standi to bring an action to recover on behalf of a company property or money transferred or paid in an ultra vires transaction and that it is not a necessary averment that control is vested in individual defendants so as to prevent the company from bringing the proceedings. I am not persuaded that it follows from that that the minority shareholder necessarily has an individual and indefeasible right to prosecute that action on the company's behalf.

(3) A third category of case which I only mention to dispose of is made up of matters which the court concludes are mere matters of internal management. *MacDougall v Gardiner* (1875) 1 Ch D 13 is an example. They are of no assistance to the present problem.

(4) A further category are those cases where an individual member either of a company or a trade union has been held to be entitled to restrain illegal activity by the company or association to which he belongs. That in itself is not a subject of dispute. *Simpson v Westminster Palace Hotel Co* (1860) 8 HL Cas 712, 11 ER 608 is House of Lords authority if it be needed. Of more help, however, are some modern trade union cases. Thus in *Edwards v Halliwell* [1950] 2 All ER 1064 at 1067, from which I have already cited the general statement by Jenkins LJ quoted by the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354, [1982] Ch 204, there is what seems to me a revealing contrast in the treatment by Jenkins LJ on the one hand of acts complained of which are wholly ultra vires the company and therefore incapable of confirmation by a majority so that they constitute exceptions to the general ambit of the rule in *Foss v Harbottle* and on the other hand cases such as *Edwards v Halliwell* itself, as to which Jenkins LJ said (at 1067):

'In my judgment, this is a case of a kind which is not even within the general ambit of the rule. It is not a case where what is complained of is a wrong done to the union, a matter in respect of which the cause of action would primarily and properly belong to the union. It is a case in which certain members of a trade union complain that the union, acting through the delegate meeting and the executive council in breach of the rules by which the union and every member of the union are bound, has invaded the individual rights of the complainant members, who are entitled to maintain themselves in full membership with all the rights and privileges appertaining to that status so long as they pay contributions in accordance with the table of contributions as they stood before the purported alterations of 1943, unless and until the scale of contributions is validly altered by the prescribed majority obtained on a ballot vote. Those rights, these members claim, have been invaded. The gist of the case is that personal and individual rights of membership of each of them have been invaded by a purported, but invalid, alteration of the tables of contributions. In those circumstances, it seems to me the rule in *Foss v. Harbottle* has no application at all, for the individual members who are suing sue, not in the right of the union, but in their own right to protect from invasion their own individual rights as members.'

The boundary there seems to me very clearly drawn between suits in the right of the union and suits to protect the individual rights of members. The former are capable of coming within the rule in *Foss v Harbottle*, the latter are not.

(5) Another category is to be found where the constitution of a corporation has been sought to be varied in a manner which is ultra vires, eg by amalgamation. *Clinch v Financial Corp* (1868) LR 5 Eq 450; *affd* LR 4 Ch App 117, CA, is an example of such a case, but the shareholder's right in such a case was described by Lord Cairns LC as a right to bring a suit to arrest a contract on the ground that it was in the eye of the court beneficial to all the shareholders to do so (see LR 4 Ch App 117 at 122). Similarly Page Wood V-C, who heard the case at first instance as well as in the Court of Appeal, said that every shareholder is supposed to have a common interest with the plaintiff in varying any arrangement that may have been entered into ultra vires (see LR 5 Eq 450 at 479). The fact that even such ultra vires arrangements are capable of being within the ambit of the rule in *Foss v Harbottle* is shown very clearly by *Gray v Lewis* (1873) LR 8 Ch App 1035, chosen by the court in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 at 363–364, [1982] Ch 204 at 217–219 as a simple application of the first aspect of the rule in *Foss v Harbottle*, viz that a company is the proper plaintiff to sue for redress for moneys due to it.

I turn now to a modern case from which I have derived much assistance. This is *Taylor v National Union of Mineworkers (Derbyshire Area)* [1985] BCLC 237. The headnote reads as follows:

In September 1984 the plaintiffs, who were members of the Derbyshire Area of the National Union of Mineworkers (the Derbyshire Union), were successful in obtaining, inter alia, a declaration that a strike called by their union (the Derbyshire Union) and the National Union of Mineworkers (NUM) was unlawful. The plaintiffs sought in the present proceedings by way of summary judgment an order restraining the defendants, who were the Derbyshire Union and some of its officers, from using the funds of the Derbyshire Union for the purpose of a strike called by the NUM and the Derbyshire Union, and requiring those defendants who were officers of the Derbyshire Union to restore to the union funds which had been used for this purpose. *Held* – Injunction granted: summary judgment on the monetary claim refused. Where a member of a union commenced an action on behalf of the union, the union would be treated as being analogous to a company and the member's standing to bring the action would be determined on the same principles as those applicable to an action brought by a shareholder on behalf of a company. These principles did not prevent an individual member from maintaining an action on behalf of the union against its officers where it was clear that the officers had made an ultra vires application of the funds which could not be ratified by the members. In such an action by a member of the union against its officers for the ultra vires misapplication of the union's funds, the court could order the officers responsible to restore the funds as such misapplication would constitute a breach of fiduciary duty. On the facts, it was clear that the Derbyshire Union's funds had been used to support the strike and there was no reasonably arguable case that this payment was authorised by the union's rules or could be ratified by the members of the union. Accordingly, as a matter of principle, the plaintiffs were entitled to the order which they sought. However, although the making of the payment could not be ratified by the members of the union, the members could resolve to take no action to remedy the wrong done to the union provided that such resolution was made in good faith and for the benefit of the union. As there was evidence to suggest that the members might so resolve, and as the circumstances in this case were otherwise exceptional, the court would not grant summary judgment on the monetary claims.

Then there is a statement that an injunction to prevent future misapplications was available to them. Vinelott J said (at 241):

'The first question is whether the plaintiffs are in a position to maintain an action against the individual defendants in effect on behalf of the Derbyshire union whose members have not been consulted on the question whether proceedings should be brought against the individual defendants. A great wealth of authority has been cited on this issue. The position, in my view, is not open to serious doubt.'

He then proceeded to review the authorities, and said (at 246):

'The principles which emerge are, I think clear. *Foss v Harbottle* applies to a union but does not bar the right of an individual to maintain an action joining the union and its officers as defendants and claiming that a particular application by the officers was ultra vires and an injunction to restrain further application of the funds of the union for the same purposes and requiring the officers to make good the loss to the union. Being ultra vires the misapplication cannot be ratified by any majority of the members. The central issue in this case is whether the payments, amounting to over £1.7m, were misapplications of the funds of the union within the exception to the rule in *Foss v Harbottle*. Before turning to that question, I should mention two preliminary objections which have been made by counsel for the defendants.'

He answered that question, after a review of the authorities and facts, where he said (at 254–255):

'If that is the right conclusion, then it seems to me that it must follow that any payment to a member on unofficial strike whether by way of weekly allowance or

a by way of intermittent payment or by meeting expenses directly or in any other way with a view to making good the wages lost by the member on unofficial strike must be equally impermissible. So also must payments to pickets be impermissible . . . I find myself therefore driven to the conclusion, uncomfortable though it is, that once it is accepted that the payments in question were made, as they admittedly were made, to pickets and otherwise in furtherance of the strike or for the relief of miners on unofficial strike from hardship caused by the stoppage of work and wages, the conclusions that follow inevitably are first that the payments were beyond the powers of the union; second, that the two officers, the second and third defendants, who made or sanctioned the payments, are liable to reimburse the union; third, that the plaintiffs are entitled to maintain this action; and fourth, that the misapplication of the union's funds cannot now be ratified by any majority of the members, however large. Should I therefore, make the order which is sought? I have come to the conclusion that I should not. My reasons are shortly as follows. Although the misapplication of the funds of a corporate body (I include for this purpose funds belonging to a union) cannot be ratified by any majority of the members, however large, it is open to a majority of the members, if they think it is right in the interests of the corporate body to do so, to resolve that no action should be taken to remedy the wrong done to the corporate body and such a resolution, if made in good faith and in what they considered to be for the benefit of the corporate body, will bind the minority. The majority of the members of a trading company, for instance, might properly take the view that the publicity, costs, and the inevitable loss, let us say, of the services of a managing director, who would be the defendant, would outweigh the benefit to the company of successfully prosecuting an action and might properly decide not to pursue it; although, of course, a contractual release of the right of action, as compared with a decision simply not to institute proceedings, would require to be supported by some consideration. In the instant case there is an impressive body of evidence filed on behalf of the defendants which is designed to establish that the overwhelming majority of members approves the expenditure in question. It must, I think, follow that they would most probably oppose proceedings for the recovery of the moneys misapplied.'

f He then goes on to deal with three particular reasons advanced by counsel for the plaintiffs against a refusal to give summary judgment. They are particular to the facts of that case and neither the reasons nor the basis for Vinelott J's rejection of them is directly material to this case. Vinelott J's conclusion was (at 256-257):

g 'In these circumstances I have come to the conclusion that the right course is not to make an order for summary judgment in the hope that the action will come on, if it does come on, after this dispute has been settled, and that the members will be able to work together in the future for their common benefit within the rules of the union. It will be said that this is a case where hard cases make bad law. My reply to that is that it sometimes happens that hard cases made good law, because they h compel a radical re-examination of principles which, rigidly applied, would lead to a result which would be felt widely to be unjust. In particular the boundary between ratifying a misapplication of a union's funds and resolving to take no action to recover funds innocently misapplied may not be easy to draw in the case of a union and this aspect of the case may, I think, merit further consideration when the union is properly represented.'

i That authority draws the distinction between impossibility of ratification and the possibility of not suing in respect of the consequences of ultra vires transactions very clearly and in my judgment lends strong support to the view in principle which I have expressed. Overall therefore, on the authorities cited to me, I conclude that there is some support for and no absolute bar on that conclusion.

Another consideration which tends in the same direction is that the plaintiffs have

applied for, and until Walton J discharged the master's order obtained, the benefit of an indemnity as to costs in respect of the action. There was never any suggestion that the plaintiffs were enforcing personal rights in respect of the claimed ultra vires transactions as opposed to the rights of the company. On the contrary, the whole basis of the decision on which reliance was placed (see *Wallersteiner v Moir* (No 2) [1975] 1 All ER 849, [1975] QB 373) was that the minority shareholder was acting for the benefit of the company rather than asserting an individual right.

Reliance was also placed by counsel for the company on *Viscount of the Royal Courts of Jersey v Shelton* [1986] 1 WLR 985 as supporting the distinction between the impossibility of ratifying an ultra vires transaction and the possibility of a compromise or release of a right of action in respect of such a transaction. I accept the submission of counsel for the plaintiffs that this authority is concerned with the rather different point of how far articles of association can, outside this jurisdiction, which has a statutory prohibition, now contained in s 310 of the Companies Act 1985, confer an immunity from suit on directors who participate in breaches of their fiduciary duty. That is not to say that I regard the distinction drawn by counsel for the company as an invalid one.

Counsel for the plaintiffs further submitted that there were three objections to any reliance on a release or the equivalent of a release of the claims against defendants in relation to ultra vires acts. The first was that the right in question was that of the minority shareholder and not of the company, so that neither the board nor the shareholders in general meeting could release it. With that I have already dealt.

Secondly, assuming it to be legally possible, he submitted first that the board had no available power to do so, and that, in the circumstances of the present case, is not in dispute, and further, that the company in general meeting could only do so by special resolution. The reason for this was that by art 80 of Table A, which applies to the company, the management of the business of the company is given to the directors. It followed that the shareholders could only pass a valid resolution about the conduct of proceedings, which it is common ground is part of the business of the company, by a resolution capable of altering articles, i.e. a special resolution. In support he cited the passage in *Buckley on the Companies Acts* (14th edn, 1981) vol 1, p 989, under the heading 'How far members may control directors':

'There is no provision in this Act corresponding with s. 90 of the Companies Clauses Consolidation Act 1845, which provides that the exercise by the board of their powers shall be subject to the control of any general meeting specially convened for the purpose. And it appears now to be established that under an article in the present form, whatever effect is to be given to the words "to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting", these words do not enable the shareholders, by resolution passed at a general meeting without altering the articles, to give directions to the directors as to how the company's affairs are to be managed, nor to overrule any decision come to by the directors in the conduct of its business, even as regards matters not expressly delegated to the directors by the articles.'

Counsel for the company countered this submission by drawing a distinction between shareholders in general meeting seeking to compel directors to do that which they declined to do and shareholders in general meeting authorising or ratifying a matter which the directors considered to need their authority or ratification. In the former case a special resolution is needed; in the latter an ordinary resolution will suffice. In my judgment that distinction is validly made and is supported by Buckley J's decision in *Hogg v Cramphorn Ltd* [1966] 3 All ER 420, [1967] Ch 254. Buckley J said ([1966] 3 All ER 420 at 429, [1967] Ch 254 at 265):

'Counsel for the plaintiff says, no doubt rightly, that the company in general meeting could not by ordinary resolution control the directors in the exercise of the

a powers under art. 10. He goes on to say, I think with less justification, that what they could not ordain a majority could not ratify. There is, however, a great difference between controlling the directors' exercise of a power vested in them and approving a proposed exercise by the directors of such a power, especially where the proposed exercise of the power is of a kind which might be assailed if it had not the manifest approval of the majority. Had the majority of the company in general meeting approved the issue of the 5,707 shares before it was made, even with the

b purported special voting rights attached (assuming that such rights could have been so attached conformably with the articles), I do not think that any member could have complained of the issue being made; for in these circumstances, the criticism that the directors were, by the issue of the shares, attempting to deprive the majority of their constitutional rights would have ceased to have any force. It follows, in my opinion, that a majority in a general meeting of the company at which no votes

c were cast in respect of the 5,707 shares could ratify the issue of those shares. Before setting the allotment and issue of the 5,707 shares aside, therefore, I propose to allow the company an opportunity to decide in general meeting whether it approves or disapproves of the issue of these shares to the trustees.'

That passage was cited with approval by Harman LJ in *Bamford v Bamford* [1969] 1 All ER 969 at 974, [1970] Ch 212 at 240–241. In my judgment, it would not be right in a

d case where the court declines to act on the views of the board as not sufficiently disinterested to assume that the board was not merely disqualified but also opposed to a decision by the shareholders in general meeting. I see no difference in principle between directors referring a doubtful matter to shareholders in general meeting and the court taking into account the views of shareholders in general meeting where the directors are

e effectively disqualified from speaking for the company. On this aspect of the matter I accept the submission of counsel for the plaintiffs that the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* did not deal at all with the question of what sort of resolution would have been needed regarding the non-prosecution of the action.

The third point of counsel for the plaintiffs was that in any event Wren Trust's views

f should not be taken into account. I propose to deal with that later.

I turn now to the question whether it is right for the court to have regard to the views of the majority inside a minority which is, I assume for this purpose, in a position to bring an action to recover on behalf of the company in respect of breaches of duty by persons with overall control.

The fourth defendant and the company claim that it is; the plaintiffs claim that it is

g not. On the plaintiffs' view of the matter all that the court is concerned with, in cases where the exception to the rule in *Foss v Harbottle* based on frauds on the minority applies, is the single question whether the defendants have control. The issue is highlighted by the conflicting interpretations placed by the parties on what the Court of Appeal said in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*. Immediately

h after the formulation of the two matters which in the Court of Appeal's view a plaintiff ought at least to be required to show before proceeding with a minority shareholder's action there comes the following sentence ([1982] 1 All ER 354 at 366, [1982] Ch 204 at 222):

'On the latter issue it may well be right for the judge trying the preliminary issue to grant a sufficient adjournment to enable a meeting of shareholders to be convened by the board, so that he can reach a conclusion in the light of the conduct of, and proceedings at, that meeting.'

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Counsel for the plaintiffs submitted that the purpose of that adjournment was to enable the courts to discern whether the defendants had control. I reject that submission. In my judgment the concern of the Court of Appeal in making that statement was to secure for

the benefit of a judge deciding whether to allow a minority shareholder's action on behalf of a company to go forward what was described as the commercial assessment whether the prosecution of the action was likely to do more harm than good or, as it was put originally by counsel for Newman Industries, to kill the company by kindness (see [1982] 1 All ER 354 at 366, [1982] Ch 204 at 221). The whole tenor of the Court of Appeal's judgment was directed at securing that a realistic assessment of the practical desirability of the action going forward should be made and should be made by the organ that had the power and ability to take decisions on behalf of the company. Also the question of control pure and simple hardly admitted of any doubt in that particular case. a

Counsel for the plaintiffs submitted in the alternative that what the Court of Appeal said was obiter. This I accept, but it was clearly a carefully considered statement contrasting with the express acknowledgment that they had had little argument on the proper boundaries of the exception to the rule in *Foss v Harbottle* and were therefore not making any definitive statement on that subject, and I propose to follow what I understand to be the true construction of this statement, albeit obiter, unless there is other authority binding on me the other way. b

As to that counsel for the plaintiffs submitted that no reported authority held that in a case falling within the fraud on a minority exception to the rule in *Foss v Harbottle* the court should go beyond seeing whether the wrongdoers are in control and count heads to see what the other shareholders, i.e. those other than the plaintiffs and the wrongdoers, think should be done. I accept that in many reported cases the court has not gone on to the second stage. *Mason v Harris* (1879) 11 Ch D 97 is one such case, and there are modern examples too, such as *Pavlidis v Jensen* [1956] 2 All ER 518, [1956] Ch 565 and *Daniels v Daniels* [1978] 2 All ER 89, [1978] Ch 406. But the fact that such an investigation was not conducted is not conclusive that it could not be conducted, more especially in the absence of any argument on this precise point. An investigation for interlocutory purposes of the propriety of the exercise of voting power in connection with the proposed prosecution of a minority shareholder's action was conducted by Megarry V-C in *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 437, [1982] 1 WLR 2. In that case he permitted the action to proceed, but counsel for the company submitted that the careful scrutiny to which the propriety of the shareholders' voting activities was subjected is of itself an indication of the significance that the court in a proper case will attach to it. This I accept. Another indication in the same direction is Walton J's reaction in the earlier proceedings. He said ([1986] 2 All ER 551 at 560, [1986] 1 WLR 580 at 591): c

'This is, of course, not an application to strike out the action on the grounds that it cannot be justified as a minority shareholders' action, but quite clearly the same kind of considerations apply. If the majority of the independent shareholders do not wish the action to be continued, clearly the court will not sanction its continuance and certainly not at the expense of the company.' d

I accept that this is only by way of obiter for that particular question was not argued at that stage or before Walton J, but it represents the reaction of a judge very experienced in this field. In my judgment the word 'control' was deliberately placed in inverted commas by the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] 1 All ER 354 at 364, [1982] Ch 204 at 219 because it was recognised that voting control by the defendants was not necessarily the sole subject of investigation. Ultimately the question which has to be answered in order to determine whether the rule in *Foss v Harbottle* applies to prevent a minority shareholder seeking relief as plaintiff for the benefit of the company is: is the plaintiff being prevented improperly from bringing these proceedings on behalf of the company? If it is an expression of the corporate will of the company by an appropriate independent organ that is preventing the plaintiff from prosecuting the action he is not improperly but properly prevented and so the answer to the question is No. The appropriate independent organ will vary e

a according to the constitution of the company concerned and the identity of the defendants, who will in most cases be disqualified from participating by voting in expressing the corporate will.

b Finally on this aspect of the matter I remain unconvinced that a just result is achieved by a single minority shareholder having the right to involve a company in an action for recovery of compensation for the company if all the other minority shareholders are for disinterested reasons satisfied that the proceedings will be productive of more harm than good. If the argument of counsel for the plaintiffs is well founded, once control by the defendants is established the views of the rest of the minority as to the advisability of the prosecution of the suit are necessarily irrelevant. I find that hard to square with the concept of a form of pleading originally introduced on the ground of necessity alone in order to prevent a wrong going without redress.

c I therefore conclude that it is proper to have regard to the views of independent shareholders. In this case it is common ground that there would be no useful purpose served by adjourning to enable a general meeting to be called. For all practical purposes it is quite clear how the votes would be cast, and that I described at the outset of this judgment. The questions therefore remain: what is the test of independence? and does Wren Trust pass it?

d On the former, counsel for the plaintiffs submitted I should apply the test formulated in *Re Hellenic and General Trust Ltd* [1975] 3 All ER 382, [1976] 1 WLR 123 by analogy. That decision was concerned with a scheme of arrangement and was accepted by counsel for the plaintiffs not to be direct authority, but he suggested that the passage in the judgment of Templeman J provides appropriate guidance. He said ([1975] 3 All ER 382 at 385, [1976] 1 WLR 123 at 125):

e 'The question therefore is whether MIT, a wholly owned subsidiary of Hambros, formed part of the same class as the other ordinary shareholders. What is an appropriate class must depend on the circumstances but some general principles are to be found in the authorities. In *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573, [1891-4] All ER Rep 246 the Court of Appeal held that for the purposes of an arrangement affecting the policy-holders of an assurance company the holders of policies which had matured were creditors and were a different class from policy-holders whose policies had not matured. Lord Esher MR said ([1892] 2 QB 573 at 580, [1891-4] All ER Rep 246 at 250): "... they must be divided into different classes ... because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes." Bowen LJ said ([1892] 2 QB 573 at 583, [1891-4] All ER Rep 246 at 251): "It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest." Vendors consulting together with a view to their common interest in an offer made by a purchaser would look askance at the presence among them of a wholly owned subsidiary of the purchaser.'

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j Counsel for the fourth defendant, on the other hand, took me through a line of authority regarding the efficacy of resolutions passed by or with the help of votes whose validity was impugned. From *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, [1900-3] All ER Rep 746 onwards there has been applied a test whether the votes in question were exercised bona fide for the benefit of the company as a whole. The generality of the test has led to differences of judicial opinion on the result of applying it to a particular set of facts, notably in that particular case. That is further illustrated by the different results reached on not very dissimilar facts in *Brown v British Abrasive Wheel Co Ltd* [1919] 1 Ch 290 and *Sidebottom v Kershaw Leese & Co Ltd* [1920] 1 Ch 154. In my judgment in this

case votes should be disregarded if, but only if, the court is satisfied either that the vote or its equivalent is actually cast with a view to supporting the defendants rather than securing benefit to the company or that the situation of the person whose vote is considered is such that there is a substantial risk of that happening. The court should not substitute its own opinion but can, and in my view should, assess whether the decision-making process is vitiated by being or being likely to be directed to an improper purpose.

In general terms I would seek to apply the test applied by the Court of Appeal in *Allen v Gold Reefs of West Africa Ltd* but it seems to me possible to formulate a more particular one in the circumstances of this case. The analogy with schemes of arrangement and *Re Hellenic and General Trust Ltd* is a good deal less compelling. Moreover the application of such a test as I have indicated should prevent any risk of the danger that counsel for the plaintiffs relied on of the resolution which prevents proceedings being brought on behalf of the company being itself treated as a fraud on the minority.

The question thus arises whether Wren Trust's decision, which is the equivalent of a vote, passes the test or is vitiated by being directed to an improper purpose. The evidence filed by the defendants on this issue consist of two affidavits by the fourth defendant and two by Mr Baldock, who is the managing director of Gresham Trust plc and a director of Wren Trust, its subsidiary. Mr Baldock deposed in an affidavit sworn on 1 July 1985 as follows:

'4. As a Director of Gresham Trust and Wren Trust I am involved in making a number of investments in unquoted companies. I can say that, without doubt, the investment in Film Finances has been, both in terms of capital appreciation and income, a very successful investment. For the reasons set out in [the fourth defendant's] Affidavit I am of the opinion that the remuneration which has been paid to Messrs. Soames, Korda and Croft is in all the circumstances reasonable.

5. The present litigation is a source of some considerable concern to Gresham Trust and Wren Trust in that it jeopardises a valuable investment. My reasons for so stating are that, as a professional investor, I am of the view that Mr. Soames represents the principal asset of the Company. The present proceedings, purportedly brought on behalf of the Company, are thus a personal attack on the Company's principal asset. Whilst Mr. Soames has a substantial equity stake in the Company he is not bound to the Company by a long term service contract. There is therefore no reason why if Mr. Soames became so disenchanted with the present litigation he could not either set up business on his own account in this country or seek alternative employment in the same industry in the United States of America. I have no doubt that in view of the record of the Company he would have little difficulty in either obtaining the necessary finance to commence business on his own account or to find alternative employment in the United States of America at the same or a higher salary.

6. If Mr. Soames were to leave the Company the effect upon the investment of all the minority shareholders in the Company would in my opinion be catastrophic and, even if it were possible to replace Mr. Soames, then I verily believe that the remuneration which would have to be paid for an appropriate replacement would be at the same level or in excess of that which Mr. Soames is already receiving.

7. The Statement of Claim in these proceedings alleges that the proceedings are brought for the benefit of all shareholders. Wren Trust as a minority shareholder holding some 19.66% of the issued share capital of the Company is of the view:— (i) that the remuneration which has been paid to the executive directors is in all the circumstances reasonable; (ii) that the present proceedings are not for the benefit of the minority shareholders; and (iii) that if the present proceedings continue they will put in jeopardy the value of the investment of all the minority shareholders.'

After the independence of Wren Trust had been challenged, Mr Baldock swore a further affidavit on 18 March 1986 in which he said:

a '5. Wren Trust Limited is not a party to the present proceedings. However, it has been suggested that because the non-executive chairman of Film Finances Limited, [the fourth defendant], is a director of Wren Trust and Gresham Trust, Wren Trust cannot properly be said to be an independent shareholder. In this regard, the Board of Gresham Trust and the Board of Wren Trust have carefully considered the passage in the Judgment of Mr Justice Walton [see [1986] 2 All ER 551 at 564-565, [1986] 1 WLR 580 at 596-597].

b 6. The Directors of Gresham Trust and the Directors of Wren Trust have been advised that this Honourable Court would be entitled to disregard the views of Gresham Trust and Wren Trust in assessing whether a majority of the independent shareholders considers that the proceedings are for the benefit of Film Finances Limited, if they allowed their consideration of the merits of the present proceedings to be influenced by the fact that [the fourth defendant] is a Defendant in the proceedings.

c 7. The Directors of Gresham Trust and the Directors of Wren Trust (excluding in each case [the fourth defendant]) have carefully considered the issues in the present action, the Affidavits sworn herein and the Judgment of Mr Justice Walton. For the reasons already set out in my first Affidavit . . . and in the Affidavit of [the fourth defendant] . . . they have concluded that the present proceedings are not only
d of no benefit to Film Finances Limited but they put at risk the investment of Gresham Trust and Wren Trust in Film Finances Limited. Accordingly, the Directors of Gresham Trust and the Directors of Wren Trust (excluding in each case [the fourth defendant]) have resolved to support the application by Film Finances Limited to strike out the present proceedings, and any application which [the fourth defendant] may be advised to make to strike out the present proceedings, and I have
e been authorised to swear this Affidavit in support of such applications . . .'

Then he exhibits minutes of the relevant board meetings. That in relation to Wren Trust recorded that Mr Scott, a solicitor, reported on the present state of the proceedings which had been commenced by three minority shareholders in the company where Wren Trust is a substantial minority shareholder, and then he refers to the application before Walton J
f and the possibility of an appeal. There being no questions of a factual nature the fourth defendant then left the meeting, and the minute then said:

g 'Mr. Scott explained to the meeting that in considering Film Finances Limited's application to dismiss the proceedings, the Court would wish to have regard to the views of the independent shareholders. In considering the merits of the proceedings and whether the Board considered that the prosecution of the proceedings was in the best interests of Film Finances Limited, the Board must disregard the fact that one of its number was a Defendant in the proceedings. The Directors should only have regard to the effect of the present proceedings upon its investment in Film Finances Limited. If, for the reasons set out in the Affidavits already sworn by [the fourth defendant] and Mr. Baldock, the Board considered that there were good
h commercial reasons why the proceedings were not in the best interests of Film Finances Limited, then it should resolve to support Film Finances Limited's application to dismiss the proceedings and, on the basis of Mr. Justice Walton's judgment, there was no reason why the Court should not take note of Wren Trust Limited's view as to the merit of the proceedings.'

j And then the resolution is recorded.

An attempt was made on behalf of the plaintiffs to adduce evidence to show that Mr Baldock as well as the fourth defendant was personally interested but that attempt was not persisted in or relied on at the hearing before me. I need not therefore take up time dealing with it. But the fact that it was made and that repeated offers to tender Mr Baldock and the fourth defendant for cross-examination on this issue of the independence

of Wren Trust were not taken up is, in my judgment, some indication of the weakness of the plaintiffs' case on that issue.

Counsel for the plaintiffs relied on evidence that showed that Wren Trust has been described as an associate of the executive directors. I accept that there is evidence that Wren Trust sided with the executive directors in the boardroom tussle that resulted in Mr Garrett's resignation as a director of the company and could properly be described as associates in that context, and that there is evidence that Gresham Trust plc itself was involved in the share transactions leading up to Mr Garrett's resignation. I nevertheless remain firmly of the view that there is no sufficient evidence that, in relation to the present question whether these proceedings should continue, Wren Trust has reached its conclusion on any grounds other than reasons genuinely thought to advance the company's interests. It is not for me to say whether the decision itself is right or wrong. It is for me to say whether the process by which it was reached can be impugned, and I hold that it cannot. Nor do I consider that in the circumstances there is shown to have been a substantial risk of Wren Trust's vote having been cast in order to support the defendants as opposed to securing the benefit of the company.

That conclusion means that I accede to the fourth defendant's and the company's motions and direct that the statement of claim be struck out. Before parting with the case I should like to say a further word about the procedure.

Counsel for the plaintiffs at the end of his long and helpful addresses described the procedure as a shambles. Without going to those lengths I do agree that it had unsatisfactory features, not least the length of time taken. The order of speeches did not in the event match the onus of proof and, although I doubt whether in the course of his marathon counsel left any ground uncovered, nevertheless that was another unsatisfactory feature. It may very well be that the Court of Appeal will have an opportunity of elaborating what was said in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354, [1982] Ch 204.

For my part I would say three things. First, I consider there may well be a much stronger case for requiring a prospective plaintiff to have the onus of establishing that his case falls within the exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 or outside it altogether than there is for putting the same onus on him to show that the company would be likely to succeed if it brought the action. On the latter it might well be appropriate to apply the usual test under RSC Ord 18, r 19 and the inherent jurisdiction which puts the onus on the defendants to show the case is effectively unarguable.

Second, I consider it would be highly desirable for applications in respect of costs under *Wallersteiner v Moir* (No 2) [1975] 1 All ER 849, [1975] QB 373 procedure to be made at the same time as the plaintiff establishes whatever it is that he does have to establish. A great deal of expense has been caused in this case by the piecemeal way in which the matter has proceeded.

Third, I believe that it would be helpful for there to be specific procedure laid down, whether by way of rules of court or practice direction I know not, for the initiation and prosecution of actions by minority shareholders to recover on behalf of a company.

Statement of claim struck out as against the fourth defendant and the company. Leave to appeal granted.

Solicitors: *Herbert Smith* (for the fourth defendant); *Harbottle & Lewis* (for the company); *Gouldens* (for the plaintiffs).

Evelyn M C Budd Barrister.

Ogwo v Taylor

HOUSE OF LORDS

LORD MACKAY OF CLASHFERN LC, LORD BRIDGE OF HARWICH, LORD ELWYN-JONES, LORD TEMPLEMAN AND LORD ACKNER

22 OCTOBER, 19 NOVEMBER 1987

a

Negligence – Duty to take care – Persons to whom duty owed – Fireman – Duty of care owed to fireman – Nature of duty – Fireman attending premises to put out fire – Fire caused by occupier's negligence – Fireman injured by steam created by fighting fire with water – Fireman wearing protective clothing – Whether person starting fire owing duty of care to fireman – Whether fireman's injuries reasonably foreseeable – Whether duty of care to fireman limited to special or exceptional risks.

c

The defendant negligently started a fire by using a blowlamp to burn off the paint on the fascia board under the eaves of his house thereby causing the roof timbers to catch fire. The plaintiff, a fireman, went into the roof space to tackle the fire and sustained serious injuries from steam generated by water poured onto the fire, notwithstanding that he was wearing standard protective clothing. There was no suggestion that the contents of the roof space were unusually combustible or that there was any special danger from some hidden cause. The plaintiff brought an action in negligence against the defendant, contending that, because the fire had been started negligently and because he had been injured as a result, he was entitled to recover damages from the defendant. The judge held that the defendant had been negligent but that he could not reasonably have foreseen the injury suffered by the plaintiff and rejected the claim. The plaintiff appealed. The Court of Appeal held that a person who negligently started a fire was liable for any injury sustained by a fireman or another person fighting the fire which was a foreseeable consequence of the negligent starting of that fire and accordingly gave judgment for the plaintiff. The defendant appealed to the House of Lords, contending that a person who negligently started a fire was only liable to a fireman if there was an exceptional risk associated with the fire which imposed an additional hazard over and above the ordinary risks inherent in fire-fighting.

d

e

f

Held – Where it could be foreseen that firemen would have to attend to extinguish a fire which was negligently started and that, because of the very nature of the fire, the firemen would be at risk even if they exercised all their professional skill, the person starting the fire owed a duty of care to the firemen and was liable for injuries suffered by a fireman while attempting to put out the fire, regardless of whether the injuries were suffered as the result of exceptional or merely ordinary risks undertaken by the fireman. The defendant was accordingly liable to the plaintiff and the appeal would therefore be dismissed (see p 962 *e f*, p 963 *h* to p 964 *b*, p 965 *b* to *d*, p 966 *b* to *d j* to p 967 *b*, post).

g

Dictum of Woolf J in *Salmon v Seafarer Restaurants Ltd* (British Gas Corp, third party) [1983] 3 All ER at 736 approved.

h

Decision of the Court of Appeal [1987] 1 All ER 668 affirmed.

Notes

For the duty to take care, see 34 Halsbury's Laws (4th edn) para 5, and for cases on the subject, see 36(1) Digest (Reissue) 17-32, 34-103.

j

Cases referred to in opinions

Donoghue (or *M'Alister*) v *Stevenson* [1932] AC 562, [1932] All ER Rep 1, HL.

Flannigan v British Dyewood Co Ltd 1969 SLT 223, Outer House.

Hartley v British Rlys Board (1981) 125 SJ 169, CA.

Hughes v Lord Advocate [1963] 1 All ER 705, [1963] AC 837, [1963] 2 WLR 779, HL. a

Krauth v Geller (1960) 157 A 2d 129, NJ SC.

Merrington v Ironbridge Metal Works Ltd [1952] 2 All ER 1101, Salop Assizes.

Salmon v Seafarer Restaurants Ltd (British Gas Corp, third party) [1983] 3 All ER 729, [1983] 1 WLR 1264.

Wagon Mound, The (No 2), Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd [1966] 2 All ER 709, [1967] 1 AC 617, [1966] 3 WLR 498, PC. b

Walters v Sloan (1977) 20 Cal 3d 199, Cal SC.

Appeal

The defendant, Robert Arnold Taylor, appealed, with the leave of the House of Lords given on 18 February 1987, against the decision of the Court of Appeal (Dillon, Stephen Brown and Neill LJ) ([1987] 1 All ER 668, [1987] 2 WLR 988) on 16 December 1986 allowing the appeal of the plaintiff, Michael Chiagoro Ogwo, against the decision of Nolan J dated 25 November 1985 dismissing the plaintiff's claim for damages for personal injuries against the defendant. The facts are set out in the opinion of Lord Bridge. c

W R H Crowther QC and *R Moxon Browne* for the defendant. d

Benet Hytner QC, *John Leighton Williams QC* and *Stephen Rubin* for the plaintiff.

Their Lordships took time for consideration.

19 November. The following opinions were delivered. e

LORD MACKAY OF CLASHFERN LC. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge. I agree that this appeal should be dismissed for the reasons which he gives. I am glad to note that my noble and learned friend's reasoning accords with the opinion of Lord Guthrie in *Flannigan v British Dyewood Co Ltd* 1969 SLT 223. f

LORD BRIDGE OF HARWICH. My Lords, I shall refer to the parties to the appeal before your Lordships as the plaintiff and the defendant. The defendant was the occupier of a small terrace house on two floors in Hornchurch. He attempted to burn off paint from the fascia boards beneath the eaves of his house with a blowlamp and in so doing set fire to the premises. The fire brigade were called and the plaintiff, an acting leading fireman, arrived with the first fire appliance. Smoke was coming from the house, but it was impossible to locate the seat of the fire from outside. The plaintiff and a colleague entered the house wearing breathing apparatus and the usual fireman's protective clothing and armed with a hose. In due course they located the seat of the fire in the roof space. The rafters to the rear of the house were well alight from the eaves to the ridge. The two firemen were able, with the aid of a stepladder, to squeeze through a small hatch to get into the roof space and in due course to bring the fire under control by playing their hose on it. The heat within the roof space was intense until they were able to relieve it by kicking out some of the roof tiles, as they had been trained to do in such a situation. The plaintiff, although he did not realise it until he came down from the roof, suffered serious burn injuries to his upper body and face from scalding steam which must have penetrated his protective clothing. g
h

The plaintiff's claim for damages was tried by Nolan J who had no difficulty in finding that the defendant had negligently started the fire, but nevertheless dismissed the plaintiff's claim on the ground that the injuries he sustained were not a reasonably foreseeable consequence of the defendant's negligence. The Court of Appeal (Dillon, Stephen Brown and Neill LJ) ([1987] 1 All ER 668, [1987] 2 WLR 988) reversed the i

a judge and gave judgment for the plaintiff in the agreed sum, inclusive of interest to the date of judgment, of £14,402. The defendant appeals by leave of your Lordships' House.

The finding of negligence is not challenged. Counsel for the defendant expressly disclaimed any intention to rely on the defence of volenti and accepted that the appeal turned solely on the issues of foreseeability, proximity and causation. He relied on the judge's conclusion as a finding of fact which an appellate court should not disturb.

b I find it convenient to examine the issues first in the light of basic and well-established principles of general application and only later to consider the authorities concerned specifically with injuries sustained by professional firemen performing their duties in fighting fires occasioned by negligence. It is important, however, to emphasise at the outset that no suggestion of any kind is made of fault on the part of the plaintiff and the chain of events leading to his injuries must accordingly be considered on the footing that he himself acted throughout precisely as was to be expected of a properly trained and properly equipped fireman in the circumstances which confronted him.

c The trial judge expressed his conclusion on foreseeability in the following passage:

d 'The question here is whether it could be foreseen that Mr Ogwo, going up into the roof and remaining there, in conditions of intense heat, would suffer *the burns from which he did suffer*, even though he was a trained fireman and had been sent to a fire without extraordinary features. Here it seems to me that the plaintiff cannot succeed, because it seems that neither the plaintiff himself nor his colleague were able to foresee, looking into that apparently ordinary loft of an ordinary house, the danger that confronted them *to the extent of the injuries caused*. Of course they saw there was danger, but they did not anticipate that Mr Ogwo would come out badly burned, as he was.' (My emphasis.)

e The words emphasised demonstrate where the judge appears to me to have fallen into error. The proper question to be asked is not whether the particular injuries sustained by the plaintiff were reasonably foreseeable, still less whether they were actually foreseen. As Lord Reid put it in *Hughes v Lord Advocate* [1963] 1 All ER 705 at 706, [1963] AC 837 at 845, a negligent defendant 'can only escape liability if the damage can be regarded as differing in kind from what was foreseeable'. Of course, the plaintiff entering the loft did not foresee the nature or severity of the injuries he was going to suffer. As the judge said, he could see there was danger, but a man with the courage which a fireman must constantly be called to show has no time in such a situation to reflect on the precise nature and extent of the risks he is running. Looked at, as it should be, from the point of view of the negligent defendant who started the fire in the loft, he could foresee that the fire brigade would be called, that firemen would use their skills to do whatever was both necessary and reasonably practicable to extinguish the fire and that, if this involved entering the loft and playing a hose on the fire, they would be subject to any risks inherent in that operation, of which the risk of a scalding injury was certainly one. This was a real risk occasioned by setting fire to the rafters of a small terrace house, a risk which the defendant could have avoided by elementary care and without difficulty or expense to himself and certainly not a risk which a reasonable man would brush aside as far fetched. It therefore satisfies the criterion of foreseeability posed as the test of remoteness by Lord Reid, delivering the judgment of the Privy Council in *The Wagon Mound* (No 2), *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd* [1966] 2 All ER 709 at 719, [1967] 1 AC 617 at 643-644.

j Counsel for the defendant also sought to argue that the defendant owed the plaintiff no duty of care. Here again, the case to me seems to fall clearly within the principle enunciated in the classic passage from the speech of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at 580, [1932] All ER Rep 1 at 11. The plaintiff was a person so closely and directly affected by the defendant's act that the defendant ought reasonably to have had him in contemplation as being so affected when directing his mind to the acts or

omissions called in question, in this case using the blow lamp without taking care to avoid setting the rafters alight.

So far as causation is concerned, no more need be said than that the links in the chain of causation from the negligence which started the fire to the injuries which the plaintiff sustained were clearly continuous and unbroken.

On the face of it, therefore, this seems to me a straightforward case of a plaintiff to whom the defendant owed a duty of care suffering injury as a reasonably foreseeable consequence of a breach of that duty by the defendant.

The principal theme by which counsel for the defendant sought to avoid that conclusion was that, in the case of a professional fireman, a distinction could be drawn between the 'ordinary' risks inherent in fire-fighting and 'exceptional' risks created by some unusual feature of the fire which arises from the nature or condition of the premises where the fire occurs or in some other way. The submission, as I understand it, is that the party who negligently starts the fire is not liable to a professional fireman injured by the 'ordinary' risks of fire-fighting, but only to one injured by an 'exceptional' risk which the defendant could have foreseen and avoided by warning or otherwise. If the submission is well founded, counsel has the advantage of a factual foundation for its application here in findings by the judge that there was nothing unusual about this fire, that there was no unusually combustible material in the loft and that attending fires in terrace houses was a regular part of a fireman's duties.

The first case relied on in support of the submission is *Merrington v Ironbridge Metal Works Ltd* [1952] 2 All ER 1101, a decision at first instance of Hallett J. This was a claim by a fireman injured in fighting a fire at a factory where the defendants had allowed large quantities of fine dust containing aluminium and carbon particles to accumulate. The plaintiff was injured by a dust explosion caused, as the judge held, by the defendants allowing their premises to be in a condition which created 'exceptional and serious risks' of fire and explosion. Having considered and rejected a defence of volenti, the judge said (at 1104):

'This may be a convenient moment to say emphatically that I do not accept the submission of leading counsel for the plaintiff that, if a fireman sustains injury as the result of performing his duty at a fire, he ipso facto becomes entitled to recover compensation from any person whose carelessness has caused the fire in question.'

This is the cornerstone of counsel's argument that negligence in starting a fire to which the fire brigade have to be called can never, per se, be sufficient to establish liability in damages to a fireman injured by a hazard of a kind to which the inherent dangers of the fireman's profession necessarily subject him. There must always, so it is argued, be some extraneous or exceptional feature in the circumstances of the fire which imposes an additional hazard for which the tortfeasor can be held responsible.

Further support for this view is sought in the decision of the Court of Appeal in *Hartley v British Rlys Board* (1981) 125 SJ 169. There a railway servant, responsible for manning a station building, left it unattended without telling his employers that he was doing so and left a coal fire burning inside in an open stove. The stove was piled high with coal and a burning coal fell from it and set fire to the building. When the fire brigade were called by the railway authorities, they inquired whether the building was occupied and were told that it was. Consequently, on arrival at the scene, the plaintiff fireman was sent in to search the building for the servant believed to be still inside and in the course of the search he sustained the injuries which were the subject of the claim. The Court of Appeal, reversing the trial judge, held that the servant's negligence was responsible for the fire, but they founded their attribution of liability to the employers on the additional element of negligence on the part of the servant in failing to inform his employers that he was leaving the building unattended at a time when he was supposed to be on duty there. It was this failure, as the Court of Appeal held, which led foreseeably to the unnecessary search of the building by the plaintiff fireman and hence to his injury.

a Of course I accept that not everybody, whether professional fireman or layman, who is injured in a fire negligently started will necessarily recover damages from the tortfeasor. The chain of causation between the negligence and the injury must be established by the plaintiff and may be broken in a number of ways. The most obvious would be where the plaintiff's injuries were sustained by his foolhardy exposure to an unnecessary risk either of his own volition or acting under the orders of a senior fire officer. But, subject to this, I can see no basis of principle which would justify denying a remedy in damages against b the tortfeasor responsible for starting a fire to a professional fireman doing no more and no less than his proper duty and acting with skill and efficiency in fighting an ordinary fire who is injured by one of the risks to which the particular circumstances of the fire give rise. Fire out of control is inherently dangerous. If not brought under control, it may, in most urban situations, cause untold damage to property and possible danger to life. The duty of professional firemen is to use their best endeavours to extinguish fires c and it is obvious that, even making full use of all their skills, training and specialist equipment, they will sometimes be exposed to unavoidable risks of injury, whether the fire is described as 'ordinary' or 'exceptional'. If they are not to be met by the doctrine of volenti, which would be utterly repugnant to our contemporary notions of justice, I can see no reason whatever why they should be held at a disadvantage as compared to the layman entitled to invoke the principle of the so-called 'rescue' cases.

d Counsel for the defendant suggested it would be anomalous that a fireman should recover damages for injuries sustained in fighting a fire caused by negligence when his colleague who suffers similar injuries in fighting another fire of which the cause is unknown has no such remedy. If this be an anomaly, it is one which is common to most, if not all, injuries sustained by accident and is inevitable under a system which requires proof of fault as the basis of liability. The existence of the suggested anomaly is the e strongest argument advanced by those who support the introduction of a 'no fault' system of compensation. But it has no special application to the case of firemen.

f At the end of the day I am happy to find my views in full accord with those expressed in the latest authority directly in point, which is the decision at first instance of Woolf J in *Salmon v Seafarer Restaurants Ltd (British Gas Corp, third party)* [1983] 3 All ER 729, [1983] 1 WLR 1264. The facts and the grounds of the decision are conveniently summarised in the headnote, which I quote ([1983] 1 WLR 1264):

g 'The plaintiff fireman attended a fire at the defendants' fish-and-chip shop, which had been caused by the failure of the defendants to put out a light under a chip fryer before closing the shop for the night. While in attendance at the fire, the plaintiff was ordered by a senior officer to use a ladder to obtain access to the second floor, via a flat roof. As the plaintiff stood footing the ladder on the flat roof an explosion occurred, caused by the heat from the fire melting seals on gas meters on the premises and allowing gas to escape. The explosion caused the plaintiff to be thrown to the ground and sustain injury. He brought an action for damages for personal h injuries alleging that the fire had been started by the defendants' negligence and that he had been injured as a result of that negligence. The defendants denied that they owed a duty of care to the plaintiff. On the question as to the duty owed by an occupier to a fireman attending at his premises to put out a fire: Held, that notwithstanding the special training received by firemen to deal with the dangers inherent in fires, the duty owed by an occupier causing fire on premises to a fireman attending that fire extended to the ordinary risks and dangers inherent in a fireman's i occupation and was not limited to a requirement to protect the fireman only against special, exceptional, or additional risks; that the fireman's special skills and training were relevant in determining liability but, where it was foreseeable that a fireman exercising those skills would be injured through the negligence of the occupier, the occupier was in breach of his duty of care; that as the fire had been caused by the defendants' negligence and since it was foreseeable that the plaintiff would be

required to attend the fire and would be at risk of the type of injuries he received from the explosion which was caused by the negligence, the defendants were liable for those injuries and damages were recoverable by the plaintiff.' a

I would particularly wish to adopt and indorse a passage in the judgment where the judge said ([1983] 3 All ER 729 at 736, [1983] 1 WLR 1264 at 1272):

'Where it can be foreseen that the fire which is negligently started is of the type which could, first of all, require firemen to attend to extinguish that fire, and where, because of the very nature of the fire, when they attend they will be at risk even though they exercise all the skill of their calling, there seems no reason why a fireman should be at any disadvantage when the question of compensation for his injuries arises.' b

There was some discussion in argument before your Lordships whether in the phrase 'because of the very nature of the fire' the definite article which I have emphasised might not have been superfluous and unintended. It is perhaps arguable that any fire, once out of control, may put firemen at risk and that accordingly it is 'the very nature of fire' which makes the risk foreseeable. But I prefer the view that the judge was using language with his usual precision and accuracy and recognising that there may be some fires which, although calling for the services of the fire brigade, pose no foreseeable risk to firemen acting with due skill and care. c

The defendant's written case indicated an intention to rely on what is known as the 'fireman's rule' as applied in the jurisprudence of some of the states of the United States of America, and cited as the rationale of the rule the following passage from the judgment of the Supreme Court of New Jersey delivered by Weintraub CJ in *Krauth v Geller* (1960) 157 A 2d 129 at 130-131: d

'That the misfortune here experienced by a fireman was well within the range of foreseeability cannot be disputed. But liability is not always co-extensive with foreseeability of harm. The question is ultimately one of public policy, and the answer must be distilled from the relevant factors involved upon an inquiry into what is fair and just . . . it is the fireman's business to deal with that very hazard [the fire] and hence, perhaps by analogy to the contractor engaged as an expert to remedy dangerous situations, he cannot complain of negligence in the creation of the very occasion for his engagement. In terms of duty, it may be said there is none owed the fireman to exercise care so as not to require the special services for which he is trained and paid. Probably most fires are attributable to negligence, and in the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained by public funds to deal with those inevitable, although negligently created, occurrences.' e

In oral argument, however, counsel for the defendant did not feel able to derive any assistance from this source and, as I think prudently, did not pursue the matter. f

In the Supreme Court of California in *Walters v Sloan* (1977) 20 Cal 3d 199 the 'fireman's rule' was affirmed in the majority judgment delivered by Clark J, but was exhaustively analysed, criticised and rejected as unsound in the dissenting judgment of Tobriner ACJ. Having read those two judgments, I am left in no doubt whatever that the American 'fireman's rule' has no place in English law. g

I would accordingly dismiss the appeal. h

LORD ELWYN-JONES. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge. I agree with it and for the reasons given by him I would dismiss this appeal. i

LORD TEMPLEMAN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge. I agree with it and for the reasons given by him I would dismiss this appeal.

LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge. I agree with it, and for the reasons which he gives I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Berrymans* (for the defendant); *Robin Thompson & Partners*, Ilford (for the plaintiff).

Mary Rose Plummer Barrister.

Slazengers Ltd and others v Seaspeed Ferries International Ltd The Seaspeed Dora

COURT OF APPEAL, CIVIL DIVISION

DILLON AND BINGHAM LJ

27, 28 OCTOBER 1987

Costs – Security for costs – Plaintiff ordinarily resident out of jurisdiction – Co-plaintiff resident in England – Whether security of costs should be ordered – RSC Ord 23, r 1.

The defendants, a Liberian company, were the owners of a vessel which loaded cargo at Felixstowe, Antwerp and Rotterdam and then sailed to Jeddah, where, in the course of unloading, the vessel capsized and sank with part of the cargo still on board. An action was brought against the defendants in the name of some 116 or 117 plaintiffs representing the cargo interests, being the shippers or consignees of the lost cargo. The cargo was insured and the action was in fact brought in the plaintiffs' names by the underwriters, the large majority of whom were Lloyd's syndicates, claiming by subrogation. Some 50 or 51 of the named plaintiffs were resident outside the jurisdiction and the defendants applied under RSC Ord 23, r 1^a for an order that those plaintiffs provide security for costs. The judge ordered that the foreign plaintiffs provide as security an aliquot share of the defendants' estimated costs of £250,000. The plaintiffs appealed to the Court of Appeal against the order, contending, inter alia, that there was a rule of practice that security for costs should not be granted where there was a plaintiff resident in England even though there were co-plaintiffs resident abroad.

Held – There was no binding rule that security for costs would not be ordered against a foreign plaintiff if there was a co-plaintiff resident within the jurisdiction. Instead, the wide discretion which the court had under RSC Ord 23, r 1 enabled it to order security for costs if it considered it was just to do so notwithstanding that there were plaintiffs resident both within and outside the jurisdiction. Furthermore, the court could make an apportioned order for costs in such circumstances, although (per Bingham LJ) an apportioned order was intrinsically unlikely in a commercial case. However, the court

^a Rule 1, so far as material, is set out at p 790 c d, post

had to look at the reality of the case and if the defendant would have no difficulty in enforcing an order for costs it would be inappropriate to order the plaintiff to give security. Since there was no suggestion that the plaintiffs within the jurisdiction, with or without the support of their underwriters, would not be able to meet any order for costs that might be made, it was not appropriate to order the foreign plaintiffs to provide security. The appeal would therefore be allowed and the judge's order set aside (see p 970 c to h, p 971 f h j, p 972 b h and p 973 b f to h, post).

Decision of Webster J [1987] 2 All ER 905 reversed.

Notes

For the power to order security for costs where the plaintiff is ordinarily resident abroad, see 37 Halsbury's Laws (4th edn) para 299, and for cases on the subject, see 37(2) Digest (Reissue) 430-433, 2634-2653.

Cases referred to in judgments

Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira [1986] 2 All ER 409, [1986] AC 965, [1986] 2 WLR 1051, HL.

Crozat v Brogden [1894] 2 QB 30, [1891-4] All ER Rep 686, CA.

Davies v Eli Lilly & Co [1987] 1 All ER 801, [1987] 1 WLR 1136, CA.

D'Hormusgee & Co v Grey (1882) 10 QBD 13, DC.

Lloyd v McMahon [1987] 1 All ER 1118, [1987] 2 WLR 821, CA and HL.

Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074, [1987] 1 WLR 420.

Procon (GB) Ltd v Provincial Building Co Ltd [1984] 2 All ER 368, [1984] 1 WLR 557, CA.

Winthrop v Royal Exchange Assurance Co (1775) 1 Dick 282, 21 ER 277.

Case also cited

Bosworth (No 2), *The* [1960] 1 All ER 729, [1961] 1 WLR 319, CA.

Interlocutory appeal

The plaintiffs, Slazengers Ltd and some 115 others (50 or 51 of whom were resident out of the jurisdiction), appealed against the decision of Webster J ([1987] 2 All ER 905, [1987] 1 WLR 1197) on 20 March 1987 whereby it was ordered that those plaintiffs resident out of the jurisdiction do provide security for the costs of the defendants, Seaspeed Ferries International Ltd, of Monrovia, Liberia, in the plaintiffs' action against the defendants for damages for breach of contract and/or duty in and about the loading, handling, custody, care and discharge of the plaintiffs' cargo and the carriage thereof on board the defendants' vessel Seaspeed Dora from Rotterdam to Jeddah in 1977. The amount of security ordered to be provided was $\frac{50}{115}$ of £250,000, the amount to be apportioned if necessary equally between the foreign plaintiffs. The facts are set out in the judgment of Dillon LJ.

Dominic Kendrick for the plaintiffs.

Christopher C Russell for the defendants.

DILLON LJ. This is an appeal by the plaintiffs in the action against the decision of Webster J ([1987] 2 All ER 905, [1987] 1 WLR 1197) on 20 March 1987 whereby he ordered that the plaintiffs, or alternatively those of them who are resident outside the jurisdiction, do provide security for the defendants' costs of the action in the sum of $\frac{50}{115}$ of £250,000. Leave to appeal was granted by Kerr LJ, sitting as a single judge of this court. The important factor in the case is that of the large number of plaintiffs many are resident within the jurisdiction of this court; many others are not.

The basic facts out of which the claims arise are simple. The defendants, a Liberian company, were the owners of the Seaspeed Dora, a roll-on roll-off container-carrying ship. In the early summer of 1977 she loaded a cargo partly at Felixstowe, partly at

a Antwerp and partly at Rotterdam, which she carried to the port of Jeddah. In the course of unloading at Jeddah in June 1977, when a part of the cargo had been unloaded but the greater part had not, things were so managed that the ship capsized and went to the bottom, taking with her all the cargo that was still on board. Three actions were therefore started in 1978 and have been consolidated. The plaintiffs claim to represent the cargo interests, being the shippers and the consignees of all the parts of the cargo that were lost. The defendants were the owners of the ship.

b Although the action was started so long ago, and there seems to have been a good deal of sound and fury ever since, progress has been remarkably slight and the parties apparently remain at odds over virtually every issue of fact that could be imagined. Indeed, it goes so far that on the documents before us there is a conflict of evidence between the plaintiffs' solicitor and the defendants' solicitor whether there are 116 or 117 plaintiffs. Of that total, whichever figure be correct (a figure of 115 has also been mentioned), it seems that 50 or 51 are resident outside the jurisdiction. Those resident c outside the jurisdiction are predominantly the consignees of the various consignments of cargo and the shippers of most of the consignments loaded at Antwerp and Rotterdam.

The defendants also dispute the title to sue of all the plaintiffs, so that, as matters stand, if everything continues in the present highly contentious manner, they are seemingly seeking to assert that they have been brought before the court by 116 or 117 parties d claiming to be the cargo owners, no one of whom has any right to claim. Be that as it may, what is common ground is that all the cargo interests were insured and the action is brought in the names of the plaintiffs, be they 116 or 117 or any other number, by underwriters claiming by subrogation. Many of the underwriters are resident within the United Kingdom, but they are not, of course, parties to the action. Others are resident abroad. It is claimed that they are first-class underwriters, and I do not know that that is e disputed.

The essential issues which are likely to be the primary issues when the action comes on for trial are whether the defendants are liable, whether they are entitled to limit their liability and what the effect is of package limitation of liability under the Hague Rules relevant to the particular contracts of carriage.

f The position so far as security of costs is concerned where there are some plaintiffs resident within the jurisdiction and others resident out of the jurisdiction is that it has for a very long time been categorically stated in *The Supreme Court Practice* in the note which is now para 23/1-3/3 of the 1988 edition as follows:

g 'No order will be made if there are co-plaintiffs resident in England . . . but they must be genuine co-plaintiffs and not merely the English attorney joined to avoid giving security . . .'

Here there is of course no doubt that the co-plaintiffs resident in England are genuine co-plaintiffs.

h The authorities given in *The Supreme Court Practice* for the proposition that no order will be made if there are co-plaintiffs resident in England are *Winthorpe v Royal Exchange Assurance Co* (1755) 1 Dick 282, 21 ER 277 and *D'Hormusgee & Co v Grey* (1882) 10 QBD 13. The practice as stated in the 1901 edition of *The Annual Practice*, to which we have been referred, is as follows. After referring to the then RSC Ord 16, r 1, it is said:

i 'Security for costs.—The Rule does not alter the practice existing before the Judicature Act, that where one of two joint plaintiffs is a foreigner out of the jurisdiction and the other resides in England, there can be no order for security for costs.'

Reference is made to *D'Hormusgee & Co v Grey*.

The first point, therefore, which was taken before Webster J was that there was, if not no jurisdiction, at any rate a binding rule of practice that security should never be granted where there was a plaintiff resident in England even though there were others who were

foreigners. Webster J held that that was not now a binding rule, and he ordered security on the basis of fixing as security an aliquot share roughly attributable to the number of foreign plaintiffs of a sum of £250,000, which he took (and as to that there has been no dispute) as an appropriate figure for the defendants' costs. a

Until relatively recently the practice of the courts as to awarding security was not laid down in detail in the Rules of the Supreme Court but rested on the general practice of the courts before the Supreme Court of Judicature Act 1873. That practice seems to have been enforced with some rigidity, as appears from the judgments in the decision of this court in *Crozat v Brogden* [1894] 2 QB 30, [1891-4] All ER Rep 686 and the exceptions characterised by *D'Hormusgee & Co v Grey* seem equally to have been applied with rigidity. However, the present rule (RSC Ord 23, r 1) deals with the matter in wording which makes it plain that the court has a very wide discretion over ordering security. Leaving out alternatives which are not relevant to this case, Ord 23, r 1 provides as follows: b

'Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the court—(a) that the plaintiff is ordinarily resident out of the jurisdiction . . . then if, having regard to all the circumstances of the case, the court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.' c

I have no doubt that on that wording there is jurisdiction at the discretion of the court to order security where some of the plaintiffs are ordinarily resident out of the jurisdiction but others are not, if, having regard to all the circumstances of the case, the court thinks it just to do so. The discretion is, therefore, one to be applied to all the circumstances of the case, and the general statement in *The Supreme Court Practice* that no order will be made if there are co-plaintiffs resident in England must be qualified by the existence of that general discretion. d

It has been recently laid down by the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd*, *The Vimeira* [1986] 2 All ER 409, [1986] AC 965 that the discretionary power of the court to award costs in s 51(1) of the Supreme Court Act 1981 is expressed in very wide terms. It appears that it may well be that in cases where large numbers of plaintiffs join in one action or in one appeal and fail, the court may take the view that only an aliquot share of the total costs should be awarded against each of the unsuccessful parties, instead of making an order for all the costs against all the parties. Thus, in a case where it was just to make such an aliquot order, there would be no risk of one plaintiff being pursued for more than his fair share of the costs and being left to endeavour to recover it from his co-plaintiffs. e

Instances where such a result might be arrived at can be seen from the *Opren* case, *Davies v Eli Lilly & Co* [1987] 1 All ER 801, [1987] 1 WLR 1136 and the case of the Liverpool councillors, *Lloyd v McMahon* [1987] 1 All ER 1118, [1987] 2 WLR 821. f

If therefore the case in which security is sought, where there are some English plaintiffs and some foreign plaintiffs, was a case where there was a realistic possibility that the court at the trial might make an order if the plaintiffs failed, ordering each merely to bear an aliquot share of the costs, an order such as Webster J made ordering security for aliquot shares of the costs would in my view be highly appropriate. My difficulty in this case, however, is in marrying that order to the way this case is constituted. g

The foreign plaintiffs are some of them the consignees of cargo shipped by United Kingdom shippers, and I cannot see how in those cases there is any likelihood of an order for costs being made against the foreign consignees and not against the English shippers. The two have joined in the action to cover the question of title to sue. If they fail, both will be the subject of an order for costs rather than just the foreign consignees. h

The judge was invited also to consider some form of limited security by reference to the bills of lading or to the issues raised, but that also presents, as it seems to me in the i

a circumstances of this case, very formidable difficulties. On a revised schedule, which has been put before us, we are told that there are 24 claims where there is both a foreign consignor and a foreign consignee and no plaintiff within the jurisdiction. Those claims seem to relate to some 23 bills of lading. One, at any rate, of those bills of lading covers other goods shipped where there was an English consignor. We are told that the total in value of the claims where there is no plaintiff within the jurisdiction represents 99% of the claims expressed in United States dollars, 85% of the claims expressed in Deutsche-

b marks, 100% of the claims expressed in Dutch florins and 4.5% of the claims expressed in sterling. The original estimate was 3% of claims expressed in sterling, but further research has apparently revealed that some of the shippers in relation to the sterling claims are resident in the Republic of Ireland and not in the United Kingdom.

c Then, if the value of claims is looked at rather than the heads, it is said that these claims where there is no plaintiff within the jurisdiction represent 53% of the total of all sums claimed by the plaintiffs. That depends, however, on taking rates of exchange on a particular day, and the percentage could well be different if a different day is taken. The percentages will again be different if there were apportionment by the value of the individual issues as opposed to the value by reference to the bills of lading. It is common ground on the evidence that it is very difficult to apportion costs between the common issues between all the plaintiffs and the defendants and individual issues which may

d relate to individual plaintiffs.

The position is that the defendants asked for security for costs but the plaintiffs' solicitors refused to give security. The defendants' solicitors then asked for an undertaking that the plaintiffs would accept that the plaintiffs resident in the jurisdiction would be liable for any costs which might be awarded against plaintiffs resident out of the jurisdiction. The plaintiffs' solicitors stated that they were not in a position to give any

e such undertaking.

The plaintiffs have resolutely opposed any order for security being made and have come to this court by way of appeal against the decision of the judge. The obvious conclusion must be that when this action comes for trial if no security has been ordered the judge, if the plaintiffs fail or fail to any extent, must make any order for costs against all the plaintiffs, including those resident in the jurisdiction. They have chosen to stand

f together and should fall together. That is, of course, the reality of the situation as this is an underwriters' claim.

There being the jurisdiction to make an order for security as there are co-plaintiffs outside the jurisdiction, and it not being a case in which issues affecting only the co-plaintiffs outside the jurisdiction can be easily identified, or in which there is in my view any likelihood of the court ordering each individual plaintiff to bear an aliquot share

g only of costs, is it right that there should be an order somewhat in the way of a blunt instrument for the provision of aliquot shares for security, or is this a case in which security is not really required by the defendants because it is a case in which, if they succeed, they will be bound to get an order for costs against plaintiffs resident within the jurisdiction? There is no suggestion that the plaintiffs within the jurisdiction, with or

h without the support of their underwriters, would not be able to meet any order for costs that might be made. They include several apparently very substantial companies.

I have no doubt in these circumstances that the form of order which the judge made is inappropriate to this action. It is an underwriters' action in which the plaintiffs stand together as I have said, and it is plain that if when matters come to trial the plaintiffs fail and the defendants are entitled to an order for costs they are bound to get it as against

j plaintiffs within the jurisdiction as well as against the plaintiffs outside the jurisdiction. Therefore, while I entirely approve the judge's decision that he is not limited by an inflexible rule as stated hitherto in *The Supreme Court Practice*, I think he was wrong to order the security which he did order.

For these reasons I would allow this appeal and set aside the security which was ordered by the judge.

BINGHAM LJ.

'The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs.'

(See Sir Nicolas Browne-Wilkinson V-C in *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074 at 1076, [1987] 1 WLR 420 at 422.)

Where the conditions for ordering security are satisfied, the decision whether or not to make an order and, if so, in what amount is one for the master or district registrar or judge, who will take account of all the circumstances of the case and make such order, if any, as appears to him to be just. The discretion of the master or district registrar or judge is not to be fettered by any inflexible rule (see, for example, *Procon (GB) Ltd v Provincial Building Co Ltd* [1984] 2 All ER 368, [1984] 1 WLR 557). The passage in *The Supreme Court Practice* 1988 vol 1, para 23/1-3/3, which Dillon LJ has quoted, accordingly cannot stand without qualification as a statement of legal principle.

I am satisfied that the judge's order in this case is not bad in principle and is not shown to have been the result of legal misdirection. Indeed, if I may say so, the judge rendered a service by reviewing the old authorities and pointing out that they established no inflexible legal rule. Accordingly, the judge's decision is challengeable in this court only on familiar grounds: that he took account of factors which he should not have taken into account or that he failed to take account of factors which he should have taken into account or that his decision was plainly wrong.

For the purposes of this case it is necessary to assume that the defendants are successful, wholly or in part, against some or all of the foreign plaintiffs. The ordinary consequence would then be that an order for costs would be made in the defendants' favour against those plaintiffs. If it were a reasonably foreseeable outcome of the case that the order would be for each such foreign plaintiff to pay a proportionate part of the defendants' costs, and if it were reasonably likely that there would be no fund in the jurisdiction against which to enforce such an order, the judge's order could not be shown to be wrong and would, indeed, be beyond all challenge.

Those two conditions do, however, require to be reviewed in the context of this case. An apportioned order for costs is not without precedent. Dillon LJ has referred to the *Opren* case, *Davies v Eli Lilly & Co* [1987] 1 All ER 801, [1987] 1 WLR 1136 and to the Liverpool councillors' case, *Lloyd v McMahon* [1987] 1 All ER 1118, [1987] 1 All ER 1074, although it is to be noted that in those cases legal aid may well have had an influence on the order for costs. In my limited experience, such an order in this type of case is unheard of, and I am sure that it is not usual, if indeed it is known, in the Commercial Court.

That is not, of course, by any means conclusive. The judge's discretion in costs at the conclusion of the trial is very wide, as is his discretion to order or not to order security. That discretion also is not to be hampered by inflexible rules. But I must, for my part, say that I would regard such an order at the conclusion of this case as being intrinsically unlikely. Furthermore, if these foreign plaintiffs were now to avoid giving security by submitting that such an order would not be made, I would regard it as inconceivable that any judge would think it fair to make such an order to the prejudice of the defendants at the end of the trial. Here, counsel for all the plaintiffs, English and foreign, submits that such an order would not be made. He accepts that an order made against the plaintiffs generally could be enforced in toto against any plaintiff. He has not given any undertaking, but he has made a clear statement in open court, which no doubt has been recorded.

At the end of the trial I can see no circumstances in which the defendants, if they did not have security, would want an apportioned order, and the plaintiffs would be in no position to ask for such an order. It simply would not be open to counsel for the plaintiffs hereafter to contend for such an order in the light of the submissions made to us. If,

a therefore, the judge were minded to make such an order, the defendants would, in my judgment, have an unanswerable objection. I do not, therefore, think that the first condition is satisfied in this case, although I think that the point has been put rather differently in this court and the judge did not have the benefit of the full submissions that we have heard.

b I turn to the second condition. All these claims, although brought in the names of the plaintiffs, are substantially brought by underwriters who are subrogated to the plaintiffs' claims. We have seen a list of the underwriters. The very large majority are Lloyd's syndicates. There are some other English insurers and some foreign insurers. There is every reason to think that there is an ample fund available within this country against which an order for costs could be enforced. No previous instance has been brought to our attention in which there has been difficulty in obtaining satisfaction of an order in circumstances of this kind. That I regard as a fact of some significance. The claim here, if c not common form, is not an unusual type of claim. The solicitors for the plaintiffs and the defendants respectively are highly experienced and very well known to each other. They probably handle more work of this kind against each other than any other solicitors in the City of London or probably in the world. Neither has drawn our attention to any occasion on which an apportionment order has been made or in which there has been any difficulty in obtaining payment of costs ordered against plaintiffs generally.

d I think that this order is novel. That is not in itself an objection. The judge's legal analysis and reasoning were, as I respectfully think, impeccable. He pointed out quite correctly that there is no such rule as *The Supreme Court Practice* suggests. But *The Supreme Court Practice's* statement does represent a practice which has been observed for a long time. In my judgment it is on the whole desirable that practitioners should know what to expect in a recurring situation such as this. It is also on the whole desirable that a e settled practice should be followed unless reason is shown for departing from it. The fact that this statement has endured in *The Supreme Court Practice* through edition after edition does suggest that it is a practice which is acceptable and fair in the ordinary run of cases.

f In my view the judge's decision cannot be successfully challenged on the grounds of failure to take into account the unlikelihood of the making of an apportionment order. As I say, the argument before him simply was that an apportionment order was unlikely. I respectfully disagree with his judgment on that point, but would not feel entitled to interfere on that ground alone. I am, however, persuaded that the plaintiffs have established that he failed to take account of a significant matter, namely the presence of insurers and the existence of an ample fund within the jurisdiction against which an order for costs would be satisfied. It is, on the material before us, a virtual certainty that g there would be no problem in enforcement.

Accordingly, in my judgment, it is open to this court to exercise its discretion afresh, and I would do so by declining to make an order for security, because I do not think that an order is needed for the reasonable protection of the defendants.

h For those reasons, in addition to those which Dillon LJ has given, I agree that this appeal should be allowed and the judge's order set aside.

Appeal allowed. Order for security of costs set aside.

Solicitors: Clyde & Co (for the plaintiffs); Ince & Co (for the defendants).

Azza Abdallah Barrister.

Polkey v A E Dayton Services Ltd

HOUSE OF LORDS

LORD MACKAY OF CLASHFERN LC, LORD KEITH OF KINKEL, LORD BRIDGE OF HARWICH, LORD BRANDON OF OAKBROOK AND LORD ACKNER

12, 13, 14 OCTOBER, 19 NOVEMBER 1987

Unfair dismissal – Determination whether dismissal fair or unfair – Reasons justifying dismissal – Determination of whether employer acted reasonably – Redundancy – Employer failing to consult employee prior to dismissal – Industrial tribunal concluding that failure to consult not making any difference to decision to dismiss employee – Whether any distinction between reason for dismissal and manner in which dismissal effected – Whether industrial tribunal bound to consider whether failure to consult made any difference to result – Whether dismissal unfair – Employment Protection (Consolidation) Act 1978, s 57(3).

The employee was employed as a van driver by the employers from 1978. In 1982 the employers, in order to stem continuing financial losses, decided to reorganise their business to reduce overheads by replacing their four van drivers with two van salesmen. The employers formed the view that three of the van drivers, including the employee, would not be suitable for employment as van salesmen and that they should therefore be dismissed as redundant. Without any prior consultation or warning, the employee was told that he was being made redundant, handed a redundancy letter and immediately sent home. The employee complained to an industrial tribunal that he had been unfairly dismissed. The tribunal dismissed his claim, holding that although the employers had failed to observe the requirements of the statutory code relating to consultation the employee would still have been dismissed if there had been consultation. The employee appealed to the Employment Appeal Tribunal and then to the Court of Appeal but both courts dismissed his appeal on the ground that they were bound by authority to do so. The employee appealed to the House of Lords, contending that the failure to consult showed that the employers had 'acted . . . unreasonably in treating [the redundancy] as a sufficient reason for dismissing the employee' and that was sufficient to make the dismissal unfair for the purposes of s 57(3)^a of the Employment Protection (Consolidation) Act 1978 and whether the outcome would have been the same if there had been consultation was hypothetical and irrelevant.

Held – In determining for the purposes of s 57(3) of the 1978 Act whether an employer had acted reasonably or unreasonably in treating as sufficient his reason for dismissing an employee, the industrial tribunal was required to determine whether the employer had acted reasonably on the facts known to him at the time, and accordingly it was not open to the tribunal to find, on the basis of facts subsequently brought to light after the dismissal, that the dismissal was reasonable because the employee had not in fact suffered any injustice as a result. It followed therefore that the appeal would be allowed and the case remitted to an industrial tribunal to determine whether, on the facts known to the employer at the time of the dismissal, the employer had acted reasonably (see p 976 h to p 977 a b, p 978 h to p 979 g, p 982 g h, p 983 c g h, p 984 b to d and p 985 b to d, post).

Dictum of Browne-Wilkinson J in *Sillifant v Powell Duffryn Timber Ltd* [1983] IRLR at 97 approved.

British Labour Pump Co Ltd v Byrne [1979] ICR 347 and *W & J Wass Ltd v Binns* [1982] ICR 486 overruled.

Decision of the Court of Appeal [1987] 1 All ER 984 reversed.

^a Section 57(3) is set out at p 976 g h, post

Notes

- a** For fair and unfair dismissal, see 16 Halsbury's Laws (4th edn) paras 626-630, and for cases on the subject, see 20 Digest (Reissue) 403-407, 3357-3374.
For the Employment Protection (Consolidation) Act 1978, s 57, see 16 Halsbury's Statutes (4th edn) 439.

Cases referred to in opinions

- b** *Bailey v BP Oil (Kent Refinery) Ltd* [1980] ICR 642, CA.
British Labour Pump Co Ltd v Byrne [1979] ICR 347, EAT.
British United Shoe Machinery Co Ltd v Clarke [1978] ICR 70, EAT.
Devis (W) & Sons Ltd v Atkins [1977] 3 All ER 40, [1977] AC 931, [1977] 3 WLR 214, HL.
Earl v Slater & Wheeler (Airlyne) Ltd [1973] 1 All ER 145, [1973] 1 WLR 51, NIRC.
Letts (Charles) & Co Ltd v Howard [1976] IRLR 248, EAT.
c *Lowndes v Specialist Heavy Engineering Ltd* [1977] ICR 1, EAT.
Sillifant v Powell Duffryn Timber Ltd [1983] IRLR 91, EAT.
Vokes Ltd v Bear [1974] ICR 1, NIRC.
Wass (W & J) Ltd v Binns [1982] ICR 486, CA.
Weddell (W) & Co Ltd v Tepper [1980] ICR 286, CA.
Williams v Compair Maxam Ltd [1982] ICR 156, EAT.

Appeal

- Dennis Polkey (the employee) appealed with leave of the Court of Appeal against the decision of that court (Neill, Nicholls LJ and Sir George Waller) ([1987] 1 All ER 984, [1987] 1 WLR 1147) on 22 October 1986 dismissing the employee's appeal against the decision of the Employment Appeal Tribunal (Poplewell J, Mr T Batho and Mrs M L Boyle) given on 2 October 1984 whereby it dismissed the employee's appeal against the decision of an industrial tribunal (chairman Miss N Healey) sitting at Nottingham dated 23 February 1983 dismissing his claim that he had been unfairly dismissed by the respondents, A E Dayton Services Ltd (formerly Edmunds Walker (Holdings) Ltd) (the employers). The facts are set out in the opinion of Lord Mackay LC.
- f** *Eldred Tabachnik QC* and *Robin Allen* for the employee.
Frederic Reynold QC and *John Wardell* for the employers.

Their Lordships took time for consideration.

- g** 19 November. The following opinions were delivered.

LORD MACKAY OF CLASHFERN LC. My Lords, the appellant (the employee) was employed by the respondents (the employers) from 19 June 1978 until 27 August 1982 as a van driver. On that date he was dismissed as redundant. On 8 November 1982 he applied to an industrial tribunal to hold that he had been unfairly dismissed. On 23 February 1983 the industrial tribunal dismissed the application. It was accepted on behalf of the employee before the industrial tribunal that at the time of his dismissal it was urgently necessary for the employers to reduce their overheads in their undertaking and that, in consequence, it was necessary to make certain of their van drivers redundant. They had three male van drivers and one female van driver and it was decided that for the future only two van salesmen should be appointed. The manager immediately responsible for the employee decided that none of the three male van drivers was capable of performing the task of a van salesman but that the female van driver was so capable. Some four weeks after the employee's dismissal a second van salesman was appointed from outside the employer's work-force. On 20 August the employee's branch manager informed his superior of his decision and without any consultation with employees or their representative or earlier warning to the employee his branch manager called him

into his office on the afternoon of 27 August, told him quite out of the blue that he was redundant and handed to him his redundancy letter. The employee was immediately driven home by a fellow employee. The industrial tribunal characterised this aspect of the employee's dismissal by saying: 'There could be no more heartless disregard of the provisions of the code of practice than that.' The code of practice referred to is the statutory code presently in force under the Employment Protection Act 1975, Sch 17, para 4 in which para 46 provides:

'If redundancy becomes necessary, management in consultation, as appropriate, with employees or their representatives, should: (i) give as much warning as practicable to the employees concerned . . . (iii) establish which employees are to be made redundant and the order of discharge . . .'

The industrial tribunal further found:

'There is nothing that excuses their failure to consult but [this is the matter that gives rise to the point of principle in the present appeal] at the end of the day we have no alternative but to find that in this case had they acted in accordance with the code of practice, as interpreted in the recent case [*Williams v Compair Maxam Ltd* [1982] ICR 156], the result would not have been any different, and we have therefore unhappily to reject this application.'

The employee appealed to the Employment Appeal Tribunal but on his behalf it was conceded that the appeal tribunal was bound by authority to dismiss the appeal. The only question the Employment Appeal Tribunal had to consider was whether to give leave to appeal which they did. The Court of Appeal (Neill, Nicholls LJ and Sir George Waller) ([1987] 1 All ER 984, [1987] 1 WLR 1147) dismissed the appeal, held that they were bound by authority to do so and granted leave to the employee to appeal to this House.

This appeal raises an important question in the law of unfair dismissal. Where an industrial tribunal has found that the reason for an employee's dismissal was a reason of a kind such as could justify the dismissal and has found that there has been a failure to consult or warn the employee in accordance with the code of practice should the tribunal consider whether, if the employee had been consulted or warned before dismissal was decided on, he would nevertheless have been dismissed? The answer depends on the application to this situation of s 57(3) of the Employment Protection (Consolidation) Act 1978 as amended, which is in these terms:

'Where the employer has fulfilled the requirements of subsection (1), then, subject to subsections 58 to 62, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.'

Where there is no issue raised by ss 58 to 62 the subject matter for the tribunal's consideration is the employer's action in treating the reason as a sufficient reason for dismissing the employee. It is that action and that action only that the tribunal is required to characterise as reasonable or unreasonable. That leaves no scope for the tribunal considering whether, if the employer had acted differently, he might have dismissed the employee. It is what the employer did that is to be judged, not what he might have done. On the other hand, in judging whether what the employer did was reasonable it is right to consider what a reasonable employer would have had in mind at the time he decided to dismiss as the consequence of not consulting or not warning.

If the employer could reasonably have concluded in the light of the circumstances

a known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the code. Failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee.

b I turn to consider how these views accord with the decided cases. Very early in the history of this legislation and its statutory predecessors Donaldson P in *Earl v Slater & Wheeler (Airlyne) Ltd* [1973] 1 All ER 145 at 150, [1973] 1 WLR 51 at 57 said:

c 'With respect to the tribunal, we think that it erred in holding that an unfair procedure which led to no injustice is incapable of rendering unfair a dismissal which would otherwise be fair. The question in every case is whether the employer acted reasonably or unreasonably in treating the reason as sufficient for dismissing the employee and it has to be answered with reference to the circumstances known to the employer at the moment of dismissal. If an employer thinks that his accountant may be taking the firm's money, but has no real grounds for so thinking and dismisses him for this reason, he acts wholly unreasonably and commits the unfair industrial practice of unfair dismissal, notwithstanding that it is later proved that the accountant had in fact been guilty of embezzlement. Proof of the embezzlement affects the amount of the compensation, but not the issue of fair or unfair dismissal.'

d Again in *Vokes Ltd v Bear* [1974] ICR 1 at 5 Griffiths J, referring to the statutory predecessor of this section, said:

e 'We are unable to accept the submission that "the circumstances" are limited to those directly affecting the ground of dismissal, in the sense submitted by [counsel for the employers]. "The circumstances" embrace all relevant matters that should weigh with a good employer when deciding at a given moment in time whether or not he should dismiss his employee. The subsection [s 24(6) of the Industrial Relations Act 1971] is focusing the tribunal's attention upon "the dismissal," that is, the dismissal on March 2. The question they have to ask themselves is whether on March 2 the employers were acting reasonably in treating redundancy as a sufficient reason for dismissing the employee on that date. The tribunal are entitled to take into account all the circumstances affecting both the employers and the employee at the time of the dismissal. In the present case, no doubt the time would have come when the employers would have to dismiss the employee for redundancy for the good of the company as a whole, but the tribunal were fully entitled to take the view that that moment had not yet arrived by March 2. The employers had not yet done that which in all fairness and reason they should do, namely, to make the obvious attempt to see if the employee could be placed somewhere else within this large group. The position is somewhat analogous to the case of a warning. An employer may have good grounds for thinking that a man is not capable of doing his job properly, but in the general run of cases it will not be reasonable for him to regard that lack of capability as a sufficient reason for dismissing him until he is given a warning so that the man has the chance to show if he can do better. So in this case there was a redundancy situation but there was no compelling reason why the axe should fall until the employers had done their best to help the employee. It is therefore with satisfaction that we find that there is nothing in the wording of section 24(6) of the Act of 1971 which compels us to take the view that behaviour which we think most people would consider manifestly unfair is nevertheless to be deemed fair under the Act. If the employers had made all reasonable attempts to place the employee in the group and had failed, then the time might have come

when it would be reasonable for them to regard the redundancy as a sufficient reason for the dismissal, but until that moment had come the tribunal were entitled to take the view that it was not reasonable to dismiss for redundancy and accordingly that it was unfair.' a

This approach to the legislation was indorsed in this House in *W Devis & Sons Ltd v Atkins* [1977] 3 All ER 40, [1977] AC 931. Viscount Dilhorne, in a speech with which the other members of the House sitting in the appeal agreed, said of the statutory predecessor of s 57(3) ([1977] 3 All ER 40 at 46, [1977] AC 931 at 952): b

'Paragraph 6(8) [of Sch 1 to the Trade Union and Labour Relations Act 1971] appears to me to direct the tribunal to focus its attention on the conduct of the employer and not on whether the employee in fact suffered any injustice.'

After quoting, with approval, the principal part of the passage I have already cited from Donaldson P in *Earl v Slater & Wheeler (Airlyne) Ltd* and after referring to the statutory provision then entitling the tribunal to take the code into account, Viscount Dilhorne said ([1977] 3 All ER 40 at 48, [1977] AC 931 at 955): c

'It does not follow that non-compliance with the code necessarily renders a dismissal unfair, but I agree with the view expressed by Sir John Donaldson P in *Earl v Slater & Wheeler (Airlyne) Ltd* that a failure to follow a procedure prescribed in the code may lead to the conclusion that a dismissal was unfair, which, if that procedure had been followed, would have been held to have been fair.' d

So far, the current of decision is entirely in accordance with the views I have expressed, but the tribunal in the present case were bound by a stream of authority applying the so-called *British Labour Pump* principle (see *British Labour Pump Co Ltd v Byrne* [1979] ICR 347). e

Browne-Wilkinson J in *Sillifant v Powell Duffryn Timber Ltd* [1983] IRLR 91 at 92 thus described the principle:

'... even if, judged in the light of the circumstances known at the time of dismissal, the employer's decision was not reasonable because of some failure to follow a fair procedure yet the dismissal can be held fair if, on the facts proved before the Industrial Tribunal, the Industrial Tribunal comes to the conclusion that the employer could reasonably have decided to dismiss if he had followed a fair procedure.' f

It is because one of its statements is contained in *British Labour Pump Co Ltd v Byrne* that it has been called the *British Labour Pump* principle although it did not originate in that decision. In *Sillifant's* case the Employment Appeal Tribunal were urged to hold that the principle was unsound and not to give effect to it. After referring to the cases which introduced this principle, namely *Charles Letts & Co Ltd v Howard* [1976] IRLR 248 (a decision relating only to compensation), *Lowndes v Specialist Heavy Engineering Ltd* [1977] ICR 1, *British United Shoe Machinery Co Ltd v Clarke* [1978] ICR 70 and the *British Labour Pump* case itself, Browne-Wilkinson J continued ([1983] IRLR 91 at 97): g

'Apart therefore from recent Court of Appeal authority and the *Lowndes* case, the *British Labour Pump* principle appears to have become established in practice without it being appreciated that it represented a fundamental departure from both basic principle and the earlier decisions. If we felt able to do so we would hold that it is wrong in principle and undesirable in its practical effect. It introduces just that confusion which *Devis v Atkins* ([1977] 3 All ER 40, [1977] AC 931) was concerned to avoid between the fairness of the dismissal (which depends solely upon the reasonableness of the employer's conduct) and the compensation payable to the employee (which takes into account the conduct of the employee whether known to the employer or not). In our judgment, apart from the authority to which we are h

about to refer, the correct approach to such a case would be as follows. The only test of the fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect. An industrial tribunal is not bound to hold that any procedural failure by the employer renders the dismissal unfair: it is one of the factors to be weighed by the Industrial Tribunal in deciding whether or not the dismissal was reasonable within s. 57(3). The weight to be attached to such procedural failure should depend upon the circumstances known to the employer at the time of dismissal not on the actual consequence of such failure. Thus in the case of a failure to give an opportunity to explain, except in the rare case where a reasonable employer could properly take the view on the facts known to him at the time of dismissal that no explanation or mitigation could alter his decision to dismiss, an Industrial Tribunal would be likely to hold that the lack of "equity" inherent in the failure would render the dismissal unfair. But there may be cases where the offence is so heinous and the facts so manifestly clear that a reasonable employer could, on the facts known to him at the time of dismissal, take the view that whatever explanation the employee advanced it would make no difference: see the example referred to by Lawton LJ in *Bailey v BP Oil (Kent Refinery) Ltd* ([1980] ICR 642). Where, in the circumstances known at the time of dismissal, it was not reasonable for the employer to dismiss without giving an opportunity to explain but facts subsequently discovered or proved before the Industrial Tribunal show that the dismissal was in fact merited, compensation would be reduced to nil. Such an approach ensures that an employee who could have been fairly dismissed does not get compensation but would prevent the suggestion of "double standards" inherent in the *British Labour Pump* principle. An employee dismissed for suspected dishonesty who is in fact innocent has no redress: if the employer acted fairly in dismissing him on the facts and in the circumstances known to him at the time of dismissal the employee's innocence is irrelevant. Why should an employer be entitled to a finding that he acted fairly when, on the facts known and in the circumstances existing at the time of dismissal, his actions were unfair but which facts subsequently coming to light show did not cause any injustice? The choice in dealing with s. 57(3) is between looking at the reasonableness of the employer or justice to the employee. *Devis v Atkins* shows that the correct test is the reasonableness of the employer: the *British Labour Pump* principle confuses the two approaches.'

I gratefully adopt that analysis. The Employment Appeal Tribunal, however, went on to hold that they were bound by the decision of the Court of Appeal in *W & J Wass Ltd v Binns* [1982] ICR 486 which held that the *British Labour Pump* principle is good law and to that decision of the Court of Appeal I must now turn.

In that case an employee was dismissed for misconduct which had occurred on the morning of the day on which he was dismissed. There was evidence of previous misbehaviour by the employee but the industrial tribunal held that the case had to be determined on the basis of what had happened on that morning and that the employers had acted reasonably and had fairly dismissed the employee even though they had not warned him about his previous misbehaviour or given him an opportunity to explain his conduct on that morning. The industrial tribunal decided that even if there had been an investigation the employee would still have been dismissed because on the balance of probabilities the employers would not have accepted his explanation and the dismissal was therefore fair. The Employment Appeal Tribunal reversed the decision of the industrial tribunal but the Court of Appeal (Waller and O'Connor LJ, Sir George Baker dissenting) restored the decision of the industrial tribunal. Waller LJ said ([1982] ICR 486 at 493):

'[Counsel for the employer] submitted that the test in the *British Labour Pump* case goes further than section 57(3) of the Employment Protection (Consolidation) Act 1978 requires, and submits that it is the statutory test which must be complied

with. This in my opinion is strictly correct, and if the employer and the industrial tribunal are satisfied in an exceptional case that no opportunity to explain need be offered and that the employer in the circumstances acted reasonably in accordance with equity and the substantial merits of the case, the test would not apply. But since in the majority of cases fairness would require an opportunity to explain, as indeed many industrial contracts provide, then in such cases the *British Labour Pump* case provides useful guidelines. It was argued by [counsel for the employee] that the *British Labour Pump* case was itself not in accordance with the observations of Viscount Dilhorne in *W. Devis & Sons Ltd. v. Atkins* ([1977] 3 All ER 40 at 43-51, [1977] AC 931 at 949-958). That case was dealing with a different point, namely, whether a dismissal can be justified as fair when the fact, or facts, are not known at the time of dismissal but are discovered afterwards. I do not find anything in the speech of Viscount Dilhorne which throws doubt on the reasoning of the decision in the *British Labour Pump* case.

O'Connor LJ, after holding that the employee's conduct on the morning of dismissal justified summary dismissal, went on to consider the industrial tribunal's finding that the explanation proffered by the employee was not acceptable. He said (at 496):

'For my part I think that once the industrial tribunal made that finding they would have been entitled to say that the employee had not been prejudiced in any way by not being asked to explain his conduct and that the dismissal was fair. The industrial tribunal in fact applied the *British Labour Pump Co. Ltd. v. Byrne* test and found in favour of the employers. I can find no ground for disturbing that finding. I do not think that any question of law was raised before the Employment Appeal Tribunal. I am satisfied that the decision of the industrial tribunal was not perverse. I see no reason for disturbing it.'

Sir George Baker said (at 498-499):

'... the failure to give the employee any opportunity to explain why he should not be dismissed seems to me to be in the circumstances of this case a denial of natural justice which eliminated equity or fair play. There are cases where instant dismissal without an opportunity of explaining would be fair ... Then there must be many cases where it is clearly for the tribunal to decide whether, in the words of Stephenson L.J. in *W. Weddell & Co. Ltd. v. Tepper* ([1980] ICR 286 at 297), the employers have acted "without making the appropriate inquiries or giving the employee a fair opportunity to explain himself ...". Viscount Dilhorne in his speech in *W. Devis & Sons Ltd. v. Atkins* ([1977] 3 All ER 40 at 47, [1977] AC 931 at 953) ... said: "If, however, the reasons shown appear to have been a sufficient reason, it cannot, in my opinion, be said that the employer acted reasonably in treating it as such if he only did so in consequence of ignoring matters which he ought reasonably to have known and which would have shown that the reason was insufficient." Like Waller L.J. I do not think that this throws any doubt on the reasoning in the later decision of the Employment Appeal Tribunal (Slynn J.) in *British Labour Pump Co. Ltd. v. Byrne* ([1979] ICR 347) which the industrial tribunal in the present case purported to apply as the right test.'

He went on to conclude on the evidence, differing in this respect from his colleagues, that the evidence did not show that after the employee had given his explanation the employers would probably still have dismissed him and for this reason he held the dismissal was unfair. The opinions of the Court of Appeal thus do not add to the reasoning in the cases examined by Browne-Wilkinson J in *Sillifant's* case.

The only other Court of Appeal decision remaining for consideration that supports the *British Labour Pump* principle is that in the present case. The Court of Appeal held themselves bound by the decision in *W & J Wass Ltd v Binns* and, in my opinion, they

a
were clearly right in that aspect of their decision. Neill LJ, taking up the point which had been described by Browne-Wilkinson J as the double standards aspect of the *British Labour Pump* principle, says ([1987] 1 All ER 984 at 989, [1987] 1 WLR 1147 at 1153-1154):

b
 'The question can then be asked: if an employer cannot justify dismissal and if an employee cannot complain of a dismissal on the basis of facts not known to the employer at the time of dismissal, how can it be right for an industrial tribunal to embark on the speculative exercise of examining facts which were not known to the employer at the time of dismissal in order to decide whether a procedural defect made any difference? At first sight, this question appears to require the answer that such an exercise would be contrary to the decision in *W Devis & Sons Ltd v Atkins* because it would allow an employer to rely on facts not known to him at the time of dismissal, or, where an internal appeal procedure has been put in operation, not known to him at the time when the final decision to uphold the dismissal was taken.
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 On further analysis, however, it seems to me that an answer on these lines overlooks the crucial distinction between the reason for a dismissal and the manner in which the dismissal is effected.'

d
 After reference to the statutory provision he goes on ([1987] 1 All ER 984 at 989-991, [1987] 1 WLR 1147 at 1154-1156):

e
 'It will be seen therefore that a complaint of unfair dismissal will succeed where the employer fails to establish that the reason for dismissal was one of those specified in s 57(2) or where the tribunal reaches the conclusion that even though the employer has fulfilled the requirements of s 57(1) he acted unreasonably in treating the reason shown by him as a sufficient reason for dismissing the employee. But, on the other hand, a complaint of unfair dismissal will not succeed *merely* because of the manner in which the dismissal was carried out. A failure to observe a proper procedure may make a dismissal unfair, but this is not because such failure by itself makes the dismissal unfair but because the failure, for example, to give an employee an opportunity to explain may lead the tribunal to the conclusion that the employer, in the circumstances, acted unreasonably in treating the reason for dismissal as a sufficient reason. The tribunal will look at the practical effect of the failure to observe the proper procedure in order to decide whether or not the dismissal was unfair. Where an employee is dismissed for alleged misconduct and he then complains that he was unfairly dismissed, it is to be anticipated that the industrial tribunal will usually need to consider (a) the nature and gravity of the alleged misconduct, (b) the information on which the employer based his decision, (c)
 f
 whether there was any other information which the employer could or should have obtained or any other step which he should have taken before he dismissed the employee. Similarly, in a case of alleged redundancy, it is to be anticipated that the industrial tribunal will usually need to consider (a) the information on which the employer based his decision to dismiss the employee as redundant and the method of selection which he used and (b) whether there was any other information which the employer could or should have obtained or any other step which he should have taken before he dismissed the employee. In some cases of misconduct, however, the misconduct may be so grave and the information available to the employer so clear that the tribunal will be likely to conclude that no further inquiries by the employer were necessary... But in many cases of misconduct the tribunal will need to consider whether the employer, either in accordance with some disciplinary procedure or otherwise, should have taken steps to obtain further information either from the employee or from elsewhere because such information might throw light on the sufficiency of the employer's reason for dismissal. But the failure to obtain this information does not *ipso facto* render the dismissal unfair, and it seems to me to be both logical and desirable to require the industrial tribunal to try to evaluate
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the effect in practice of the failure. Thus, as counsel for [the employee] acknowledged, there may be cases where the evidence of misconduct is not so clear as to justify instant dismissal and which could be capable of explanation, but where on examination, the employee has no explanation to put forward. In such a case, the failure to seek an explanation from the employee, which fairness would in principle require, will not make any difference. In a case where dismissal is on the ground of redundancy, the matter may have to be looked at rather differently because the system adopted for the selection of the individual for redundancy may be at the very centre of the inquiry when the tribunal comes to determine whether the employer has acted reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the employee concerned. The decision of the Employment Appeal Tribunal in *Williams v Compair Maxam Ltd* [1982] ICR 156 demonstrates the importance of the use of a fair system. Furthermore, it is to be noted that s 59 of the 1978 Act contains special provisions rendering a dismissal on the ground of redundancy unfair . . . But where s 59 does not apply, it seems to me to be proper and indeed necessary for the tribunal to investigate the effect of the failure to consult the employee or to warn him or to hold discussions or as the case may be. In some cases, the facts may show beyond peradventure that no discussions or other steps could have made any difference whatever because the state of the company was so grave. In other cases, the matter will be more evenly balanced. But, for my part, I can see no objection in principle to the tribunal seeking to evaluate the effect in practice of any failure by the employer to observe the provisions of a code of practice or of the guidelines prescribed in cases such as *Williams v Compair Maxam Ltd* . . . Prima facie, as the reason for dismissal was redundancy, the reason was a valid reason. The failure to consult did not automatically render the dismissal unfair: it was for the tribunal to determine whether that failure showed that the employers had acted reasonably or unreasonably in treating redundancy as a sufficient reason for the dismissal of [the employee]. For that purpose, they had to look at all the circumstances including the consequences of the failure.'

In my opinion Neill LJ's answer on first sight was correct. With much of what he says I would respectfully agree but I cannot accept it all. For example, in referring to a case of dismissal for misconduct where the evidence of misconduct could be capable of explanation and no explanation has been invited before dismissal, the examination of which Neill LJ speaks is an examination of matters other than the employee's conduct which could not be known to the employer until after the decision to dismiss had been reached and, therefore, it was not available to the employer at the time he reached that decision. Perhaps the point is highlighted most plainly in the very last sentence which I have quoted. The consequences of the failure determine whether or not the employee suffered an injustice. This is not to be confused with the question whether the employer acted reasonably.

Further, in my opinion, the statutory test shows that at least some aspects of the manner of dismissal fall to be considered in considering whether a dismissal is unfair since the action of the employer in treating the reason as sufficient for dismissal of the employee will include at least part of the manner of the dismissal. Accordingly, it is not correct to draw a distinction between the reason for dismissal and the manner of dismissal as if these were mutually exclusive, with the industrial tribunal limited to considering only the reason for dismissal. Nicholls LJ agreed with Neill LJ as did Sir George Waller. Sir George Waller, however, added some observations. He said ([1987] 1 All ER 984 at 991, [1987] 1 WLR 1147 at 1156):

'The industrial tribunal, having inquired into what would have happened if the code of practice had been complied with, came to the conclusion that it would have made no difference. In other words, the employer acted reasonably in treating redundancy as a sufficient reason for dismissing [the employee].'

a In my view, with great respect, these two sentences show that Sir George Waller was treating the question whether the employee had suffered injustice as the same question as whether the employer had acted reasonably.

b In my opinion, therefore, the additional reasons given by the Court of Appeal in the present case for supporting the *British Labour Pump* principle involve an impermissible reliance on matters not known to the employers before the dismissal and a confusion between unreasonable conduct in reaching the conclusion to dismiss, which is a necessary ingredient of an unfair dismissal, and injustice to the employee which is not a necessary ingredient of an unfair dismissal, although its absence will be important in relation to a compensatory award.

c It follows that I do not agree with the decision of the Court of Appeal in the present case and this appeal should be allowed, the *British Labour Pump* principle and all decisions supporting it are inconsistent with the relevant statutory provision and should be overruled and, in particular, the decision of the Court of Appeal in *W & J Wass Ltd v Binns* [1982] ICR 486 should be overruled.

d That leaves for consideration the appropriate form of order to be made by the House. Counsel for the employee asked that the House should hold that the employee's dismissal had been unfair and remit the case to the tribunal to consider remedy. Counsel for the employers, while accepting that the *British Labour Pump* principle and *W & J Wass Ltd v Binns* were wrong and that, accordingly, the industrial tribunal had applied the wrong test in coming to its conclusion, submitted that on the findings of the tribunal supplemented by the evidence the tribunal were bound to hold that the dismissal was fair since a reasonable employer considering the facts known to this employer at the date of the dismissal could reasonably have concluded that observance of the code would make no difference to the conclusion.

e The notes of evidence available to your Lordships are necessarily only a brief summary and the tribunal's findings do not deal exhaustively with all the matters that appear to have been raised in the evidence; in particular, they do not deal with the evidence that appears to have related to an appeal by the employee to the employers to rescind the dismissal. In these circumstances I consider that no adequate basis exists for your Lordships to determine whether this dismissal was fair or unfair. The industrial tribunal asked themselves the wrong question when they applied the *British Labour Pump* principle. It is not apparent what their answer would have been if they had asked themselves the correct question. In my opinion the proper course is to remit this case to a new industrial tribunal for consideration in the light of your Lordships' judgment. The employers must bear the employee's costs in the Court of Appeal and in this House.

g **LORD KEITH OF KINKEL.** My Lords, I have had the opportunity of considering in draft the speech delivered by my noble and learned friend Lord Mackay LC. I agree with it, and for the reasons he gives would allow the appeal and remit the case to an industrial tribunal differently constituted.

h **LORD BRIDGE OF HARWICH.** My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Mackay LC and I agree with it. I add some short observations of my own because of the importance of the case.

j Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by s 57(2)(a), (b) and (c) of the Employment Protection (Consolidation) Act 1978. These, put shortly, are: (a) that the employee could not do his job properly; (b) that he had been guilty of misconduct; (c) that he was redundant. But an employer having *prima facie* grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as 'procedural', which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of

incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is *not* permitted to ask in applying the test of reasonableness posed by s 57(3) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of s 57(3) this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under s 57(3) may be satisfied.

My Lords, I think these conclusions are fully justified by the cogent reasoning of Browne-Wilkinson J in *Sillifant v Powell Duffryn Timber Ltd* [1983] IRLR 91 to which my noble and learned friend Lord Mackay LC has already drawn attention.

If it is held that taking the appropriate steps which the employer failed to take before dismissing the employee would not have affected the outcome, this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation or, in the case of redundancy, no compensation in excess of his redundancy payment. Thus, in *Earl v Slater & Wheeler (Airlyne) Ltd* [1973] 1 All ER 145, [1973] 1 WLR 51 the employee was held to have been unfairly dismissed, but nevertheless lost his appeal to the Industrial Relations Court because his misconduct disentitled him to any award of compensation, which was at that time the only effective remedy. But in spite of this the application of the so-called *British Labour Pump* principle (see *British Labour Pump Co Ltd v Byrne* [1979] ICR 347) tends to distort the operation of the employment protection legislation in two important ways. First, as was pointed out by Browne-Wilkinson J in *Sillifant's* case, if the industrial tribunal, in considering whether the employer who has omitted to take the appropriate procedural steps acted reasonably or unreasonably in treating his reason as a sufficient reason for dismissal, poses for itself the hypothetical question whether the result would have been any different if the appropriate procedural steps had been taken, it can only answer that question on a balance of probabilities. Accordingly, applying the *British Labour Pump* principle, if the answer is that it probably would have made no difference, the employee's unfair dismissal claim fails. But if the likely effect of taking the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation, as Browne-Wilkinson J puts it in *Sillifant's* case [1983] IRLR 91 at 96:

"There is no need for an "all or nothing" decision. If the Industrial Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."

The second consideration is perhaps of particular importance in redundancy cases. An industrial tribunal may conclude, as in the instant case, that the appropriate procedural steps would not have avoided the employee's dismissal as redundant. But if, as your Lordships now hold, that conclusion does not defeat his claim of unfair dismissal, the industrial tribunal, apart from any question of compensation, will also have to consider

a whether to make any order under s 69 of the 1978 Act. It is noteworthy that an industrial tribunal may, if it thinks fit, make an order for re-engagement under that section and in so doing exercise a very wide discretion as to the terms of the order. In a case where an industrial tribunal held that dismissal on the ground of redundancy would have been inevitable at the time when it took place, even if the appropriate procedural steps had been taken, I do not, as at present advised, think this would necessarily preclude a discretionary order for re-engagement on suitable terms, if the altered circumstances b considered by the tribunal at the date of the hearing were thought to justify it.

For these reasons and for those given by my noble and learned friend Lord Mackay LC I would allow the appeal and remit the case to be heard by another industrial tribunal.

c **LORD BRANDON OF OAKBROOK.** My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend on the Woolsack. I agree with it, and for the reasons which he gives I would allow the appeal and remit the case to a new industrial tribunal.

d **LORD ACKNER.** My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend on the Woolsack. I agree with it, and for the reasons which he gives I would allow the appeal and remit the case to a new industrial tribunal.

Appeal allowed. Case remitted to a new industrial tribunal.

Solicitors: *Seifert Sedley Williams* agents for *Gregsons*, Nottingham (for the employee); *Penningtons Ward Bowie*, agents for *Gorna & Co*, Manchester (for the employers).

Mary Rose Plummer Barrister.

Rover International Ltd and others v Cannon Film Sales Ltd (No 2) a

CHANCERY DIVISION

HARMAN J

11, 12 MARCH 1987

Document – Admissibility in evidence – Admission of documentary statement without calling maker – Person beyond the seas – Beyond the seas – Whether person in Guernsey ‘beyond the seas’ – Civil Evidence Act 1968, s 8(2). b

The Channel Islands and the Isle of Man are ‘beyond the seas’ for the purposes of s 8(2)^a of the Civil Evidence Act 1968 because a subpoena issued by an English court will not run in those territories and therefore the court has no power to compel persons resident there to attend and give evidence in person in England. Accordingly, a statement made by a person living in Guernsey is admissible in English proceedings pursuant to the 1968 Act as evidence of facts stated therein (see p 990 *d* to *h*, post). c

Re Boulter, Capital and Counties Bank v Boulter [1921] All ER Rep 167 considered. d

Notes

For general principles of admissibility of hearsay evidence, see 17 Halsbury’s Laws (4th edn) para 55, and for cases on the subject, see 22 Digest (Reissue) 77–101, 477–709.

For the Civil Evidence Act 1968, s 8, see 17 Halsbury’s Statutes (4th edn) 165.

Cases referred to in judgment

Boulter, Re, Capital and Counties Bank v Boulter [1922] 1 Ch 75, [1921] All ER Rep 167. e

Films Rover International Ltd v Cannon Film Sales Ltd [1986] 3 All ER 772, [1987] 1 WLR 670.

Ford v Lewis [1971] 2 All ER 983, [1971] 1 WLR 623, CA.

Lane v Bennett (1836) 1 M & W 70, 150 ER 350.

Cases also cited

Infields Ltd v Rosen [1939] 1 All ER 121.

Morris v Stratford-upon-Avon RDC [1973] 3 All ER 263, [1973] 1 WLR 1059, CA. f

Interlocutory application

By writ issued on 11 July 1986 the plaintiffs, Rover International Ltd (by amendment to the writ from Films Rover International Ltd), Monitor TV and Merchandising Srl, Proper Films Ltd and Luigi de Rossi, brought an action against the defendant, Cannon Film Sales Ltd (formerly Thorn-EMI Film Distributors Ltd), for damages for, inter alia, breach of contract. The defendants counterclaimed. During the course of the hearing of the action, the plaintiffs sought leave to adduce in evidence statements made pursuant to RSC Ord 38, r 21. The facts are set out in the judgment. g

Michael Beloff QC, Roderick Cordara and Geraldine Andrews for the plaintiffs. h
Alan Pardoe and Ralph Wynne-Griffiths for the defendant.

^a Section 8(2), so far as material, provides: ‘Rules of court made in pursuance of subsection (1) above shall in particular, subject to such exceptions (if any) as may be provided for in the rules . . . (b) enable any party who receives such notice as aforesaid [ie notice from another party to the civil proceedings of his desire to give in evidence any statement] by counter-notice to require any person of whom particulars were given with the notice to be called as a witness in the proceedings unless that person is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he was connected or concerned as aforesaid and to all the circumstances) to have any recollection of matters relevant to the accuracy or otherwise of the statement.’ j

HARMAN J. I have before me an action begun by writ issued on 11 July 1986. For the purposes of this interlocutory judgment it is I think necessary just briefly to set out a few of the procedural steps that have been taken. The matter came on, there was a motion and orders were made. There was an appeal to the Court of Appeal in August 1986. There followed further steps, and an order was made by Hoffmann J on 28 August (see sub nom *Films Rover International Ltd v Cannon Film Sales Ltd* [1986] 3 All ER 772), after the Court of Appeal decision, dealing with the interlocutory relief and treating the matter as plainly an action requiring a speedy trial by adopting the well-known procedure of giving all the directions and referring the matter to the master at a fixed date. That date in fact was 29 October 1986, when the matter came before Master Gower. On that date Master Gower gave various directions including a direction that the plaintiffs do on 24 November 1986 set this action down for trial with an estimated duration of ten days.

The action concerns various contracts, notably a contract described as 'the theatrical contract', for the showing of films made or controlled by the defendant, Cannon Film Sales Ltd (formerly Thorn-EMI Film Distributors Ltd), in Italy in cinemas and also on television. The matters are complicated and do not affect the issue I have now to try and deal with.

Unfortunately, the plaintiffs did not set the action down on 24 November. That neglect of the direction has been explained to me, and I think is reasonably justified because they were awaiting a substantial amendment to the defence, which was in fact served on 19 December 1986. Having got that, it should I think have become clear to everybody that the action should have been set down in the first week of January 1987. In fact the matter was not then set down and a further motion for interlocutory relief taken out by the plaintiffs met with a cross-motion by the defendant for an immediate setting down. The cross-motion was served on 5 February and on that same day the plaintiffs set the action down. The motions then came before Gibson J on 10 February and on that date, the action having been set down, it having obviously been a matter for a speedy trial since August of the preceding year and there being plainly fast-moving events which did require a speedy resolution, Gibson J took the opportunity to see what assistance could be given. Owing to remarkable events in the Chancery witness fixed list there has been a sudden availability, wholly unforeseeable and unexpected, of 'judge time'. Accordingly, on 10 February Gibson J was able to fix the trial of the hearing of this matter for Tuesday, 10 March, a month off.

The setting down by the plaintiffs on 5 February resulted in time beginning to run for the 21-day period allowed under RSC Ord 38, r 21 for the giving of notices under the Civil Evidence Act 1968. That period, as is obvious, would have expired on Thursday, 26 February. In fact a batch of notices was served on Friday, 27 February, the action being due to come on for trial on Tuesday, 10 March, thereby allowing one working week and one day between the service of those notices and the hearing, and although they are technically out of time the defendant takes no objection to their admission. However, there then followed on Monday, 2 March the service of three more statements, and on Wednesday, 4 March three further statements. On Thursday, 5 March a yet further step was taken, which raises a different point: a notice was served purporting to require the reading of an affidavit by the fourth plaintiff in the action, Mr Luigi de Rossi. On Monday, 9 March, the day before the trial was due to start, two statements of some substantial length (over two pages of close-typed A4, I understand) by that same Mr Luigi de Rossi and by his brother Mr Angelo de Rossi, who is a director of the second defendant to the counterclaim by the defendant in this action, were served.

Objection is taken to those statements by counsel for the defendant on the ground that this late production of documents prejudices his client in that it is not given adequate time to prepare to deal with the matter. In the normal way the period of 21 days from setting down is a period far more usually broken than observed because, in the usual way, the period between setting down and trial is some months at the least. In this particular case that period has in fact been about five weeks, and the three-week period has therefore been very material. In my view, as a general proposition, the court should

not exclude evidence unless it is satisfied that real prejudice has been caused, or unless it is clear that a deliberate attempt has been made to take the other side by surprise, a practice which it is the exact purpose of the rules to prevent. That appears from the decision of the Court of Appeal in *Ford v Lewis* [1971] 2 All ER 983 esp at 991, [1971] 1 WLR 623 esp at 633 by Edmund Davies LJ. His judgment was expressly assented to by Karminski LJ although differed from by Davies LJ. Being guided by that general principle, I have to consider whether in this case the discretion which exists should be exercised in the plaintiffs' favour to let in these documents undoubtedly late and undoubtedly in the circumstances a very short time before trial, but in circumstances where it is also undoubted that there was no attempt whatever to take the other side by surprise. Most of the material in fact had been disclosed, though in other and inadmissible forms, at much earlier stages of the action.

The statements are a statement of Mr Ferrara Santamaria made in Italy on 26 February 1987 and the notice given on Monday, 2 March 1987. That statement follows on two earlier statements of Mr Ferrara Santamaria which are within the slightly extended time allowed. It is true that the statement is out of time but it is short and apparently not of a very difficult nature with which to deal, and it is a matter which on the face of it is one which would not be likely to prejudice the defendant by taking it by surprise, eg by raising an issue which it could not have anticipated would be raised, or otherwise causing it difficulty. Although it is late, and although I deplore late procedures, particularly from plaintiffs who were, to say in default perhaps a little hard, but were in breach of a direction to set down, which it is conceded should have been honoured in the first week of January, which would have made the out-of-time nature of these documents the more obvious, yet it is a matter where in my view no serious prejudice can be caused to the defendant by admitting it, and I propose to direct that that be admitted.

I then turn to a statement by Mr Pietro Bregni. That was made on 3 November 1986. It was the subject of a notice dated 2 March 1987. The objection taken to that is that it is not a proper document under the 1968 Act at all because, although undoubtedly it is a document and although the word 'document' is the word used in the Act and the Rules of the Supreme Court, yet the Act and the rules are made expressly subject to the Rules of the Supreme Court and, as appears on examination, the statement attempts to give expert evidence. Now expert evidence is the matter of a separate and specific part of the code relating to evidence contained in RSC Ord 38. As I understand Ord 38, it is a complete code affecting the whole of evidence given at trial. Order 38, r 36 expressly provides:

'(1) Except with the leave of the Court or where all parties agree, no expert evidence may be adduced at the trial or hearing of any cause or matter unless the party seeking to adduce the evidence [has made various applications] . . .'

No such applications have been made, as junior counsel for the plaintiffs has very helpfully and properly in his able address conceded. In my view Mr Bregni's evidence is not the proper subject of a notice under the 1968 Act on the ground that so to admit would be to avoid the whole of the provisions in Ord 38, r 35 onwards, especially r 36, as to expert evidence. If it were possible simply to say, 'The expert is beyond the seas; here is his statement', and that were a proper way of getting it in, all the qualifications about limitations on number of experts and the proper exchange of proofs with opportunities for consideration by the experts of what they can agree and on what they must disagree are wholly avoided. In my view, the provisions of Ord 38, r 21 and the 1968 Act cannot be applied so as to completely evade the provisions of another part of the code of rules in Ord 38. In my view, Mr Bregni's statement is not admissible for that reason.

There follows a statement by a Mr Moraskie. The interesting thing about that is that he is a principal officer of a company associated with, I think, the parent of, but it matters not, the defendant Cannon Films. This is a short extract of evidence given by Mr Moraskie between 30 October and 5 November 1986 in proceedings in Milan. In those

a proceedings he was a witness and he made various statements. No explanation of any very clear sort has been given of the long delay between the giving of that evidence and the giving of the notice save, junior counsel for the plaintiffs told me frankly, that it was a lapse because people had not applied their minds to the need for such evidence. The objection raised on the other side to it is that it is embarrassing to have a snippet of one of the defendant's own officer's evidence in other proceedings put in, he being a man who in the film business is constantly beyond the seas and therefore may well not be available to give his own evidence in answer to it. I have wavered somewhat about this matter but in the end, on the principle that evidence ought to be admitted unless serious prejudice is caused, I am not prepared to refuse to exercise my discretion in favour of letting it in, and I so order.

c The next matter is the evidence of a Mr Bannister. That was given on 2 March and the notice is dated 4 March. That raises an interesting question whether Mr Bannister is qualified as being beyond the seas. Counsel for the defendant, in a delightful address, drew my attention to a decision of Sargant J in *Re Boulter, Capital and Counties Bank v Boulter* [1922] 1 Ch 75, [1921] All ER Rep 167, where he considered a gift in a will which forfeited the interests of children who were abroad for a period. The argument before him was that 'abroad' was too vague and it was unclear to what it extended (see [1922] 1 Ch 75 at 79, [1921] All ER Rep 167 at 169). Here I have a phrase which is in my view even more vague and even less easy to be clear about what it means. The phrase in the 1968 Act, s 8(2)(b) is 'beyond the seas'. I am told that that phrase is also the phrase used in the Criminal Evidence Act 1965. It is a phrase which seems to me to be entirely archaic today. It has splendid overtones of Elizabeth I's reign and suchlike matters but is not a matter, I would think, of current ordinary speech or even lawyers' speech. I doubt one often says of somebody, 'Oh, he is beyond the seas.'

e However, Parliament in its wisdom has chosen to use that phrase and I have to wrestle with it. The word 'abroad' was said by Sargant J to be something reasonably but not precisely clear. He observed ([1922] 1 Ch 75 at 83, [1921] All ER Rep 167 at 169):

f 'The word "abroad" is not satisfied by a transference to some other part of these islands, although it may be that the children are taken out of the English jurisdiction. The word "abroad" can never be used by anybody in talking of a person who has gone to Scotland nor, I think, of a person who has gone to Ireland *rebus sic stantibus*.'

The inwardness of the Latin tag is that of course that decision was in October 1921 when the treaty between His Majesty of Great Britain and the Irish rebels had recently been signed or was about to be signed and the creation of Ireland as a dominion of His Majesty was coming into force, not the present position where southern Ireland is a republic with no connection with Her Majesty whatever. Going on in the judgment Sargant J said ([1922] 1 Ch 75 at 83, [1921] All ER Rep 167 at 169):

h 'There is therefore some little difficulty in deciding whether "abroad" means out of England, or means as it ordinarily means, outside the British Islands. I think myself it must mean outside the British Islands.'

j From that counsel for the defendant ingeniously moved to the definition of the 'British Islands' in the Interpretation Act 1978, taken from the original Interpretation Act 1889, in the schedule whereto there appears the definition, "'British Islands" means the United Kingdom, the Channel Islands and the Isle of Man', thereby, as I see it, plainly including the six counties of Northern Ireland being part of the United Kingdom, but not including southern Ireland which is not part of the United Kingdom nor of the Channel Islands nor of the Isle of Man. That explanation, it is said, led one to the conclusion that one should interpret this phrase 'beyond the seas' by the dictionary equivalent, and he referred to the *Shorter Oxford English Dictionary*, where the phrase 'beyond the seas' was equated with being abroad, and he said that one could see that Guernsey was in the Channel Islands.

Therefore Mr Bannister was not beyond the seas and was not the proper subject of a notice of the 1968 Act.

Counsel for the plaintiffs, with more classical learning, went back to *Lane v Bennett* (1836) 1 M & W 70, 150 ER 350, where Lord Abinger CB had to consider the actual phrase 'beyond the seas' in connection with a defendant being in Dublin. He considered that Ireland before the Union, that of course is the Union of 1801, was beyond the seas, and set out that the Act of Union had not changed it. It is a most interesting judgment with references to *Coke's Commentaries upon Littleton* and the references to 'the four seas', which, as I see it, is indeed the true origin of the phrase 'beyond the seas'. It meant the four seas surrounding Great Britain, that is the English Channel, the North Sea, the Irish Sea and the Arctic Ocean. The phrase used in that sense would obviously exclude Northern Ireland. That may be a very inconvenient fact if that be the true interpretation of Parliament's modern use of this archaic expression. Fortunately, I do not have to decide that. I have to decide whether Guernsey is 'beyond the seas'.

Counsel for the plaintiffs submitted to me that plainly the words could not be taken literally. Otherwise the Isle of Wight or the Isles of Scilly, which are quite plainly beyond the low tide mark and thus 'beyond the seas', would be excluded. Such a conclusion, he submitted, was plainly ridiculous, and I accept and agree with him in that.

In my view I am assisted by a different process of thought in considering what is 'beyond the seas'. In my view the purpose of the 1968 Act, to get evidence in without the need for bringing persons to give the evidence here, can be considered in the light of the powers of the court to make people come and give evidence here. Where a subpoena will run a witness can be compelled. A subpoena will not run in the Isle of Man or the Channel Islands and those parts are not parts of the United Kingdom in right of the Crown of England or of the Crown of the Unions. The Channel Islands, it is known, are part of the domains of Her Majesty as Duke of Normandy, and the Isle of Man as part of the Duchy of Lancaster. Neither of them is within the kingdom or any of the kingdoms. On that basis no subpoena can be issued to persons in those places. They are in my view, although within the English Channel, beyond the seas in the contemplation of Parliament as the 1968 Act was written, and in my view Mr Bannister is a witness beyond the seas as would be any witness in Guernsey or Jersey, or even Sark.

I reach that conclusion with no very great satisfaction. As it seems to me it is the easiest thing these days to come from the Channel Islands to give evidence in this country and a witness who is on the side of the plaintiffs, as Mr Bannister is, would not require the pressure of a subpoena to come and give the evidence. It seems to me that the whole concept of the 1968 Act has been rapidly outdated by modern flying and modern blind landing systems, which means that there are frequent, regular and rarely interrupted flights all over Europe, and that in these days of the European Economic Community it is a folly to allow evidence to be given by this way. Be that as it may, which is a matter of policy and not for me, in my view the phrase means 'beyond the seas' in the old sense and not 'abroad' or 'beyond the British Islands', which are ingenious sideways steps taken by counsel for the defendant but not the proper construction of the Act.

For that reason I hold that Mr Bannister's evidence is admissible within the 1968 Act and the notice. It is late; it is not very satisfactory; its weight will be a matter I shall have to think about. But in my view it can be and should be let in as a matter of discretion.

There follow two persons called Ottaviani who are Italians who are both lawyers, that is to say attorneys, and also holders of a power of attorney. They give evidence which was obtained on 2 March and is the subject of a notice dated 4 March the same as Mr Bannister's. I regret the lateness of the evidence but I do not think that I should as a matter of discretion exclude it. I exercise my discretion in favour of admitting it.

I then come to the group of evidence which is perhaps the most difficult. First, Mr Luigi de Rossi, who swore an affidavit on 10 July 1986 when the action was only an intended action, was the subject of a notice of 5 March 1987. The first blow of counsel for the defendant at this was to say that affidavits are not properly documents within the

a meaning of the 1968 Act. The reason, he said, was that the 1968 Act and the rules under it are part of and are made subject to the code contained in rules of court. By parity of reasoning, he said, just as the report of an expert only admissible under Ord 38, rr 35 and 36 would be not a document within the Act (although plainly a piece of paper with writing on it and a document in that sense), so also an affidavit, which is expressly dealt with by Ord 38, r 2, is not a document within the 1968 Act. He cited, and I was very much impressed by, the practical consequences, in this division particularly, if that were not to be the rule.

b I think for one moment of ordinary Companies Court proceedings for the winding up of a company on the ground that it was just and equitable so to do. Such matters raise hotly contested issues of fact. They are always conducted on affidavit in the first instance, but in my universal experience, which is now quite wide, of those matters the direction is always given by the judge on the petition that the parties are to have liberty at trial c to cross-examine the deponent to affidavits and if the deponent is not then produced for cross-examination his affidavit shall not be read. Having made such a direction at an interlocutory stage, if the petition were then set down and the affidavits were promptly made the subject, within the 21 days from setting down, of 1968 Act notices saying that the affidavits are to be read at trial because the deponents are at the time of giving the notice beyond the seas, the whole of the direction, given for the purpose of the d ascertainment of contested facts, would be avoided. I cannot believe that the rules are intended to operate in that way. In my view the fact that the Act and the rules are subject to rules of court and that there is an express and particular rule (Ord 38, r 2) dealing with affidavits takes affidavits out of the scope of 1968 Act notices, notwithstanding that *Phipson on Evidence* (13th edn, 1982), edited, I venture to observe, by persons who are not e as familiar with proceedings conducted on affidavit as perhaps the Chancery judges are and who therefore perhaps have not seen the difficulties which may be caused, assumes that affidavits are documents within the Act.

In reply, counsel for the plaintiffs confessed and avoided the point very neatly by saying that he would now apply to treat Mr de Rossi's document of 10 July as a document and not as an affidavit, as it were notionally deleting the heading, 'I, Luigi de Rossi, make f oath and say as follows' and the termination, the jurat, 'sworn before me at such a place', leaving standing the whole substantive matter as a mere statement not made on oath. That seems to me to be an ingenious answer and one which has attractions because it removes the difficulty that an affidavit is not to be disbelieved merely because a judge does not like the nature of the evidence in it, in the absence of cross-examination or direct challenge by other affidavits. That is a proposition which is well established as applying to affidavits and guides judges who have to deal with interlocutory matters, or indeed g with trials where affidavits have been directed to be read. To concede that the writing is not to be treated as an affidavit removes the extra weight and gravamen which may be attached to the fact that it has been put in under oath, and makes it a mere statement for such weight as it may have.

h On that basis then one has to consider this document as being a mere statement of which notice was given on 5 March. It has to be considered with a further statement, on exactly the same basis, namely a mere statement of Mr Luigi de Rossi, made on 19 or 20 February in Italy, of which notice was given on Monday, 9 March, the day before the trial began on Tuesday, 10 March, and also with a statement by Mr Angelo de Rossi in exactly the same position as the last one. In my view these matters fail on a different basis as a matter of discretion treating them all as mere statements.

i Mr Luigi de Rossi is an actual plaintiff. He was a participant in some of the meetings at which discussions took place which may have material importance. The statements delivered on 9 March, the day before trial, seem to me to be so late as to genuinely put the other side in difficulty in knowing how to deal with the matter. I do not think that 5 March is so much earlier for the same statement-maker's position to be improved by the lapse of three extra days. To my mind these gentlemen, who are very close to the heart

of this case, are not persons in whose favour I should exercise a discretion to let in their statements of fact delivered so late when they have every wish, it appears, not to give evidence on oath and be cross-examined in the witness box. The fact that had they been delivered in proper time I might have had no discretion is not to the point. There might then have been other steps that could be taken to endeavour to deal with the matter. It is the fact that the statements are taken very late, they require my discretion to be exercised in the plaintiffs' favour, and in my view I should not exercise my discretion in favour of letting in statements so late as this from persons so central to the issue and so actively interested in the matter as to be actual plaintiffs in the case, in the case of Mr Luigi de Rossi. I therefore refuse to allow any of the de Rossi statements to be put in, treating them as mere statements. I would separately have refused to allow Mr Luigi de Rossi's affidavit to be put in as an affidavit on the ground that it is excluded by the rules. a b

For those reasons I make the various directions which I have outlined, excluding Mr Bregni's statement, permitting the other statements down to those of Messrs Ottaviani of 4 March and excluding those after that date. c

Order accordingly.

Solicitors: *Denton Hall Burgin & Warrens* (for the plaintiffs); *Jeffrey Green & Russell* (for the defendant). d

Evelyn M C Budd Barrister.

Chilton v Telford Development Corp e

COURT OF APPEAL, CIVIL DIVISION
PURCHAS, NEILL AND BALCOMBE LJJ
8 DECEMBER 1986 f

Compulsory purchase – Compensation – Assessment – Date by reference to which compensation is to be assessed – Notice of entry – Subsequent entry on part of land – Notice of entry served in respect of 67 acres subject to compulsory purchase order – Acquiring authority taking possession of land in individual parcels at various dates – Whether acquiring authority taking possession of whole 67 acres on date of first entry – New Towns Act 1965, Sch 6, para 4(2). g

The claimant owned several parcels of agricultural land totalling some 67 acres. On 10 July 1973 a compulsory purchase order was made under s 7 of the New Towns Act 1965 in respect of the claimant's land. On 3 May 1978 the acquiring authority served on the claimant a notice of entry relating to the whole of the 67 acres. On 5 June 1978 the authority took possession of 4.62 acres pursuant to the notice of entry and thereafter the authority went into possession of the land piecemeal on seven separate dates over the next 28 months. The claimant remained in occupation of the unacquired land until such time as the authority entered into occupation. The claimant claimed that for the purposes of calculating compensation for disturbance under para 4(2)^a of Sch 6 to the 1965 Act the authority was to be treated as having taken possession of the whole 67 acres on the date of the first entry onto the land. The Lands Tribunal disallowed his claim on the ground that the authority was to be treated as having taken possession of each individual parcel of land on the date when it took actual physical possession of that parcel. The claimant appealed. h j

^a Paragraph 4(2) is set out at p 995 d to e, post

- Held** – Having regard to the facts that the 1965 Act conferred statutory power to deprive a citizen of his title and right of occupation of his land and that para 4(2) of Sch 6 provided protection for an owner or occupier who was subjected to that draconian power, the 1965 Act was to be construed in favour of the owner or occupier rather than the acquiring authority. Applying such a construction, since a notice of entry referred to the intention of the acquiring authority to enter on and take possession of the land described in the notice, any subsequent entry onto any part of the land by the authority related to the whole of the land described in the notice. It followed that for the purposes of calculating compensation for disturbance the authority had taken possession of the whole of the 67 acres when it first entered onto the land and took possession of the first parcel. The appeal would therefore be allowed (see p 995 g, p 997 b to d f to h and p 998 b e to g, post).

c Notes

For the date at which compensation for the compulsory purchase of land falls to be assessed, see 8 Halsbury's Laws (4th edn) para 250, and for cases on the subject, see 11 Digest (Reissue) 151–152, 216–220.

For the New Towns Act 1965, s 7, Sch 6, para 4, see 36 Halsbury's Statutes (3rd edn) 381, 434.

- d As from 30 November 1981, s 7 of and para 4 of Sch 6 to the 1965 Act were replaced by s 10 of and para 4 of Sch 6 to the New Towns Act 1981.

Cases cited

Birmingham City Corp v West Midland Baptist (Trust) Association (Inc) [1969] 3 All ER 172, [1970] AC 874, HL.

- e *Inglewood Pulp and Paper Co Ltd v New Brunswick Electric Power Commission* [1928] AC 492, PC.

Washington Development Corp v Bamblings (Washington) Ltd (1984) 83 LGR 561, CA.

Case stated

- f A R H Chilton (the claimant) appealed by way of case stated from the decision of a single member of the Lands Tribunal, Mr V G Wellings QC, on 1 April 1985 whereby he held on a preliminary point arising out of a notice of reference dated 3 January 1983 made by the Telford Development Corp (the acquiring authority), that, for the purposes of calculating compensation for disturbance and interest on the purchase price payable to the claimant in respect of the compulsory purchase of 67.87 acres of land known as Trench Lodge Farm, Trench, Telford, Shropshire, the authority was to be taken as having taken possession of the separate parcels of Trench Lodge Farm on the date when the authority took actual physical possession of each parcel. The facts are set out in the judgment of Purchas LJ.

Anthony J Anderson QC and Robert Fookes for the claimant.

- h *Robert Carnwath QC and Alice Robinson* for the acquiring authority.

PURCHAS LJ. This is a case stated by the Lands Tribunal at the request of Mr A R H Chilton, the claimant, under s 3(4) of the Lands Tribunal Act 1949. The single member of the tribunal had been asked to determine a preliminary point of law, and he did so on 1 April 1985.

- j The point arises out of the compulsory purchase and compensation provisions contained in the New Towns Act 1965 and the Compulsory Purchase Act 1965. Although the former Act has been repealed by the New Towns Act 1981, we are told by counsel that the corresponding provisions in the later Act are the same in most relevant particulars, and that the point is one of some interest generally, beyond the interests of the parties particularly involved in this reference.

The point raises a consideration of the relevant date, or dates, of entry and taking possession of land by the acquiring authority for the purpose of compensation. The acquiring authority involved is the Telford Development Corp.

The question posed was summarised in the decision of the single member in these words:

'Possession of the land acquired was taken by the acquiring authority in several parcels and the preliminary issue is concerned with the question whether there is a single date, namely, the date on which possession of the first parcel was taken, or several dates namely, the individual dates on which possession of the several parcels was taken, which is or are material for the purposes of valuation.'

The parties had agreed the facts so far as they were relevant; they are as follows. The land of which the claimant at all material times was owner-occupier, and which he farmed, consisted of 67.87 acres or thereabouts of agricultural land at Trench Lodge Farm, Trench, Telford, Shropshire. On 10 July 1973 the acquiring authority made the Telford Development Corporation (Hadley Park No. 1) Compulsory Purchase Order 1973 under s 7 of the New Towns Act 1965. The order was confirmed by the Secretary of State for the Environment on 10 March 1978. The order related to the 67.87 acres and other lands [required by the developing corporation for their activities under the New Towns Act 1965].

A notice to treat in accordance with the statutory provisions was served on, and dated, 3 May 1978; it related to the whole of the 67.87 acres. On the same date the acquiring authority served on the claimant one notice of entry relating to the whole of the 67.87 acres.

As the history evolved, the acquiring authority went into physical occupation of individual parcels of the whole area over a period of 28 months. The first date of entry, 5 June 1978, involved 4.62 acres; thereafter there were three more areas involved and entries made, until 6 December 1978, which I mention specifically because in respect of that area, 4.9 acres, the acquiring authority purported to serve a 'revised notice'. No point has been taken on this, and for the purposes of this appeal it can be ignored. It is common ground that the 'revised notice' was of no formal effect.

The remaining acts of taking possession and entering occurred, as to 3.95 acres on 1 January 1980, as to 1.60 acres on 1 January 1980 and then an area which is over half the whole of the area involved, 35.501 acres, on 4 October 1980. After 5 June 1978 in fact the claimant remained in occupation of the parcels not previously entered, until such time as the acquiring authority in fact entered into physical occupation. Saving only the area of 4.9 acres entered on 6 December 1978, there is no evidence or information as to any further sort of notice, but it must be assumed that there was some kind of communication between the parties. That is how things progressed.

The dispute, as is clear from the question posed, relates to the effective date of entry and taking possession for the purposes of compensation. But the particular statutory provisions which must be considered relate mainly to inhibit or restrict the exercise of the powers to acquire compulsorily by way of granting some limited protection to the owner or occupiers involved.

In very short summary, and by way of introduction, the statutory procedure involves two main steps: first of all, the obtaining of the compulsory purchase powers; there are provisions in that process whereby the landowner or occupier can oppose the confirming of the order; and, secondly, those powers having been confirmed, how they are to be exercised. They are exercised subject to these restrictions: first of all, there must be a notice to treat served under s 5 of the Compulsory Purchase Act 1965; then, that having been done, there are further restrictions on the acquiring authority preventing that authority from entering on the land without giving at least 14 days' notice.

It is now convenient to turn to the statutory provisions with which we are concerned. I start by reading s 12(1) of the New Towns Act 1965:

'Part I of the Compulsory Purchase Act 1965 shall apply in relation to the acquisition of land under this Act subject to any necessary adaptations and to the provisions of Part I of Schedule 6 to this Act.'

Section 11(1) of the Compulsory Purchase Act 1965 was replaced by para 4 of Sch 6 to the New Towns Act 1965, the relevant provisions of which are:

'(1) If the acquiring authority have, in respect of any of the land, served notice to treat on every owner of that land, they may at any time thereafter serve a notice—
(a) on every occupier of any of that land, and (b) on every person (other than such an occupier) . . . describing the land to which the notice relates and stating their intention to enter on and take possession thereof at the expiration of such period (not being less than fourteen days) as may be specified in the notice . . .'

I pause to emphasise the words 'describing the land to which the notice relates', that is the notice of intention to enter. The period is one of not less than 14 days, and therefore envisages periods of greater notice if appropriate.

Paragraph 4(2) of Sch 6 reads as follows:

'At the expiration of the period specified in such a notice (or, where two or more such notices are required, and the periods specified in the several notices do not expire at the same time, of the last of those periods to expire), or at any time thereafter, the acquiring authority may enter on and take possession of the land to which the notice or notices relate without previous consent or compliance with section 11 of the Compulsory Purchase Act 1965, but subject to payment of the like compensation for the land of which possession is taken, and interest on the compensation agreed or awarded, as they would have been required to pay if those provisions had been complied with.'

Paragraph 4(2) refers first of all to the cases where there may be more than one occupier or owner in respect of whom notices of intention to enter must be served, but gives power 'at any time thereafter . . . [to] enter on and take possession of the land to which the notice or notices relate without previous consent' and then 'or compliance with section 11 of the Compulsory Purchase Act 1965, but subject to' the provisions that interest will run from the date of entry and taking possession.

The member considered the arguments of counsel which, generally speaking, were in line with the arguments they have put before us. Counsel for the claimant argued to the effect that the notice of entry of 3 May 1978 related to the whole of the land and for that reason, when the acquiring authority on 5 June 1978 first took possession of a part of the land, it must be treated as having done so in the name of the whole; he developed his argument along those lines, saying also that any other interpretation of the statute would lead to doubt, confusion and hardship, and in particular relating to identifying not only the area involved if part of the land in respect of which the notice of entry was served was in fact entered, and the unfairness that would be involved, as could be said in this case, by a long delay as to a substantial part of the land under threat. I do pause to comment, however, that counsel has been scrupulous to point out that it is not alleged that there has been either unfairness or difficulty in this case: the matter comes before us essentially as one of construction of the statute and, as counsel for the acquiring authority submitted, merely construction of the statute on the accepted and established facts of what indeed happened in this case.

Counsel for the acquiring authority submitted before the single member that there was no basis in law for the proposition that the original entry into possession of part of the land was to be treated as entry in the name of the whole. There was no factual basis

on the agreed statement of facts for inferring the grant of a licence by the authority in respect of the parts which, after 5 June, continued in the occupation of the claimant. I pause to emphasise that in fact the claimant did remain farming the land which had not been occupied by the acquiring authority. On one of the two alternative assessments of compensation which had been agreed between the parties, credit is given for what is described, probably inaccurately, as *mesne profits* to relate to the benefit received by the claimant from his continued occupation of the land, if the contentions of counsel for the claimant are right, namely that the claimant is entitled to compensation, and interest thereon, to run from 5 June 1978 in respect of the whole of the land involved in the notice of entry.

The single member accepted the argument of counsel for the acquiring authority and said:

'In my judgment, on the agreed facts there is no reason to infer that when the authority took possession of part of the land on 5th June 1978 they did so in the name of the whole. Equally, notwithstanding the use of the expression "*mesne profits*" (an expression more appropriate to a tenancy than to a licence) there is no reason to infer that the authority purported to grant a licence to the claimant to remain in possession of the remainder of the land. In my opinion, in the present case, there are eight valuation dates, namely, the specific dates on which the authority entered into possession of the several parts of the land as set out in [the agreed facts]. I answer the preliminary issue accordingly.'

The questions stated for this court are threefold:

'1. Whether I was correct in law in determining as the [acquiring authority] contended that for the purposes of calculating compensation for disturbance and interest on the purchase price, the acquiring authority should be treated as having taken possession of each individual parcel of land on the date on which the acquiring authority took actual physical possession of the same . . .

2. Whether I erred in law in not adopting the [claimant's] contention that for the purposes of calculating compensation for disturbance and interest on the purchase price, the acquiring authority should be treated as having taken possession of the whole 67.87 acres on 5th June 1978, being the date of the first entry onto that land following the notice of entry dated 3rd May, 1978 relating to the whole property the subject of the Notice to Treat on 3rd May, 1978.

3. Whether I was correct in law to find on the agreed evidence no reason to infer that the authority either purported to or did grant a licence to the Appellant to remain in possession of part of the land.'

The statutory provisions which I have already set out do not give a simple definitive answer to the two contending interpretations. It is perfectly right to say that nowhere in Sch 6 does one find anything other than the expression 'intention to enter on and take possession of the land'. Paragraph 4(1) does refer to 'intention to enter on and take possession' of the land, and para 4(2) refers to 'the land of which possession is taken' shall carry interest at the rate. So the statute refers to taking possession (para 4(2) of Sch 6) or 'intention to enter on and take possession thereof' (para 4(1) of Sch 6). In addition to that there is no provision providing a period during which a notice of intention to enter should lapse. Subject to reasonable exercise of power, which has not been argued before us, if the acquiring authority took no step in relation to any part of the land, albeit that they had served a notice of intention to enter, then the provisions of para 4(2) of Sch 6 remain as a threat to the enjoyment of the land, which can be determined at any time without notice.

It must of course be remembered that before the stage of serving a notice of intention to enter and take possession, the acquiring authority has already been obliged to serve a notice to treat, which must incorporate the whole of the land, subject to the notice of

intention to enter; but of course it may, and very frequently does, extend to other lands in respect of which a notice of intention to enter will not have been served. But this does afford a remedy to the owner of the land who can, in the absence of agreement as to compensation, refer to the Lands Tribunal, but his remedies are not immediately or easily available.

So one is left here with a provision which has on its face an open-ended power granted to the acquiring authority to act or not to act. It may at least be questioned whether that was entirely the intention of Parliament in enacting what are essentially provisions for the protection of an owner or occupier who is subjected to the necessary, but nevertheless draconian, powers of the acquiring authority to dispossess him of his title and occupation of his land.

For my part, in approaching the construction of these statutory provisions I have two concepts in mind: firstly to give to this part of the legislation, if it is open to do so, a purposive construction, bearing in mind the general considerations and need for these provisions; secondly, to bear in mind that it is a statute which is depriving the citizen of his rights in property and his title, and the right to enjoy occupation of his lands, or perhaps somebody else's lands.

So, looking at s 12 of the New Towns Act 1965, and Sch 6, I pose the question: what is the purpose of requiring the acquiring authority to give notice of not less than 14 days of an intention to enter on and take possession of the land? What it cannot cover, in my judgment, is a contingent intention, not formally adopted, and not in fact carrying with it the intention to act on it within a reasonable time. Otherwise, the statute provides that the acquiring authority does not have to serve a notice of intention to enter in respect of the whole of the land, subject to the notice to treat, or of the compulsory purchase order itself as relates to the particular owner or occupier, and that they may serve, as and when necessary (which I would construe as meaning as and when they form the intention necessary to bring into effect the provisions of para 4(1)), the intention to enter on and take physical possession thereof.

I am conscious of the argument to the contrary, that there is also no express reference in this statute to give effect to the concept that entry on part of the land, subject to the notice of intention to enter, should be deemed to constitute entry of the whole, and it would not have been beyond the wit of man to have put that in the drafting of the statute. But, choosing between the two alternative approaches to this legislation, and I hope fairly recognising the lacuna which exists for practical purposes in the day-to-day carrying out of these exercises, I adopt the construction which is favourable to the owner and occupier of the land, because these sections, although incidentally dealing with calculation of compensation and interest, were primarily enacted for the protection of such a person.

I would therefore construe the statute in that light, and that would bring me to the conclusion that the answers to the questions posed by the single member for our consideration are that with regard to the first question the answer must be No; the answer to the second question must be Yes, and that leaves the answer to the third question still to be considered. For my purposes the substance of this reference is dealt with by answering the first two questions. Whatever the status may be, whether as licensee or some other formally acquired status as between the parties involved, will depend from case to case, from attitude to attitude adopted by the parties concerned (that is, the landowner or occupier and the acquiring authority) and I do not consider that any formal general answer to question 3 will further the matter in any useful way at all. If I had to choose on the facts of this case, I would have thought that the claimant was present there as a bare licensee with few or no rights, bearing in mind that under the statute he is not entitled to receive any notice of change of intention or of the termination of his licence; nor is he entitled to any description of the land which the acquiring authority will choose to possess and enter on no notice. That is a further argument for supporting the conclusion I have reached on the interpretation of the statute, namely, as I emphasised

when reading para 4 of Sch 6, it does specifically require the acquiring authority to describe the land which it intends to enter and of which it intends to take possession. By adopting the construction for which counsel for the acquiring authority in his admirable submissions contends, it would merely defeat the object of that precaution which has been put in the schedule for the protection of the landowner and occupier.

I would therefore answer questions 1 and 2 in the way that I have described, and I would not give any formal answer to question 3.

NEILL LJ. I agree. I add a few words of my own only because we are differing from the construction given to the statutory provisions by the member of the Lands Tribunal.

It was argued on behalf of the acquiring authority that for the purpose of para 4(2) of Sch 6 to the New Towns Act 1965 they entered on and took possession of the parcels of land set out in the agreed facts on the several dates therein set out. It was further argued that for the purpose of calculating the interest to be paid on the compensation for the land, these several dates constituted the time of entry on the individual parcels.

However, it seems to me, with respect, that these arguments do not pay due regard to the provisions of para 4 of Sch 6. It is clear from this paragraph (a) that a notice of entry may relate to part only of the land comprised in the relevant notice to treat, (b) that any notice of entry must describe the land to which it relates, (c) that the notice of entry must state the intention of the acquiring authority to enter on and take possession of the described land at the expiration of a specified period and (d) that at the expiration of the period specified in the notice or at any time thereafter, the acquiring authority may enter on and take possession of that land.

It follows, therefore, that an acquiring authority may, if so minded, serve a series of notices of entry and can enter on to the land described in each of such notices in accordance with a programme which suits its requirements. But where, as here, a single notice of entry is given, it seems to me that, save perhaps where the *de minimis* rule applies, a subsequent entry on to the land, or any part of the land, is an entry made in accordance with the permissive power given in para 4(2) of Sch 6, and is an entry on the land described in the notice to enter. The first entry on to the described land constitutes the entry on to the described land foreshadowed by the statutory notice; the date of that entry is the time of entry for the purpose of the interest provisions contained in para 4(2).

For these reasons, as well as for those given by Purchas LJ, I too would answer the questions in the manner in which Purchas LJ has proposed.

BALCOMBE LJ. I agree, for the reasons which have been given by Purchas and Neill LJ, that this appeal should be allowed, and I do not wish to add anything further.

Appeal allowed.

Solicitors: *Treasures & Rivers* Wyatt, Gloucester (for the claimant); *J C H Bowdler & Sons*, Shrewsbury (for the acquiring authority).

Azza Abdallah Barrister.

a **R v Secretary of State for the Home
Department, ex parte Yeboah**
**R v Secretary of State for the Home
Department, ex parte Draz**

b COURT OF APPEAL, CIVIL DIVISION
SIR NICOLAS BROWNE-WILKINSON V-C, PARKER AND RALPH GIBSON LJJ
20, 23 MARCH, 14 APRIL 1987

c *Immigration – Appeal – Notice of appealable decision – Whereabouts of person entitled to appeal unknown to authorities – Notice of decision to deport not required to be given to persons whose whereabouts are unknown – Secretary of State sending notice by recorded delivery to person's last known address – Notice returned undelivered – Whether return of notice sufficient evidence that person's whereabouts unknown – Immigration Appeals (Notices) Regulations 1972, reg 3(4).*

d *Immigration – Appeal – Notice of appealable decision – Giving of notice – Notice sent by recorded delivery to person's last known place of abode – Whether notice 'given' to person – Immigration Appeals (Notices) Regulations 1972, reg 6.*

The applicants Y and D overstayed the temporary leave to enter the United Kingdom which had been granted to them on their arrival from Ghana and Egypt respectively. On 20 October 1978 the Secretary of State made a decision to deport Y and on 23 March 1983 he made a decision to deport D. In each case notice of the decision was sent by recorded delivery to the applicants' last known address but was returned to the Home Office undelivered. Deportation orders were subsequently made against both applicants, who remained unaware of the orders until 1984, by which date the time for appealing against the orders had elapsed. Both applicants applied for judicial review, contending that the deportation orders were invalid because they had not been 'given' notice of the orders as required by reg 3(1)^a of the Immigration Appeals (Notices) Regulations 1972. The Secretary of State contended (i) that the giving of notice was not necessary because reg 3(4) dispensed with the need for notice if the Secretary of State had 'no knowledge of the whereabouts or place of abode of the person to whom it is to be given' and (ii) that notice had in fact been properly given, for the purposes of reg 6^b, because the notices had been 'sent by post . . . by the recorded delivery service to [the applicants'] last known . . . place of abode'. In both cases the judge refused the applications for judicial review. The applicants appealed.

Held – The appeals would be dismissed for the following reasons—

h (1) Where the Secretary of State claimed that under reg 3(4) of the 1972 regulations it was not necessary to give notice of a deportation order to the person affected because he had no knowledge of the whereabouts or place of abode of that person, the Secretary of State was not obliged to file an affidavit specifically deposing to the lack of the necessary knowledge, since the question in each case was whether there was sufficient evidence to satisfy the court that the Secretary of State had no knowledge of the applicant's whereabouts at the date of the decision to deport. On the facts, the return of the undelivered recorded delivery letters showed that the Secretary of State had not known the applicants' whereabouts and he had therefore not been required to give notice of the deportation order to either applicant (see p 1004 *a b e*, p 1006 *c* and p 1007 *c h*, post); *R v Immigration Appeal Tribunal, ex p Mehmet* [1977] 2 All ER 602 followed.

a Regulation 3, so far as material, is set out at p 1002 *j* to p 1003 *a*, post

b Regulation 6 is set out at p 1003 *b*, post

(2) In any event, for the purposes of reg 6 of the 1972 regulations 'sent by post' meant dispatched by post and not 'received'. Accordingly, the notices of the Secretary of State's decision to deport had been duly given to the applicants when they were posted by recorded delivery to their last known places of abode, and the time for appealing against the orders ran from the time of posting. It followed that notice of the deportation orders had been validly given to the applicants (see p 1005 f g, p 1006 c and p 1007 d h, post); *R v Appeal Committee of County of London Quarter Sessions Appeals Committee, ex p Rossi* [1956] 1 All ER 670 distinguished. a
b

Notes

For notice of rights of appeal in immigration cases, see 4 Halsbury's Laws (4th edn) para 1022.

As from 1 March 1985 reg 3 of the Immigration Appeals (Notices) Regulations 1972 was replaced by reg 3 of the Immigration Appeals (Notices) Regulations 1984, SI 1984/2040. For reg 3 of the 1984 regulations, see 14 Halsbury's Statutory Instruments (Grey Volume) 169. c

Cases referred to in judgments

Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935, [1985] AC 374, [1984] 3 WLR 1174, HL. d
Hewitt v Leicester City Council [1969] 2 All ER 802, [1969] 1 WLR 855, CA.
R v Appeal Committee of County of London Quarter Sessions, ex p Rossi [1956] 1 All ER 670, [1956] 1 QB 682, [1956] 2 WLR 800, CA.
R v Immigration Appeal Tribunal, ex p Mehmet [1977] 2 All ER 602, [1977] 1 WLR 795, DC.
R v Secretary of State for the Home Dept, ex p Makhan Singh [1976] CA Transcript 445A. e

Cases also cited

R v Barnsley Metropolitan BC, ex p Hook [1976] 3 All ER 452, [1976] 1 WLR 1052, CA.
R v Immigration Appeal Tribunal, ex p Chumun and Bano-Ovais (1986) Times, 3 December.
R v Immigration Appeal Tribunal, ex p Rocha [1982] Imm AR 12. f
R v Immigration Appeal Tribunal, ex p Subramaniam [1976] 1 All ER 915, [1977] QB 190, DC; *affd* [1976] 3 All ER 604, [1977] QB 190, CA.
R v Secretary of State for the Home Dept, ex p Swati [1986] 1 All ER 717, [1986] 1 WLR 477, CA.
R v Secretary of State for the Home Dept, ex p Torabally (18 June 1982, unreported), QBD.
SA Buitoni v Fonds d'Orientation et de Régularisation des Marchés Agricoles Case 122/78 [1979] ECR 677, CJEC. g

Appeals

R v Secretary of State for the Home Dept, ex p Yeboah
 Edward Raymond Ntiri Yeboah appealed against the decision of Simon Brown J hearing the Crown Office list on 30 January 1986 dismissing his application for judicial review of (i) the Secretary of State's decision to refuse leave to enter dated 16 December 1984, (ii) confirmation of that decision dated 25 March 1985 and (iii) a deportation order dated 30 March 1979. The facts are set out in the judgment of Sir Nicolas Browne-Wilkinson V-C. h

R v Secretary of State for the Home Dept, ex p Draz
 Mohamed Mohamed Daoud Draz appealed against the decision of Farquharson J hearing the Crown Office list on 4 November 1985 dismissing his application for judicial review of the Secretary of State's refusal dated 13 November 1984 to allow an appeal to an adjudicator out of time. The facts are set out in the judgment of Sir Nicolas Browne-Wilkinson V-C. j

The appeals were listed to be heard together.

Sir Charles Fletcher-Cooke QC and K S Nathan for Mr Yeboah.

a K S Nathan for Mr Draz.

David Pannick for the Secretary of State.

Cur adv vult

b 14 April. The following judgments were delivered.

b **SIR NICOLAS BROWNE-WILKINSON V-C.** These are two appeals from decisions of judges hearing the Crown Office list dismissing applications for judicial review. Although the facts of the two cases differ, the central issue in both is the same, viz whether a deportation order can validly be made under the Immigration Act 1971 in a case where notice of the decision to deport has been sent to, but not received by, the person to be deported.

Statutory background

d The background statutory framework is as follows. Under s 1(2) of the 1971 Act those not having a statutory 'right of abode' in the United Kingdom are subject to such regulation and control of their entry into, and stay in, the United Kingdom as the 1971 Act provides. Under s 3(1) a person may be given leave to enter for a limited period and subject to conditions. Such limitations and conditions may subsequently be varied. Under s 3(5) a person is liable to deportation if he remains after the time limited by the leave to enter. Section 5(1) provides that a person who is liable to deportation under s 3(5) can have a deportation order made against him. Such deportation order can be revoked by the Secretary of State. The 1971 Act does not expressly distinguish between a decision to deport on the one hand and the actual deportation order on the other. But such a distinction is implicit in the provisions of the 1971 Act and is in practice observed. Section 5(1) provides that a deportation order invalidates any leave to enter or remain in the United Kingdom given to the applicant whether before or after the deportation order is made. Therefore, so long as a deportation order stands, an applicant can no longer have any right to stay in the United Kingdom.

f Part II (ss 12 to 23) of the 1971 Act lays down a system of appeals to adjudicators and the Immigration Appeal Tribunal against decisions made under the Act. Section 15(1) provides for appeals against decisions to make a deportation order and to refuse to revoke a deportation order. It contains two provisions of central importance to the present cases. First, s 15(2) provides that a deportation order shall not be made 'so long as an appeal may be brought against the decision to make it'. This provision is central to the argument: *g* both appellants are seeking to establish that at the time at which their respective deportation orders were made they still had a right of appeal against the decision to deport, as a result of which the deportation orders themselves were nullities. Second, s 15(3) provides that no appeal can be brought against a refusal to revoke a deportation order so long as the applicant is in the United Kingdom. Therefore, in the present cases *h* if the existing deportation orders are valid the applicants will have to leave the United Kingdom before they can pursue their ultimate legal right, namely an appeal against a refusal to revoke the deportation order.

Section 18 confers on the Secretary of State power to make regulations relating to notices of matters in respect of which there are rights of appeal. Section 22 confers power to make rules regulating the exercise of the rights of appeal and the procedure on appeals.

j The relevant regulations made under those powers are the Immigration Appeals (Notices) Regulations 1972, SI 1972/1683, which I shall call 'the 1972 regulations', and the Immigration Appeals (Procedure) Rules 1972, SI 1972/1684, which I shall call 'the 1972 rules'. Much of the argument in these cases has turned on the detailed provisions of certain of those regulations and rules which I will set out later. I will first state the facts of the Yeboah case.

*The Yeboah case**(a) The facts*

Mr Yeboah, who is Ghanaian by birth, arrived in the United Kingdom on 19 August 1973 when he was 17 years old. He was given leave to enter for a period of four weeks only. He gave as his address in the United Kingdom his uncle's home, 13 Ashbourne Road, Mitcham, Surrey. It is not clear whether he ever stayed with his uncle at that address. If he did, he left it very shortly after his arrival. For the next five years he was engaged in a course of computer studies. On completion of those studies in 1978 he started a company which is now a successful company dealing in computer hardware and software. Although he never communicated his whereabouts to the immigration authorities he lived quite openly in this country. He has married and has a son born in this country.

In the mean time the immigration authorities had been taking certain steps. On 20 October 1978 the Secretary of State made a decision to deport. Previous inquiries of the applicant's uncle had revealed that the uncle had no knowledge of the applicant or his whereabouts, but thought that the applicant must originally have come to visit the previous occupier of 13 Ashbourne Road, a Miss Boamah. Accordingly, two notices of the decision to deport were sent by recorded delivery, one to 13 Ashbourne Road, the other to the address to which Miss Boamah had moved. Both notices were returned marked 'not known'. The Home Office accept that Mr Yeboah may well be right when he says he was quite unaware of the decision to deport him. In due course, there being no appeal or other communication from Mr Yeboah, a deportation order was made on 30 March 1979.

In 1982 Mr Yeboah went on a business visit to the Brussels Trade Fair on a Ghanaian travel document. When he returned to the United Kingdom four days later, his travel document was stamped with an indefinite leave to remain in the United Kingdom. In view of the pre-existing deportation order, this was a mistake and, under s 5(1) of the 1971 Act, has no legal validity. On 30 July 1984 Mr Yeboah obtained a Ghanaian passport. On 17 November 1984 he left the United Kingdom for another short business visit to the Amsterdam Trade Fair. When he re-entered the United Kingdom on 20 November 1984 he was given temporary admission only while the position was investigated. For the first time he learnt of the deportation order which had been made against him. On 16 December 1984 he was refused leave to enter on the grounds of the pre-existing deportation order. That decision was confirmed by a decision of the chief immigration officer communicated in a letter to him dated 25 March 1985.

In these proceedings Mr Yeboah seeks judicial review to quash (1) the decision to refuse leave to enter dated 16 December 1984, (2) the confirmation of that decision dated 15 March 1985 and (3) the deportation order dated 30 March 1979. The fundamental relief claimed is the quashing of the deportation order itself, since so long as that stands no leave to enter can validly be granted in consequence of the provisions of s 5(1) of the 1971 Act. In outline, Mr Yeboah's contention is that the relevant regulations required notice of the decision to deport to be served on him, that such notice has never been validly served, that, accordingly, the time for appeal against that decision has never started to run and that, accordingly, the deportation order itself is void as having been made in breach of s 15(2) of the 1971 Act since the right of appeal was still outstanding. Simon Brown J dismissed the application.

(b) The 1972 regulations

Regulation 3(1) and (4) provides as follows:

'(1) Subject to the following provisions of this Regulation, where any decision or action which is appealable ... is taken, written notice thereof shall as soon as practicable be given in accordance with the provisions of these Regulations to the person in respect of whom the decision or action is taken ...

- a (4) It shall not be necessary for notice to be given in compliance with the provision of paragraph (1) if the officer or authority required by paragraph (2) to give it has no knowledge of the whereabouts or place of abode of the person to whom it is to be given.'

Simon Brown J decided the case against Mr Yeboah on the ground that reg 3(4) dispensed with any need for service in his case, since at the time of the making of the decision to deport the Secretary of State had no knowledge of Mr Yeboah's whereabouts or place of abode.

Regulation 6 provides:

'Any notice required by Regulation 3 to be given to any person may be sent by post in a registered letter or by the recorded delivery service to his last known or usual place of abode.'

- c Regulation 2(3) applies the Interpretation Act 1978 to the regulations. Section 7 of the 1978 Act provides:

- d 'Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

- e The Secretary of State contends that, if the judge was wrong as to the effect of reg 3(4), even so service of the decision to deport was duly effected by sending such notice to Mr Yeboah's last known place of abode, that is to say 13 Ashbourne Road. Simon Brown J rejected this latter argument.

(c) *The principal argument*

- f As I have indicated, the principal submission of counsel for Mr Yeboah is that no proper notice of the decision to deport was given to his client as required by reg 3(1). Counsel for the Secretary of State submits that there are two routes whereby he can show that the requirements of the regulations have been complied with, viz (1) reg 3(4) applies to the present case and, therefore, there was no need to give any notice and (2) there was service by post at Mr Yeboah's last-known place of abode under reg 6.

I will deal with these in turn.

g

(1) *Regulation 3(4)*

- h Counsel for the Secretary of State submits that the only requirement to give notice of the decision to deport is that contained in reg 3(1), which is prefaced by the words 'Subject to the following provisions of this Regulation'. Then reg 3(4) expressly excludes any requirement to give notice if there is no knowledge of the whereabouts or place of abode of the applicant. In Mr Yeboah's case there is no affidavit sworn on behalf of the Secretary of State expressly stating that the Secretary of State did not have that knowledge. But the evidence does show that inquiries had been made and that the two notices were sent by post to the last known addresses. This, says counsel for the Secretary of State, is sufficient to prove the facts which bring the case within reg 3(4) in the absence of any suggestion by the applicant that the Secretary of State did know his whereabouts.

- j In answer, counsel for Mr Yeboah submits first that reg 3(4) is ultra vires the rule-making power in s 18 of the 1971 Act. However, he accepts that in this court that argument cannot succeed because of the decision by this court in *R v Secretary of State for the Home Dept, ex p Makhan Singh* [1976] CA Transcript 445A that the rule was intra vires. Second, counsel submits, following the decision of Farquharson J in *R v Secretary of State*

for the Home Dept, *ex p Draz* [1985] Imm AR 215, that, if the Secretary of State is to rely on reg 3(4), the Secretary of State must put in affidavit evidence affirmatively proving that he did not have the necessary knowledge of the applicant's whereabouts. a

In my judgment, there is no obligation on the Secretary of State in every case to file an affidavit specifically deposing to the lack of the necessary knowledge. The question in each case is whether the evidence before the court is sufficient to satisfy the court that there was no knowledge of the applicant's whereabouts at the date of the decision to deport. Where, as in the present case, the evidence shows that the notices were sent to one or more addresses as being the last known place of abode and came back marked 'not known', in the absence of any other evidence the only possible conclusion is that the Secretary of State did not know the man's whereabouts or place of abode. This conclusion accords with the decision of Simon Brown J in the present case and the decision of the Divisional Court in *R v Immigration Appeal Tribunal, ex p Mehmet* [1977] 2 All ER 602, [1977] 1 WLR 795. In that case there was no specific evidence as to the state of knowledge of the Secretary of State beyond the return of the letters through the dead letter post and it was held even so that reg 3(4) dispensed with any requirement for notice. b

I am conscious of the force of counsel's submission for Mr Yeboah that the making of a deportation order in a real sense affects the liberty of the individual and therefore the statutory requirement should be strictly complied with. For this reason it may well be desirable that in future where reg 3(4) is to be relied on there should be affidavit evidence dealing specifically with the state of knowledge of the Secretary of State. But strict compliance with the requirements can be satisfied in other ways: if the evidence before the court proves on the balance of probabilities that the Secretary of State lacked the necessary knowledge as to the man's whereabouts, the strict requirements are satisfied. c

Therefore, in my judgment, the applicant's argument on this point fails. d

(2) Regulation 6 e

If I am wrong as to the effect of reg 3(4), there remains the Secretary of State's alternative argument under reg 6. He says that he gave notice by posting the notice by recorded delivery to Mr Yeboah's last known place of abode and therefore duly served it.

Counsel for Mr Yeboah submits that reg 6, read in conjunction with s 7 of the 1978 Act, cannot deem service to have been effected when the letter is subsequently returned. He relies in particular on the decisions in *R v Appeal Committee of County of London Quarter Sessions, ex p Rossi* [1956] 1 All ER 670, [1956] 1 QB 682 and *Hewitt v Leicester City Council* [1969] 2 All ER 802, [1969] 1 WLR 855. He points out that r 4 of the 1972 rules lays down time limits for various types of appeal. Rule 4(7) requires, in relation to an appeal against a decision to deport, that notice of appeal 'be given not later than 14 days after the decision'. Rule 4(11) then provides: f

'Where notice in writing of an action or decision is required by the Immigration Appeals (Notices) Regulations 1972 to be given then, for the purposes of this Rule, that action or decision shall be deemed to have been taken—(a) where the notice is sent by post, on the day on which it was sent; (b) in any other case, on the day on which the notice was served.' g

Therefore, the time for appeal against a decision to deport starts to run on the day on which the notice is 'sent by post'. h

Were it not for one factor, I would have agreed with Simon Brown J that the Secretary of State's argument on this point should not succeed. The principle in *Ex p Rossi* [1956] 1 All ER 670, [1956] 1 QB 682, as I understand it, is that where the principal Act makes the date of receipt of a notice crucial either for the purpose of enabling the person to whom it is addressed to take some action or for the purpose of, for example, fixing the date of valuation, s 7 of the 1978 Act cannot operate to deem that the notice has been received when it has not in fact been received. The exact process of reasoning whereby this conclusion is reached is not entirely clear to me. But the reasoning of Parker LJ in j

a *Ex p Rossi* [1956] 1 All ER 670 at 680–682, [1956] 1 QB 682 at 700–702 seems to be as follows. In a case where the date of receipt is crucial, and there is no actual receipt of the notice, there is ‘evidence to the contrary’ which excludes the deemed receipt under s 7 of the 1978 Act. The question then is whether the principal Act, in referring to a notice being ‘sent’, means posted or actually received by the addressee. If actual receipt is necessary to enable the addressee to take some necessary step, then the word ‘sent’ in the principal Act will be construed to mean ‘received’ and the requirement of notice will not be satisfied.

b This reasoning applies to all notices to be served under reg 3: under r 4 time for appeal runs from the day on which the notice is ‘sent by post’. Unless ‘sent’ in the 1972 rules means ‘received’, in every case the already short time limited for appeal (usually 14 days) will be further curtailed. In cases such as the present, where the notice is never received, the right of appeal is destroyed completely if ‘sent’ means ‘placed in the post’. For these reasons, apart from one factor, there is everything to be said for applying the *Ex p Rossi* principle to the present case.

c However, the judgment of Parker LJ in *Ex p Rossi* shows that, in the ultimate analysis, the question is one of construction of the principal Act, ie in the present case the construction of the 1972 regulations. During the argument of the present appeal Parker LJ pointed out that it is impossible to construe the word ‘sent’ in r 4 as meaning ‘received’ so as to make such rule consistent with the rest of the 1972 regulations and rules. Regulation 4 requires the notice to state, amongst other things, ‘the time within which an appeal should be brought’. The period to be stated is 14 days from the date when the notice is ‘sent’ (see r 4). If ‘sent’ were to mean ‘received’ it would be impossible for the notice to state ‘the time within which an appeal should be brought’ except by some formula such as ‘within 14 days after the date of receipt by you’. But, if such formula were to be adopted, the Secretary of State could never tell whether or not time for appeal had expired. The expiry of the time for appeal is critical to the Secretary of State since, under s 15(2) of the 1971 Act, until such expiry no deportation order can be made. Accordingly, in order to make the structure of the 1971 Act and the regulations and rules work, it is essential that the Secretary of State should be able to know with certainty the date when the time for appeal starts to run and the date when it has expired. This cannot be achieved unless it is the posting of the notice, not its receipt, which is the start of the period for appeal.

e Therefore, in my judgment, there is no room to apply the *Ex p Rossi* principle to the 1972 regulations. On their true construction the word ‘sent’ means, and can only mean, dispatched by post. I reach this conclusion with regret as it leads to the result that an immigrant who in fact never receives notice of a decision is deprived of his right of appeal. This harsh result is ameliorated in the case of all decisions save only a decision to deport: r 5 gives a discretionary power in special circumstances to grant a further opportunity to appeal even after the time primarily limited has expired. But r 5(4) does not allow a further appeal against decisions to deport once a deportation order is in force. That is the present case. In such a case the only remedy of the immigrant is either to persuade the Secretary of State to make a reference to the adjudicator under s 21 of the 1971 Act or to apply to the Secretary of State to revoke the order and, if revocation is refused, leave the United Kingdom and appeal against the refusal. In a case where the Secretary of State is satisfied that notice of the decision to deport has not been received and there has been no wilful attempt to avoid it, a reference under s 21 might well be thought appropriate.

f
j (d) *The subsidiary arguments*

Counsel for Mr Yeboah submitted that the deportation order should be quashed as being a disproportionate penalty within the meaning of ‘proportionality’ as used by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 950, [1985] AC 374 at 410. The disproportion relied on, as I understand it, is between

Mr Yeboah's offence of staying on and his expulsion from this country where his wife and his child (who is patrilal) are and where he has established a successful business. I express no view on this argument beyond saying that none of those factors was known to the Secretary of State when he made the deportation order. They cannot, therefore, be relied on as a ground for quashing the order, whether or not the principle of proportionality is part of the law of England. a

Counsel for Mr Yeboah had another point. As I understand it, he suggests that at all material times an appeal has been outstanding (and therefore no deportation order could validly have been made) because Mr Yeboah is in some way entitled to the hearing of a preliminary issue under rr 8(3)(a) and 11(4). Those rules permit the adjudicator to consider whether or not to let the appeal continue notwithstanding that it is out of time. The point must fail because under r 11(4) the adjudicator cannot in any event allow an out-of-time appeal to continue where a deportation order is in force. b

For these reasons, Simon Brown J rightly dismissed Mr Yeboah's application and his appeal must be dismissed. c

The Draz case

(a) The facts

Mr Draz is an Egyptian national. He first arrived in this country on 25 March 1978 and was given leave to enter for one month as a visitor. This leave to enter was varied to permit him to remain as a student and extended from time to time until 31 October 1979. In October 1979 he was convicted for breach of the conditions (in that he had taken employment) and was recommended for deportation. He left this country voluntarily on 30 October 1979. d

He re-entered this country on 4 February 1981, being given leave to enter for one month as a visitor. He applied for an extension of stay as a visitor. This application was refused. On 8 May 1981 he filed notice of appeal under s 14(1) of the 1971 Act against this refusal, asking for an extension of one month. His notice of appeal gave his address as 71 Cambridge Gardens, Ladbroke Grove, London W10. On 4 January 1982 notice of a hearing of the appeal to be held on 5 February 1982 was sent to 71 Cambridge Gardens by recorded delivery. The notice was returned marked 'return to sender'. The appeal was heard on 3 February 1982 (not 5 February as the notice had stated) but no point is taken on this. The adjudicator proceeded to determine the s 14(1) appeal in the absence of Mr Draz. The adjudicator relied in part on the belief that Mr Draz had not by his notice of appeal asked for an oral hearing; this was a mistake. However, the adjudicator also relied on r 12(c) of the 1972 rules. The adjudicator dismissed the appeal. Notice of the decision was again sent to 71 Cambridge Gardens by recorded delivery. Again it was returned unclaimed. Mr Draz now says he was throughout this period living at 71 Cambridge Gardens. e

On 23 March 1983 notice of a decision to deport was sent by recorded delivery to Mr Draz at 71 Cambridge Gardens. Although the Home Office was not aware of the fact, Mr Draz had left 71 Cambridge Gardens in August 1982. The notice was again returned to the sender. On 6 March 1984 the Secretary of State made a deportation order. f

On 25 February 1984 Mr Draz married an English girl and shortly thereafter wrote to the Home Office informing them of the fact and giving his then current address. Shortly thereafter he learnt of the making of the deportation order. g

On 26 October 1984 his solicitors applied to appeal out of time against the decision to deport. On 13 November 1984 the Home Office refused to entertain an appeal out of time under r 5 on the ground that r 5(4) precludes any appeal out of time when a deportation order is in force. Mr Draz then applied for judicial review of the decision of 13 November 1984, ie of the decision not to give a further right of appeal under r 5. h

i

(b) *The law*

- a Rule 5 gives a further opportunity to appeal out of time. But r 5(4) expressly provides:
 ‘No steps shall be taken under this Rule by, or in the case of, a person in respect of whom a deportation order is for the time-being in force.’

Therefore Mr Draz’s application for judicial review of the decision of 13 November 1984 cannot succeed unless he too can show that the deportation order made against him on 6 March 1984 is invalid.

- b The principal arguments advanced by counsel for Mr Draz are the same as those I have already considered in the case of Mr Yeboah, i.e. that Mr Draz never received notice of the decision to deport and that, accordingly, such decision and the deportation order itself are void. The Secretary of State again relies on both reg 3(4) and reg 6 of the 1972 regulations. Farquharson J held that reg 3(4) could not be relied on as there was no affidavit expressly deposing to the lack of the necessary knowledge on the part of the Secretary of State. For the reasons I have given, I do not think such affidavit was necessary since the notices were sent to the only address given by Mr Draz and were returned. Accordingly, in my judgment, the judge’s decision on this point was incorrect. However, Farquharson J held that the necessary service under reg 6 had been proved and for the reasons already given I think he was right in so holding.

- d In Mr Draz’s case there is a secondary argument founded on the alleged fact that Mr Draz never received notice of the hearing of his appeal under s 14(1) against the refusal to extend the duration of his leave to enter. The subsidiary argument runs as follows. Mr Draz never received notice of the hearing of his s 14(1) appeal before the adjudicator. Under r 24(1) he ought to have been given such notice. In the absence of such notice, the decision by the adjudicator on the s 14(1) appeal was a nullity. Therefore, that appeal has at all times been outstanding. Section 14(1) of the 1971 Act provides that so long as such appeal is outstanding an appellant shall not be required to leave the United Kingdom. Therefore, the deportation order is void.

- e Counsel for the Secretary of State gave a number of possible answers to these submissions. It is sufficient to mention only one. Rule 12(c) of the 1972 rules provides that an adjudicator may determine an appeal without a hearing if ‘satisfied . . . that it is impracticable to give [the appellant] notice of a hearing . . .’. The adjudicator relied on this rule. On the information before the adjudicator, the adjudicator was fully entitled so to do. Communications sent to the address given by Mr Draz in his notice of appeal had been returned marked ‘return to sender’. There was no duty on the adjudicator to make further inquiries. Therefore the adjudicator was entitled to proceed without an oral hearing and the appeal was properly determined in the absence of Mr Draz. Accordingly, the foundation of the subsidiary argument of counsel for Mr Draz disappears.

Therefore, in my judgment, Mr Draz’s appeal should also be dismissed.

PARKER LJ. I agree.

- h **RALPH GIBSON LJ.** I also agree.

Appeals dismissed. Leave to appeal to the House of Lords refused.

- Solicitors: Warehams, Bristol (for Mr Yeboah); Mills-Thomas & Co (for Mr Draz); Treasury Solicitor.

Celia Fox Barrister.

Hadjiloucas v Crean

COURT OF APPEAL, CIVIL DIVISION

PURCHAS, MUSTILL LJ AND SIR ROUALEYN CUMMING-BRUCE

13, 14, 18, 19 MAY, 29 JULY 1987

Landlord and tenant – Tenancy – Tenancy distinguished from licence – Two persons signing separate ‘licences’ to occupy flat – Landlord entitled to nominate new occupant if one of existing occupants left – Both occupants responsible for payment of total rent rather than merely their share – Whether tenancy or licence created.

The appellant and a friend, B, agreed with the landlord to rent a furnished two-roomed flat with separate kitchen and bathroom. They were given copies of separate but identical documents purporting to be ‘licences’ which stated that ‘The Licensor shall grant and the Licensee accept a licence to share with ONE others each [to] be separately licensed by the Licensor and to the intent that the Licensee shall not have exclusive possession’ of the relevant premises. The term of the rental was six months and the rent for the flat was £260 per month. Each occupant was responsible for the whole rent rather than merely her share. In December 1984 the appellant and B each signed the ‘licences’. In March 1985 B left and arranged with the landlord, without consulting the appellant, for R to take her place. On the expiry of the six-month term R left but the appellant stayed on and applied to the rent officer to fix a fair rent. The rent officer registered a rent of £130 per month. The landlord then sought possession of the flat. The judge granted possession on the ground that the appellant’s occupation of the flat had not been exclusive and that therefore the appellant was not a tenant but merely a licensee. The appellant appealed to the Court of Appeal, contending (i) that the two identical agreements either misdescribed the true contractual position, which was that of a tenancy, or were a sham or artificial transaction and (ii) that, if two or more persons occupied residential premises at the same time, then it was to be presumed that they had between them a right of exclusive possession and that therefore, not being lodgers, they had to be tenants.

Held – The fact that two or more persons occupied a flat at the same time did not give rise to a presumption that they had between them a right of exclusive possession and were therefore tenants rather than lodgers and as such entitled to protection under the Rent Acts, each case depending on its own facts. Although the fact that the landlord was entitled to nominate a new occupant if an existing occupant left might be an important consideration, it would not necessarily be decisive, since it could simply be evidence of parallel tenancies, each between the landlord and a tenant in relation to an identifiable separate portion of the premises. Accordingly, the factual matrix had to be examined in order to determine whether the agreement or agreements made between the appellant, B and the landlord created a joint tenancy so as to grant the appellant and B together exclusive possession as against the outside world, or whether they created two separate licences under which neither the appellant nor B had exclusive possession. Since the judge not taken into account certain relevant facts in determining that issue, the case would be remitted to him for a retrial (see p 1015 d to f, p 1016 g, p 1017 e f, p 1018 g h j to p 1019 b and p 1024 b c, post).

Street v Mountford [1985] 2 All ER 289 considered.

Notes

For whether an agreement creates a lease or a licence, see 27 Halsbury’s Laws (4th edn) paras 6–11, and for cases on the subject, see 31(1) Digest (Reissue) 202–203, 1692–1698.

Cases referred to in judgments

- a** *Addiscombe Garden Estates Ltd v Crabbe* [1957] 3 All ER 563, [1958] 1 QB 513, [1957] 3 WLR 980, CA.
Aldrington Garages Ltd v Fielder (1978) 37 P & CR 461, CA.
Booker v Palmer [1942] 2 All ER 674.
Brooker Settled Estates Ltd v Ayers [1987] 1 EGLR 50, CA.
Cobb v Lane [1952] 1 All ER 1199, CA.
- b** *Demuren v Seal Estates Ltd* (1978) 249 EG 440, CA.
Errington v Errington and Woods [1952] 1 All ER 149, [1952] 1 KB 290, CA.
Facchini v Bryson [1952] 1 TLR 1386, CA.
Howson v Buxton (1928) 97 LJKB 749, [1928] All ER Rep 434, CA.
Isaac v Hotel de Paris Ltd [1960] 1 All ER 348, [1960] 1 WLR 239, PC.
Lloyd v Sadler [1978] 2 All ER 529, [1978] QB 774, [1978] 2 WLR 721, CA.
- c** *Marchant v Charters* [1977] 3 All ER 918, [1977] 1 WLR 1181, CA.
Marcroft Wagons Ltd v Smith [1951] 2 All ER 271, [1951] 2 KB 496, CA.
Murray Bull & Co Ltd v Murray [1952] 2 All ER 1079, [1953] 1 QB 211.
Radaich v Smith (1959) 101 CLR 209, Aust HC.
Shell-Mex & BP Ltd v Manchester Garages Ltd [1971] 1 All ER 841, [1971] 1 WLR 612, CA.
Snook v London and West Riding Investments Ltd [1967] 1 All ER 518, [1967] 2 QB 786, [1967] 2 WLR 1020, CA.
- d** *Somma v Hazlehurst* [1978] 2 All ER 1011, [1978] 1 WLR 1014, CA.
Stoneleigh Finance Ltd v Phillips [1965] 1 All ER 513, [1965] 2 QB 537, [1965] 2 WLR 508.
Street v Mountford [1985] 2 All ER 289, [1985] AC 809, [1985] 2 WLR 877, HL.
Sturrolson & Co v Weniç (1984) 272 EG 326, CA.
- e** *Yorkshire Rly Wagon Co v Maclure* (1882) 21 Ch D 309.

Cases also cited

Crancour Ltd v da Silvaes [1986] 1 EGLR 80, CA.
Leek and Moorlands Building Society v Clark [1952] 2 All ER 492, [1952] 2 QB 788, CA.
R v Plymouth City Council, ex p Freeman (1986) 18 HLR 243.

f Appeal

The defendant, Isabelle Crean, appealed against the judgment of his Honour Judge Tibber made on 14 May 1986 in the Edmonton County Court whereby he held that the plaintiff, Demetrakis Hadjiloucas (the landlord), was entitled to recover possession of flat 2, 31 Endymion Road, London N4, and that the appellant pay the landlord a licence fee of £260 per month from 1 July 1985 until possession was given up. The facts are set out in the judgment of Purchas LJ.

Andrew Arden and Terence Gallivan for the appellant.
Neil Mendoza for the landlord.

h*Cur adv vult*

29 July. The following judgments were delivered.

PURCHAS LJ. This is an appeal by Isabelle Crean against a judgment of his Honour Judge Tibber given on 14 May 1986 ordering that the plaintiff, Demetrakis Hadjiloucas, to whom I shall refer as 'the landlord', recover possession of flat 2, 41 Endymion Road, London N4 (the flat) and other relief. The appeal raises a short but important point, namely the determination of the status of two occupiers sharing residential accommodation.

The facts are shortly stated. The landlord was at all material times the owner of 41 Endymion Road. The flat was unfurnished and comprised two rooms, a kitchen,

bathroom and lavatory. The landlord's managing agent was a Mr Stavrou who conducted all relevant negotiations on the landlord's behalf. In November 1984 the appellant and a Miss Broderick were looking for furnished accommodation. Apart from being friends there is no evidence of any special relationship between them. a

On the first meeting between Mr Stavrou, the appellant and Miss Broderick, the appellant and Miss Broderick were shown three flats at 41 Endymion Road and chose the ground floor one. There was some discussion as to whether they would share one room as a bedroom and have the second room as a living room or have one bedroom each and do without a living room. They chose the latter alternative; but the judge found that how they arranged the use of the rooms was of no importance to the landlord. Having chosen the flat, the parties repaired to Mr Stavrou's office which was nearby. There were a number of different documents purporting to be licence agreements before the court. The judge made findings in relation to these which have not been challenged on appeal. b

At the meeting in November 1984 two draft agreements were prepared in similar form for the appellant and Miss Broderick respectively which they took away to study. On 5 December the two ladies had a further meeting either with Mr Stavrou or with his assistant, Mr Pallos, it matters not which. On this occasion each signed their respective agreements. It is necessary to refer to some of the terms of these documents, which were identical for each lady. The document in the case of the appellant provided: c

'THIS LICENCE is made the 5 day of December 1984 BETWEEN MR. D. HADJILOUCAS (herein after called "the Licensor") of the one part and MISS I. CREAN of 76A TURNPIKE LANE LONDON N.8 (herein after called "the Licensee") of the other part. WHEREBY IT IS AGREED as follows:—1. The Licensor shall grant and the Licensee shall accept a licence to share with ONE others each be separately licensed by the Licensor and to the intent that the Licensee shall not have exclusive possession thereof the furnished premises known as Flat No. 2, in the property situated at and known as No. 41 ENDYMION ROAD HARRINGAY LONDON N.4 for a term of SIX months terminating on the 30th day of JUNE 1985 at a weekly/calendar monthly licence rental of £260= payable on the 1st day of each week/month in advance but so that the total weekly/calendar monthly rent actually paid by all the Licensees of the said flat at any time shall not together exceed £260=.' d

There then followed 18 further provisions and finally: e

'The Licensor hereby agrees with the Licensee as follows:—That the Licensee paying the rent and performing all the agreements by the Licensee herein contained may quietly possess and enjoy the premises during the Licence without any lawful interruption from the Licensor or any person rightfully claiming under or in trust for the Licensor. AS WITNESS the hands of the parties hereto. f

[Signatures].'

Inspection of the original document discloses that it is in a 'pro forma style' with the particular details of the individual agreement completed in manuscript. In the preceding extract those parts which have been completed in manuscript are printed in italics. In particular it should be noticed that the pro forma provides for sharing with one or more other so-called licensees and by appropriate deletion can provide for weekly/calendar monthly payments. In the appellant's case the word 'ONE' is written in; but it could well have been 'two' or conceivably more. g

The copies of the agreement which the ladies took away after the meeting at the end of November did not provide for a monthly payment of £260 with a maximum aggregated payment in the same figure but for individual payments of £130 per month in respect of each of the two agreements together with a figure of £130 in the space relating to the total calendar monthly rent actually paid by all licensees. On 5 December these figures were erased in Tipp-Ex and the figures of £260 inserted. Two further 'versions' of the agreement came into existence on 21 December 1984 (one for the h

a appellant) and on 24 December (one for Miss Broderick). These were in exactly the same terms and were produced because Mr Stavrou was anxious about the Tipp-Ex corrections on the original agreements signed on 5 December. For the purposes of this appeal these additional documents may be ignored.

b In the event Miss Broderick moved in on 24 December, on which occasion it is to be remembered she signed the further agreement, but the appellant did not move in until 2 January 1985. Thereafter, the two ladies were together in the flat until Miss Broderick left after being there about two months. At the end of this time Miss Broderick told Mr Stavrou that she was leaving and inquired what would happen to the room. Mr Stavrou said that he would advertise it, whereupon Miss Broderick said that she had a friend who might be interested. This was a Miss Rollins. Miss Rollins was introduced to Mr Stavrou, who accepted her. Miss Rollins then signed an agreement in very similar terms to those pro forma agreements already mentioned. Miss Rollins's agreement was dated 1 March c 1985 and provided for a term of four months terminating on 30 June 1985 at a calendar monthly licence fee of £260 with a similar overall excess figure of £260. Two features are to be noticed: in the interval from the end of December 1984 a minor adjustment to the wording of the pro forma document had been made. The phrase 'monthly licence rental' in the earlier documents had become 'monthly licence fee'. Also the period of the agreement is reduced from six months to four months so as to be conterminal with the d agreements made with the appellant and Miss Broderick.

e Miss Rollins remained in the flat until the end of June 1985 when all the agreements expired. Towards the end of that month the appellant, together with a Miss Richards, whose relationship with the appellant is not described but must be assumed to be a friend, inquired of Mr Stavrou whether the landlord would grant a new licence on the expiry of the current agreements. Mr Stavrou said this could be done but that the rent would be £70 instead of £60 per week. The appellant said she would not sign a further licence until she had had the rent assessed. Mr Stavrou said that in those circumstances they (meaning Miss Rollins and the appellant) must leave on the expiry of the agreement. Miss Richards stayed on in the flat, leaving on 20 September 1985, since which time the appellant has remained in the flat on her own. To complete the history, on 19 August f the appellant applied to the rent officer who, on 5 November 1985, registered the rent at £130 per month.

The county court judge addressed his mind to the question whether the appellant was a tenant or licensee, applying the criteria which he considered were to be found in the speech of Lord Templeman in *Street v Mountford* [1985] 2 All ER 289, [1985] AC 809. He came to the following findings:

g 'Tenants or licensees? Counsel for [the appellant] argued that *Street v Mountford* is authority for the proposition that a court is concerned only to determine whether or not an occupier of residential accommodation is a lodger: if the occupier is not a lodger, argues counsel, then *Street v Mountford* says she must be a tenant. That argument seems to me to ignore that Lord Templeman's speech makes it clear that h the test of tenancy is exclusive occupation (see, for example, [1985] 2 All ER 289 at 300, [1985] AC 809 at 826). The agreement in the instant case is expressed to be a licence to share the premises with another licensee to be licensed by the licensor. Unlike the situation in *Somma v Hazlehurst* [1978] 2 All ER 1011, [1978] 1 WLR 1014, the instant agreement was not a sham. The occupiers were two single ladies who debated whether to share a bedroom or not. They decided not to do so but to j each have her own bedroom. When Miss Broderick said she was leaving, the agent said he would advertise for another occupier, but agreed to accept Miss Rollins. I have no doubt that, had he advertised and found another occupier, [the appellant] would have been obliged to accept that occupier. In *Somma v Hazlehurst* the two occupiers occupied a single room in "quasi-connubial bliss" so that a notice to quit served on one would be a disguised notice to quit served on the other. That is far

from the case before me. I deal below with the question of rent, but, whether a joint rent of £260 or two single rents of £130 each was charged by the agreement, it could not affect the situation: the occupation was not exclusive and therefore not a tenancy.' a

The part of Lord Templeman's speech to which the judge refers is to be found where Lord Templeman referred to the judgment of Slade LJ in the Court of Appeal ([1985] 2 All ER 289 at 300, [1985] AC 809 at 826-827): b

'Slade LJ was finally impressed by the statement at the foot of the agreement by Mrs Mountford "I understand and accept that a licence in the above form does not and is not intended to give me a tenancy protected under the Rent Acts." Slade LJ said: "... it seems to me that if [Mrs Mountford] is to displace the express statement of intention embodied in the declaration, she must show that the declaration was either a deliberate sham or at least an inaccurate statement of what was the true substance of the real transaction agreed between the parties ...". My Lords, the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent. Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy. Legal relationships to which the grant of exclusive possession might be referable and which would or might negative the grant of an estate or interest in the land include occupancy under a contract for the sale of the land, occupancy pursuant to a contract of employment or occupancy referable to the holding of an office. But where as in the present case the only circumstances are that residential accommodation is offered and accepted with exclusive possession for a term at a rent, the result is a tenancy.'

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Counsel for the appellant based his submissions on the same contention which was rejected by the judge. It will be necessary to consider his submissions in a little more detail. At the core of counsel's argument lies a reading of the speech of Lord Templeman in *Street v Mountford* on which he founds a submission that in all cases involving residential premises the occupier must either be a tenant or a lodger and that there is no room for a person enjoying some intermediate interest in the premises. In considering the issue of status counsel for the appellant submitted that the court must inquire into the true nature of the agreement between the parties, and in doing so should ask itself as a matter of established fact and by reference to the circumstances and conduct of the parties the following questions. (1) Are there premises intended to be used as residential accommodation? (2) Is there a person, or are there persons, who, it is intended, should alone or between them occupy those premises as residential accommodation? (3) Is there a sum of money which is, or sums of money which together are, identified or identifiable as being for the occupation of those premises? (4) Is the sum of money referred to in (3) referable to a term, whether fixed or periodic? If all these factual questions are answered in the affirmative, tenancy follows as a matter of law, save where (5) 'lodging' as defined by Lord Templeman applies or (6) the case falls into one of the classes of exceptional circumstances as illustrated by Lord Templeman. f
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Counsel for the appellant, adapting the above proposition to a case of multiple occupancy such as the present case, submitted that where two or more written agreements exist, which appear to conflict with a conclusion of tenancy based on the above, then the court should look to see whether the wording misdescribes the true contractual position (as in the *Street* agreement itself) or the agreements are agreements which the court should presume to be a 'sham or artificial transaction' (cf 'to be astute to detect and frustrate sham devices': see *Street v Mountford* [1985] 2 All ER 289 at 299, [1985] AC 809 at 825). i

a Notwithstanding the able and attractive arguments of counsel for the appellant, I have come to the conclusion that he is attempting to read too much into the speech of Lord Templeman. He has fallen into an error similar to that made by the trial judge in *Brooker Settled Estates Ltd v Ayers* [1987] 1 EGLR 50 at 51–52 as described by O'Connor LJ:

b 'In [*Street v Mountford*] Lord Templeman, delivering the only speech of their lordships, reviewed the authorities dealing with this tortured question as to whether an occupant is in occupation as licensee or a tenant—on which topic there are a large number of cases—and sought to introduce some order into the law for the better administration of the law and guidance of the learned judges, particularly in the county court, who have to deal with this problem . . . In my judgment, the learned judge has fallen into error, because it will be seen that what he has done is to say: "This occupant was not a lodger, as defined by Lord Templeman. Therefore she must have had exclusive possession." That does not follow. I think it is understandable that the learned judge fell into this error because of the succinct way in which Lord Templeman in his speech has attempted to try to simplify this situation.'

d The starting point of the argument of counsel for the appellant is the closing paragraph of Lord Templeman's speech in *Street v Mountford* [1985] 2 All ER 289 at 300, [1985] AC 809 at 827:

e 'My Lords, I gratefully adopt the logic and the language of Windeyer J [in *Radaich v Smith* (1959) 101 CLR 209 at 222]. Henceforth the courts which deal with these problems will, save in exceptional circumstances, only be concerned to inquire whether as a result of an agreement relating to residential accommodation the occupier is a lodger or a tenant.'

f Only in his second question is reference made to occupation. Counsel for the appellant said that by his phrase 'between them' he means that if two or more persons are occupying the premises at the same time, then it is to be presumed that under *Street v Mountford* they have between them a right of exclusive possession, that therefore they are not lodgers and that a tenancy follows as a matter of law. Counsel relied on the reference in *Street v Mountford* to *Somma v Hazlehurst* [1978] 2 All ER 1011, [1978] 1 WLR 1014, *Aldrington Garages Ltd v Fielder* (1978) 37 P & CR 461 and *Sturrolson & Co v Wenz* (1984) 272 EG 326 as extending the authority of *Street v Mountford* to cases in which the question of exclusive possession was central to the decision. Exclusive possession was, of course, conceded in their Lordships' House in *Street v Mountford*. It is helpful at this point to cite a part of Lord Templeman's speech dealing with *Somma v Hazlehurst* and the other cases ([1985] 2 All ER 289 at 299, [1985] AC 809 at 825–826):

h 'The sham nature of this obligation would have been only slightly more obvious if H and S had been married or if the room had been furnished with a double bed instead of two single beds. If the landlord had served notice on H to leave and had required S to share the room with a strange man, the notice would only have been a disguised notice to quit on both H and S. The room was let and taken as residential accommodation with exclusive possession in order that H and S might live together in undisturbed quasi-connubial bliss making weekly payments. The agreements signed by H and S constituted the grant to H and S jointly of exclusive possession at a rent for a term for the purposes for which the room was taken and the agreement therefore created a tenancy. Although the Rent Acts must not be allowed to alter or influence the construction of an agreement, the court should, in my opinion, be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Rent Acts. I would disapprove of the decision in this case that H and S were only licensees and for the same reason would disapprove of the decision in *Aldrington Garages Ltd v Fielder* (1978) 37 P & CR 461 and *Sturrolson & Co v Wenz* (1984) 272 EG 326.'

With respect to the argument of counsel for the appellant and hopefully not committing a discourtesy to Lord Templeman, the passage already cited (see [1985] 2 All ER 289 at 300, [1985] AC 809 at 826), where Lord Templeman deals with the judgment of Slade LJ in the Court of Appeal, must be viewed in the context of a single occupation where exclusive possession was conceded. The expression of intent that the Rent Acts should not apply on the part of the tenant was held not to negative a tenancy based on exclusive occupation. *Radaich v Smith* (1959) 101 CLR 209 at 222, the passage from which is included in Lord Templeman's speech, also concerned single occupancy and is of no assistance in considering multiple occupation cases (see [1985] 2 All ER 289 at 300, [1985] AC 809 at 827). Is counsel for the appellant right in his submission that the result of *Street v Mountford* is that the status of licensee in this context has been abolished and that this extends to multiple occupation cases? In my judgment there are obviously difficulties in this contention and the submission ought not to be accepted without some careful consideration.

Of the three cases of which Lord Templeman disapproved, *Somma v Hazlehurst* was clearly a sham, since neither of the parties could reasonably be thought to have intended that the landlord could or would exercise the right of imposing an alternative cohabitee so as to require S to share a room with a strange man. The other two cases, *Aldrington Garages Ltd v Fielder* and *Sturolson & Co v Wenig*, are in a different category. In neither of the agreements involved was there a readily identifiable provision to which the epithet 'sham' could be attached. With respect to Lord Templeman, the peremptory association of these two cases with *Somma's* case ought not to be used as an authority for describing the latter two cases as 'sham cases' as might be thought from the expression 'for the same reasons' which appears in Lord Templeman's speech. Sham cases do envisage the incorporation of a clause by which neither party intends to be bound and which is obviously a smoke-screen to cover the real intentions of both contracting parties: see *Snook v London and West Riding Investments Ltd* [1967] 1 All ER 518 at 528, [1967] 2 QB 786 at 802 per Diplock LJ:

'As regards the contention of the plaintiff that the transactions between himself, Auto-Finance, Ltd. and the defendants were a "sham", it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. One thing I think, however, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure* ((1882) 21 Ch D 309); *Stoneleigh Finance, Ltd. v. Phillips* ([1965] 1 All ER 513, [1965] 2 QB 537), that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.'

The correct approach to be adopted by the court in 'non-sham' cases is to inquire into the true contractual effect of the agreement, eliminating any artificial provisions. An example of this can be seen in the way Lord Templeman dealt with the expressed intention to avoid protection given by the Rent Acts in the extract already cited from *Street v Mountford*. But Lord Templeman acknowledged that 'the Rent Acts must not be allowed to alter or influence construction of an agreement'. This approach is clearly described in the judgment of Lane LJ in *Aldrington Garages Ltd v Fielder* (1978) 37 P & CR 461 at 467 when, referring to the judgment under appeal, he said:

'It is, perhaps, a carping criticism—and if it is I apologise—but it is not altogether clear from those words to what extent he (the judge) is construing the words of the

a agreement, the document, and to what extent he is relying on what was "to be inferred from the facts"; but if he was reading the terms of the agreement and construing those terms against the background of the relevant facts, then he was doing what, speaking for myself, I consider it was his duty to do.'

Before parting with *Aldrington's* case I wish to refer to a further passage in the judgment of Lane LJ (at 471):

b 'In order to succeed the defendant must show that the two agreements must be read together, and that, being read together, are effective to create a joint tenancy between himself and Miss Maxwell, on the one hand, and the plaintiffs on the other; and it is at this point, to my mind, that the defendant's case falters. If the two agreements are separate then there is no exclusive possession and no tenancy. If they are joint, how is the obligation upon the occupiers to pay their consideration, £54·17
c per month, to be construed? In order to effect the intention of the parties, if it is a joint tenancy, it would be necessary to rewrite the agreements, as I see it, to make both the defendant and Miss Maxwell jointly and severally liable for the total consideration, namely, £108·34 per month, as opposed to the several liability, under the agreement, of £54·17 each.'

d As I have already indicated, I am unable to accede to the submissions made by counsel for the appellant that the effect of the speech of Lord Templeman in *Street's* case does anything more than to say (a) that in each case the contractual relationship must be established from the construction of the document or documents involved against the factual matrix relevant to that exercise in accordance with the ordinary rules of construing
e an agreement, (b) that in considering the objective intention of the parties to the document the court should bear in mind the intention of Parliament in passing the Rent Act legislation and should not be astute to find ways of circumventing it, (c) having established the contractual position of the parties during the currency of the term created, and not before, the court should then proceed to consider whether the occupier is to be protected as a protected tenant under the Rent Act 1977.

f In taking the last step the approach of the court should bear in mind the judgment of Megaw LJ in *Lloyd v Sadler* [1978] 2 All ER 529 at 532, [1978] QB 774 at 783:

'I have come to the conclusion that, on the true construction of s 3(1)(a) of the 1968 Act, the ordinary law as to joint tenancy does not have to be, and ought not to be, applied in all its strictness. I base that opinion, primarily at least, on the judgment of Scrutton LJ in *Howson v Buxton* (1928) 97 LJKB 749, [1928] All ER Rep 434. It is not a direct authority. There is no direct authority. There are various decided cases
g to which we were properly referred as providing guidance by analogy, or as illustrating the general rule as to a joint tenancy. Some of them, or dicta in them, certainly lend support to the submissions on behalf of the landlord; but I find the most helpful guidance in *Howson v Buxton*. It appears to me to decide that, where an Act of Parliament refers to "the tenant", and the letting is to two or more persons
h jointly, it is permissible for the court to hold, if so to do makes better sense of the relevant statutory provision in its particular context, that one of those persons, by himself, may for certain purposes be treated as being "the tenant". So here Miss Sadler can be treated, and should on the facts be treated, as having been "the protected tenant" immediately before the termination of the contractual tenancy, and as being "the statutory tenant" thereafter. Hence she has security of tenure
j under the Act.'

A similar approach was taken in *Demuren v Seal Estates Ltd* (1978) 249 EG 440, a case which appears to have had a number of terms similar to the agreements in this case which I cite in extenso merely as an example of the kind of consideration which may arise. Megaw LJ said (at 444):

'A joint tenancy with each of the two tenants paying only one half of the total amount of the rent due for the joint tenancy could indeed, in certain circumstances, be regarded as creating a logical inconsistency. It would particularly be so, perhaps, if the position were that the landlord, if one of the two joint licensees or tenants walked out, would be left without having any recourse in respect of the rent that was due under the agreement from that person other than the personal action against him. In this case one would have perhaps less sympathy for the owners than might otherwise have been the case because under clause 1 of their own agreement, assuming that it is valid and effective, they would have the right to nominate some other person to occupy the room numbered "1", charging such payment as might be appropriate to that person thereafter. Moreover, they would have their remedy against the outgoing licensee, if this licence agreement is capable of being given any meaning at all, because as I have said, there is no provision in that agreement for the licensee to cease to be liable for payment up to September 30, 1977, merely because he chooses to leave his residence in room No. 1. There might indeed be a problem after September 30, 1977, in relation to a continuing rent-restricted tenancy; but, again, the provisions of clause 1 would seem to be of some avail there. However, in the circumstances of the present case there are facts which in my view make it not "logically inconsistent" at all, as it was thought to be logically inconsistent in the two earlier cases. There is here the provision of the post-dated cheques, the effect of which is that the landlord has got his payment in advance up to September 30, 1977, from each of the two applicants. He has secured for himself the whole amount due from the two joint tenants (if that is what they are) for the whole period. It seems to me that here there is no logical inconsistency in the conclusion at which the judge arrived, namely, that the agreement was one which involved that, though it was a joint tenancy, nevertheless, unusually, each of the two should be personally liable for, and only for, his share of the total rent of the flat. That is something which may be unusual but is not, as I see it, such as to prevent it from being a joint tenancy, at any rate in the circumstances of this case. It represents, as I see it, the oral agreement between the parties in this case. In so far as this curious, and in some respects unintelligible, "licence" agreement purports to provide otherwise, it is not consistent with the reality of the agreement which was made for the letting of a shared flat, particularly because of the advance payments for a year (inconsistent with the purported contractual right to determine on a week's notice) and because of the absence of any provision which could properly or sensibly be said to preclude exclusive possession of the flat by two sharing tenants. The reference to "all other occupants", when there could be none such in the intention of the parties, is a strong indication that the "licence" agreement does not reflect the real agreement.'

However, in the final analysis each case must be considered on its own facts to see whether, in the case of multiple occupancy, a joint tenancy has been created. The appellant's position vis-à-vis the Rent Acts will, therefore, depend on her contractual status immediately prior to the termination of the agreement on 30 June 1985. In order to consider this it is necessary, however, to refer back to the two original agreements dated 5 December 1984. The following questions arise. (1) Should the two agreements be read together so as to constitute a joint tenancy agreement between the appellant and Miss Broderick on the one part and the landlord on the other? (2) What is the effect of the express provisions in the agreement? (3) What was the effect on the agreement in (1) when Miss Broderick left well short of the full term of her agreement and, as a result of conversations between her and Mr Stavrou, a new occupant, Miss Rollins, was introduced with an agreement of her own so arranged as to be conterminal with the existing agreement created between the appellant and the landlord? (4) What was the position when Miss Rollins left at the end of June when the appellant remained in occupation alone together with her 'guest', Miss Richards?

In considering the first question we are told by counsel for the appellant that the whole basis on which her case was argued in the court below was that the two agreements together created a joint tenancy between Miss Broderick and the appellant so that in considering the judge's judgment dealing with these agreements it must be against this background. As appears from the extracts of the judgment which I have already cited, the judge, having come to the conclusion that the agreements were not 'sham' agreements, decided that they did not provide for exclusive occupation. In view of this conclusion the judge must have rejected the appellant's submission that there was a joint tenancy.

Counsel for the landlord submitted, with some force, that once the existence of a sham is negated the court ought to give effect to the plain meaning of the words used in the agreement. He referred to cl 1, which is the same for each of the two occupiers and which provides that neither occupant individually has exclusive possession or occupation of the flat since it is part of the agreement that that occupation must be shared with another licensee. In this case it so happened that the two ladies applied at the same time so that the other licensee was identified, but so far as the wording of the agreements is concerned this might well not have been so. Counsel for the appellant submitted that the two agreements should be looked at together and that they really amounted to an artificial exercise to avoid the creation of a joint tenancy merely by having two separate agreements and by emphasising the non-exclusivity of the rights in the agreements. Having considered the background facts the judge came to a contrary conclusion. In considering his decision this court must bear in mind the stricture contained in the speech of Lord Templeman, namely that the court should be astute to prevent the exclusion of the protection of the Rent Acts being achieved by an artificial device even if these are not a sham.

Having carefully considered the judgment and the submissions made by both counsel, I have come to the conclusion, albeit reluctantly, that this case cannot be properly decided without a closer examination of the factual matrix in order to determine whether the agreement or agreements made between the appellant, Miss Broderick and Mr Stavrou created a joint tenancy so as to grant them together exclusive possession as against the outside world, or whether it created two separate licences under which neither the appellant nor Miss Broderick had exclusive possession. Notwithstanding the argument proposed to him on the basis of such a joint tenancy, the judge has not in his judgment apparently considered this particular matter. In the extract from the judgment already cited he has considered, firstly, whether the document was a sham and thereafter, viewing the appellant's agreement in isolation, he has come to the conclusion that she would under the terms of that agreement have been obliged to accept a fellow occupant of whom she did not necessarily approve. It is, with respect to the judge, not clear that, in reaching that conclusion, he had properly applied his mind to the effect of a joint tenancy on the rights enjoyed by the appellant when Miss Broderick gave up occupation of the flat and was replaced by Miss Rollins in March 1985.

There are a number of factors which should have been considered by the judge when deciding whether or not a joint tenancy had been created on 5 December 1984. (a) The appellant and Miss Broderick made a joint approach to the landlord. (b) Although in the initial draft agreements the rent or fee was £130 on each agreement, this was later changed to £260 on each agreement but with a limit on the total amount recoverable, namely £260. It would be important to discover why Mr Stavrou made these alterations. (c) Why was there no provision for the rights, inter se, between the appellant and Miss Broderick or provision made in the agreements about what was to happen if one or other or both of the occupiers wished to bring the occupation to an end before 30 June 1985? (d) There was a fixed term of six months with apparently no provision for early determination. (e) The provision that each occupier must accept one or more fellow licensees whose identity might not necessarily be available at the time of signing the agreements which would be inconsistent with a joint tenancy. (f) Although the events

which took place in March 1985 are not available as an aid to construing the agreements, they cannot be ignored as to the working out of the position which arose when Miss Broderick left. If it were a joint tenancy then without the agreement of the appellant (and there is no evidence that she took any part in what happened in March 1985) the existing joint tenancy could not be determined. This must, in retrospect, cast a doubt on the true significance of the agreements. (g) Was it the intention of the parties that the appellant and Miss Broderick were irrevocably committed to paying for and occupying the flat for the whole of the six months? This is an unlikely suggestion in view of the transitory nature of these sort of arrangements. What in fact happened in practice must be a common event and certainly caused no surprise to anyone on the evidence available. b

The question whether or not the appellant was in fact consulted in March 1985 or whether the arrangements were made directly between Miss Broderick and Mr Stavrou with the introduction of someone who was not even known to the appellant was never fully investigated at the trial. If the appellant had not been consulted, then this would be inconsistent with the creation of a joint tenancy. If the appellant's agreement had been obtained, then there would be some support for the submission of counsel for the appellant that there had been a surrender and regrant of the joint tenancy, the new joint tenants being the appellant and Miss Rollins; but this would have involved the execution of a new tenancy agreement by the appellant which did not occur. On the other hand, if the efforts to substitute Miss Rollins for Miss Broderick were in law nugatory, then Miss Broderick remained legally liable to pay for the flat until the end of the term. c d

In particular, in concentrating on the question of exclusive possession, the judge wrongly ignored the question of liability to pay rent and did not, therefore, make findings on the tenants' evidence in this respect. Miss Broderick's evidence was to the effect that each of them were to pay £130 and later, in cross-examination, was inconsistent: 'I only signed something for £130 per month and I told Rollins that it was £130.' The appellant's evidence was that during the discussions at the end of November, having viewed the flat, the parties went to the offices at Green Lane where rent was discussed for the flat and was said to be £130 each. It is to be remembered that on the documents, the original draft agreements, removed by the appellant and Miss Broderick to study, the figure was £130 on each agreement and that this was only altered subsequently by applying Tipp-Ex to the agreements and over-typing the figure of £260. This was, or may have been, an error on Mr Stavrou's part or it may have been a change of intention on his part not communicated to the appellant and Miss Broderick. The judge has not made any findings on this important aspect of the case. Furthermore, the attitude of the appellant and Miss Broderick at the material time, namely at the end of November up to 5 December, as to the question of sharing between themselves or, if one left, sharing with someone else, was never fully investigated and in particular what Mr Stavrou's reaction would have been on these matters. These are essential features of the factual matrix against which these agreements must be considered particularly to determine the question whether they are to be read together or whether they are genuinely two separate individual agreements. A question, the answer to which might well assist in the resolution of this problem, would be the reaction of each of the proposed occupiers if the other had refused to sign, or had not liked the flat: whether the one would have continued to sign the agreement and gone into occupation. These questions were, of course, never asked. e f g

Furthermore, it may be said that, if the landlord was in effect using the vehicle of two separate licences as a front for what was in fact a joint tenancy, then there would be no reason for him to have come to any agreement with the appellant in March 1985 when the new arrangement with Miss Rollins was effected. This lends support to the proposition that in effect, notwithstanding the creation of two separate agreements, the real form of the contract between the parties was one of a joint tenancy. However, many of the considerations which I have just rehearsed are, on the findings of the judge as disclosed in the judgment, speculative. As I have already said, reluctantly I have come to h i

the conclusion that there are not sufficient findings by the judge to enable this court to decide whether or not the contractual agreement reached on 5 December 1984 was or was not a joint tenancy. The only course that this court can take in the circumstances is to order the case to be remitted to the judge for a retrial bearing in mind the views expressed by this court.

- MUSTILL LJ.** I agree with the order proposed by Purchas LJ for the reasons stated in his judgment. I will, however, add a few observations of my own because I believe, in company with O'Connor LJ in *Brooker Settled Estates Ltd v Ayers* [1987] 1 EGLR 50, that there is a risk that the judges who have to apply this branch of the law may do so in reliance on an incorrect appreciation of what was said by Lord Templeman in *Street v Mountford* [1985] 2 All ER 289, [1985] AC 809. By way of preface it is necessary to distinguish between three situations in which, aside from any question of rectification, the court may take an agreement otherwise than at its face value. The first exists where the surrounding circumstances show that the arrangement between the parties was never intended to create any legally enforceable obligation. The second is the case of the 'sham', in the sense in which that word has been used in numerous cases, including *Snook v London and West Riding Investment Ltd* [1967] 1 All ER 518 at 528, [1967] 2 QB 786 at 802. Correctly employed, this term denotes an agreement or series of agreements which are deliberately framed with the object of deceiving third parties as to the true nature and effect of the legal relations between the parties. The third situation is one in which the document does precisely reflect the true agreement between the parties, but where the language of the document (and in particular its title or description) superficially indicates that it falls into one legal category whereas when properly analysed in the light of the surrounding circumstances it can be seen to fall into another. These three situations, all of which are illustrated in the cases and discussed in *Street v Mountford*, must be carefully distinguished, and in particular it must always be kept in mind that an agreement which is not a sham may yet fail to achieve the kind of legal relationship which the parties have overtly set out to create. Thus, in *Demuren v Seal Estates Ltd* (1978) 249 EG 440 the two supposedly separate contracts for the same single room made no sense, once set against the background of a transaction whereby two men, united by nothing except friendship, together wished to rent the whole of a three-roomed flat. The document and the real transaction were quite at odds. By contrast, in *Street v Mountford* there was no suggestion that the parties had agreed on something other than what was written down; but it could be seen that the terminology used in the writing did not apply to the agreement the correct legal label. In each case, the court did not apply the document according to its terms, but the reasons why it abstained from doing so were quite different. Thus, in a case such as the present the same evidence must be analysed with two distinct questions in mind.

I now return to those aspects of *Street v Mountford* which gave rise to particular debate on the argument of the present appeal. The first stems from the reliance placed by counsel on the following passages from the speech of Lord Templeman ([1985] 2 All ER 289 at 293, [1985] AC 809 at 817):

'In the case of residential accommodation there is no difficulty in deciding whether the grant confers exclusive possession. An occupier of residential accommodation at a rent for a term is either a lodger or a tenant.'

And ([1985] 2 All ER 289 at 300, [1985] AC 809 at 827):

'Henceforth the courts which deal with these problems will, save in exceptional circumstances, only be concerned to inquire whether as the result of an agreement relating to residential accommodation the occupier is a lodger or a tenant.'

If these passages are plucked from their context, they can well be understood as conveying that the only issues which the judge is required to consider where the

application of the Rent Acts is in question are whether the occupier is a lodger and whether he or she falls into one of the special categories identified by Lord Templeman, such as an owner in fee simple, a trespasser, a mortgagee in possession, a service occupier, and so on. In my judgment, however, it becomes quite plain, once the speech is read as a whole, that this is not what the two passages are intended to convey. Since, however, the hard-pressed judge or recorder in a busy county court will not always have the opportunity for careful perusal of that speech, it may be useful to suggest a way in which it may be analysed. a

Lord Templeman began by contrasting the two views of the law which had been advanced in argument. The traditional view, for which the occupier contended, was that the distinction between a tenancy and a licence of land lay in the grant of land at a rent with exclusive possession. A licensee lacking exclusive possession could not be said to own any estate in the land. As I read it, the whole of that part of the speech, in the midst of which we find the first of the passages under review, was an exposition of this traditional view, which Lord Templeman plainly regarded as still being good law, followed by an application of it to the facts of the instant case (see [1985] 2 All ER 289 at 292–294, [1985] AC 809 at 816–818). This led inevitably to the conclusion that Mrs Mountford was a tenant, since it was never suggested that she fell into one of the special categories, and it was expressly conceded in the House of Lords that the effect of the agreement was to give her exclusive possession (see [1985] 2 All ER 289 at 292, 293, 297, 299, [1985] AC 809 at 816, 818, 823, 826). b

Lord Templeman then proceeded to deal in chronological order with the authorities cited in favour of the argument for the landlords, which was essentially that the intention of the parties should be predominant and that a person with exclusive possession and not in one of the special categories could still be a licensee if it could be seen that this was what the parties had desired. Some of the authorities discussed by Lord Templeman were treated as instances where it could be seen that the parties had not set out to create a legal relationship: see *Booker v Palmer* [1942] 2 All ER 674, *Marcroft Wagons v Smith* [1951] 2 All ER 271, [1951] 2 KB 496, *Cobb v Lane* [1952] 1 All ER 1199 and *Isaac v Hotel de Paris Ltd* [1960] 1 All ER 348, [1960] 1 WLR 239. These need not be explored here. It is, however, instructive to look briefly at the way in which the others were explained. c

First, there was *Errington v Errington and Woods* [1952] 1 All ER 149, [1952] 1 KB 290 which Lord Templeman treated as falling within the special categories. He went on to say ([1985] 2 All ER 289 at 296, [1985] AC 809 at 821): d

‘These exceptional circumstances are not to be found in the present case, where there has been the lawful, independent and voluntary grant of exclusive possession for a term at a rent.’ e

Next, in the context of a discussion of *Facchini v Bryson* [1952] 1 TLR 1386, Lord Templeman said ([1985] 2 All ER 289 at 296, [1985] AC 809 at 822): f

‘The decision also indicated that in a simple case a grant of exclusive possession of residential accommodation for a weekly sum creates a tenancy.’ g

Murray Bull & Co Ltd v Murray [1952] 2 All ER 1079, [1953] 1 QB 211 was regarded as having been wrongly decided through a failure to distinguish between conduct which negatives an intention to create a legal relationship, special circumstances which prevent exclusive occupation from creating a tenancy and the professed intention of the parties. h

Addiscombe Garden Estates Ltd v Crabbe [1957] 3 All ER 563, [1958] 1 QB 513 was a case where, when the document had been narrowly examined, it could be seen that it granted exclusive possession. Lord Templeman added ([1985] 2 All ER 289 at 297, [1987] AC 809 at 823): i

‘Exclusive possession is of first importance in considering whether an occupier is

a a tenant; exclusive possession is not decisive because an occupier who enjoys exclusive possession is not necessarily a tenant.'

Then, in the context of a dictum of Lord Denning MR in *Shell-Mex & BP Ltd v Manchester Garages Ltd* [1971] 1 All ER 841 at 843, [1971] 1 WLR 612 at 615, he went on to say ([1985] 2 All ER 289 at 298, [1985] AC 809 at 824):

b 'In my opinion the agreement was only "personal in its nature" and created "a personal privilege" if the agreement did not confer the right to exclusive possession of the filling station. No other test for distinguishing between a contractual tenancy and a contractual licence appears to be understandable or workable.'

c Finally, after quoting from another dictum of Lord Denning MR, this time in *Marchant v Charters* [1977] 3 All ER 918 at 922, [1977] 1 WLR 1181 at 1185, Lord Templeman said ([1985] 2 All ER 289 at 299, [1985] AC 809 at 825):

d 'But in my opinion, in order to ascertain the nature and quality of the occupancy and to see whether the occupier has or has not a stake in the room or only permission for himself personally to occupy, the court must decide whether on its true construction the agreement confers on the occupier exclusive possession. If exclusive possession at a rent for a term does not constitute a tenancy then the distinction between a contractual tenancy and a contractual licence of land becomes wholly unidentifiable.'

With the exception of a discussion of three cases on shared occupancy, to which I will return at a later stage, this concluded Lord Templeman's review of the English authorities. He then proceeded to deal with the instant case, stating his disagreement with the view e expressed by Slade LJ on the ground that—

f 'the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent. Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy . . . But where as in the present case the only circumstances are that residential accommodation is offered and accepted with exclusive possession for a term at a rent, the result is a tenancy.'

g (See [1985] 2 All ER 289 at 300, [1985] AC 809 at 826.)

It is at the very end of this extended discussion of the cases that one finds the second of the passages which were relied on in the present case, and which I have already quoted.

h Now it seems to me quite plain on a reading of the speech as a whole that, when Lord Templeman referred to the 'occupier' in the two passages under review, the word was implicitly qualified by 'exclusive', just as 'occupier' and 'possession' had been similarly qualified on more than 50 occasions in the course of the speech. Otherwise, there would be a conflict with the theme of the discussion, which was to the effect that (a) an occupier cannot be a tenant unless his occupation is exclusive and (b) an occupier for a fixed term at a rent will be a tenant unless he falls into one of the special categories. Nor can Lord Templeman have intended to convey, in the first of the passages under discussion, that i for the purpose of deciding a case of the present kind the judge has merely to rule out the possibility that the occupier is a lodger to find that the occupation is exclusive, for such reasoning would treat exclusive occupation as the consequence of a tenancy, whereas elsewhere it is made clear that it is a prerequisite. The core of the decision is, as it seems to me, the passage from which I have already quoted (see [1985] 2 All ER 289 at 300, [1985] AC 809 at 826).

Since an intention to confer exclusive possession was conceded in *Street v Mountford* the decision has nothing directly to say about the manner in which the existence of such an intention should be ascertained. Sometimes the task will be straightforward (see [1985] 2 All ER 289 at 293, [1985] AC 809 at 817) and sometimes it will be difficult (see [1985] 2 All ER 289 at 300, [1985] AC 809 at 826). The term of the agreement will always be of prime importance, although not always decisive. Sometimes a meticulous perusal of the document will be required, as in *Addiscombe Garden Estates Ltd v Crabbe* [1957] 3 All ER 563, [1958] 1 QB 513 and *Shell-Mex & BP Ltd v Manchester Garages Ltd* [1971] 1 All ER 841, [1971] 1 WLR 612; on other occasions it will not. The surrounding circumstances will always be material on this point as well as on the questions of sham and intention to create legal relations. *Street v Mountford* does not itself explain how the exercise is to be performed, but I do not read the speech as suggesting that special techniques are to be applied any different from those of the ordinary law of contract: and there is, of course, nothing inconsistent in this with the principle, now well established, that the court must be careful not to allow any camouflage to prevent the transaction from being seen for what it really is.

I now turn to the second aspect of *Street v Mountford* which was much pressed in argument before us, namely the disapproval of three decisions of the Court of Appeal on shared occupation, namely *Somma v Hazlehurst* [1978] 2 All ER 1011, [1978] 1 WLR 1014, *Aldrington Garages Ltd v Fielder* (1978) 37 P & CR 461 and *Sturolson & Co v Weniz* (1984) 272 EG 326. The legal problems of the type which were addressed in these cases are much more complex than in the case of sole occupation. It is not simply that the court has to interpret against their respective backgrounds two or more documents rather than one. It must also take into account the possibility that the documents are linked. The choice is not simply between licence and tenancy, but rather a threefold choice between a licence and two different kinds of tenancy. One kind will involve a pair of parallel tenancies, each between the landlord and one tenant, in relation to an identifiable separate portion of the premises; the other will consist of a single tenancy for the whole of the premises, with the two occupiers as joint tenants of the whole. The alternative forms of tenancy have this in common, that each will by definition involve a right to exclusive possession. But the rights are of a quite different character, since under the one form each tenant is entitled to exclude the whole world, including the other sharer, from his or her own part of the premises, whereas under the other form neither sharer can exclude the other. Again, in the one situation the two parallel agreements have no legal connection, whereas in the second situation the relationship between the landlord and the two tenants is triangular, with the occupiers necessarily having rights and duties inter se. Given the informality of many sharing situations, and the obvious contemplation that they may terminate earlier than expected, the problems of fitting an essentially fluid arrangement into the structure of a tenancy for a term may be formidable indeed, as the argument of the present appeal has amply demonstrated; the more so when, as will often happen, the document is embodied in a standard form ill adapted to the special features of the letting.

Faced with these and similar problems it would be understandable if a judge were to match the facts of the dispute before him against those of the three cases, as set out in the respective judgments of the Court of Appeal, and, if there appeared to be a sufficient similarity, proceed directly to a conclusion based on the opinion expressed about them.

However tempting this approach may be, I believe that it should be avoided, for two reasons. The first is that in each case it was stated that the document ought to have been discarded as a sham. (It is true that Lord Templeman also speaks of an artificial device, but I understand this as another description of a sham, since it is said that the only object is to disguise the grant of a tenancy, an expression which would not be apposite where the parties intend the document to be enforceable according to its terms, but have used terminology inconsistent with its true effect.) Having reached this conclusion the House had no occasion to consider how the transactions would properly have been interpreted

if the documents were read at their face value. Nor, since the House was concerned with sole rather than shared occupancy, was it found necessary to discuss the problem, to which considerable attention was given by the Court of Appeal in *Aldington*, of ascertaining the legal position of one joint tenant after the other sharer had left.

Secondly, the House was not concerned to explore in detail the manner in which it should be decided whether or not a document is a sham, since the controversy in *Street v Mountford* itself related only to the correct categorisation of the transaction as reproduced in the document. As regards *Somma v Hazlehurst*, the reasoning of the House, as I understand it, was that the clause permitting the landlord to substitute another sharer was so obviously inconsistent with the realities of the situation that it could properly be discarded, leaving an agreement which in the context could only be understood as the grant of a tenancy. It does not of course follow that such a clause will always be a sham, or that if it does have to be disregarded the conclusion will necessarily follow that the entire document must be set on one side as a disguise for a tenancy. In relation to *Aldington* and *Sturolson* the House gave no reasons for concluding that the documents were shams. Such reasons would have been of particular interest in relation to *Sturolson*, having regard to the facts as stated by the Court of Appeal. It seems that the initial approach to the landlord was made by a husband and wife in company with a friend, but that the latter dropped out and ultimately two agreements were signed, one of them by the husband and wife jointly and the other by a different friend. After a while the friend was replaced by someone else. Until then, the couple and the friend had each paid half the rent. The trial judge concluded that there was a joint letting of the flat to the married couple and the second friend. The Court of Appeal disagreed, but the House of Lords in *Street v Mountford* considered that the trial judge was right. It seems a reasonable surmise, from the facts set out in the report, that the element of sham took the shape of a conversation in the course of which the landlords gave some kind of undertaking about the way in which they would enforce a clause purporting to require the occupiers to share with anyone whom the landlords might choose to nominate. It would not however appear to follow inevitably that if a clause of this kind is disregarded it will necessarily be revealed that the true intent of all the parties was to bind themselves jointly for a lease of the whole of the flat for the whole of the rent. Such an intention would have to be derived from the whole of the circumstances. Evidently the House felt that on the facts set out in the report such an intention could be inferred, but I do not think it should be taken for granted that this will be the correct inference in every similar case.

In these circumstances, although the treatment of these three cases by the House of Lords must serve as a salutary reminder of how careful the courts must be not to allow themselves to be deceived into assuming that the shadow represents the substance, I believe that county court judges should not too readily assume that it will supply an automatic solution to disputes to which they bear only a superficial similarity. In this field, each case turns on its own facts.

I would only add one further comment. Any layman asked to consider whether an agreement gave exclusive possession to an occupier would be likely to think that one of the most useful pointers would be the way in which the parties conducted themselves whilst the agreement was in force but before any dispute had arisen. In this he would be mistaken, so far as the general law of contract is concerned; and I can see nothing in the reported cases to suggest that there are any special rules of construction which apply only to agreements said to fall within the Rent Acts. Thus, there will be many cases of shared occupation where it will not be legitimate to look at what happened when one of the sharers wished to move out as a guide to the correct interpretation of the agreement, for the parties might very well have misunderstood what their own agreement really meant, although the departure of the original sharer will, at least, have this relevance, that it will compel advocates to put forward an exposition of the agreement, be it licence or tenancy, which includes a plausible account of the rights and duties of the parties on the occurrence of such an event. In the present case, however, the position is different. By the time the

letting expired Miss Broderick had left, and had been replaced by Miss Rollins who in turn had left. When the appellant came to register she did so as sole tenant. For my part I do not see how the judge can be expected to decide whether the appellant is now a sole tenant, whereas according to her own argument she was one of two joint tenants, without being given a convincing explanation of the current legal position of the other two ladies. I do not pretend that this is likely to be an easy topic; at least I have certainly not found it so. It is a matter for regret that this important jurisdiction, which the judges have to exercise in difficult circumstances on the basis of evidence which is often fragmentary and imprecise, should appear to be governed by rules which do not always yield a direct and unequivocal solution. Nevertheless I feel constrained to hold that the approach of the judge in the present case omitted some important matters for consideration, and that there is no alternative but to remit the matter to him so that he can reconsider it in the light of such relevant further evidence as the parties may think fit to tender.

SIR ROUALEYN CUMMING-BRUCE. I agree with the order proposed for the reasons given in the judgments of Purchas and Mustill LJJ.

Appeal allowed. Order for possession set aside. Case remitted to judge below for retrial. Leave to appeal to the House of Lords refused.

Solicitors: *Marcus-Barnett* (for the appellant); *H M Rose & Co* (for the landlord).

Sophie Craven Barrister.

**a R v Crown Court at Inner London Sessions,
ex parte Baines & Baines (a firm) and
another**

QUEEN'S BENCH DIVISION

b WATKINS LJ AND KENNEDY J

26 JUNE, 30 JULY 1987

Criminal evidence – Special procedure material – Access to special procedure material – Application – Evidence in support of application – Whether police required to produce in advance of hearing of application evidence they intend to rely on in support of application – Police and

c *Criminal Evidence Act 1984, Sch 1, para 1.*

Privilege – Legal professional privilege – Documents – Criminal proceedings – Items subject to legal privilege – Conveyancing transactions – Records of conveyancing transaction – Solicitors acting in connection with purchase of property for client suspected by police of armed robbery – Police seeking order requiring solicitor to produce records of conveyancing transaction – Whether

d *records of conveyancing transaction privileged – Whether correspondence giving advice in connection with conveyance privileged – Police and Criminal Evidence Act 1984, s 10, Sch 1, para 1.*

The applicants were a firm of solicitors who had acted in connection with the purchase of a property for a client who had recently been acquitted of involvement in a notorious armed robbery. The police applied for an order under para 1 of Sch 1^a to the Police and Criminal Evidence Act 1984 requiring the solicitors to produce the records and correspondence relating to the purchase. Although the formal notice of intention to apply was served on the solicitors, that given to the Crown Court was, unknown to the solicitors, accompanied by an information amounting to a proof of evidence. Furthermore no approach had been made to the solicitors before the hearing for any assistance in producing the documents. The judge made the order sought. The solicitors applied for an order of certiorari to quash the order on the grounds, inter alia, (i) that the solicitors had been given no notice of any matters on which the police relied other than details of the documents sought and (ii) that the documents in question were legally privileged under s 10^b of the 1984 Act and were accordingly outside the scope of special material procedure.

g **Held** – (1) The records of a conveyancing transaction itself were not privileged under s 10 of the 1984 Act as being communications between a legal adviser and his client in connection with the giving of legal advice, and therefore a solicitor could be required to produce such records to the police pursuant to an order made under para 1 of Sch 1 to that Act. However, correspondence between the solicitor and his client regarding the conveyance would be privileged if it contained advice (see p 1030 j to p 1031 b c to e, post).

h (2) The police were not required to provide in advance of the hearing of an application for an order under para 1 of Sch 1 to the 1984 Act the evidence they intended to rely on in support of the application. Where, however, the application was accompanied by evidence, then the party against whom the order was sought should be provided with that evidence before the hearing or given an opportunity to seek an adjournment of the hearing if evidence was given which could not be adequately responded to there and then. In all the circumstances, since the proof of evidence in the information had not

a Schedule 1, so far as material, is set out at p 1027 c to f, post

b Section 10 is set out at p 1028 fg, post

been shown to counsel for the solicitors, the proceedings were irreparably flawed, and the order would accordingly be quashed (see p 1029 *h j* to p 1030 *b e* to *g* and p 1031 *b d e*, post); *R v Central Criminal Court, ex p Adegbesan* [1986] 3 All ER 113 considered. a

Notes

For police access to special procedure material, see Supplement to 11 Halsbury's Laws (4th edn) para 125B.

For the Police and Criminal Evidence Act 1984, s 10, Sch 1, see 12 Halsbury's Statutes (4th edn) 958, 1029. b

Case referred to in judgments

R v Central Criminal Court, ex p Adegbesan [1986] 3 All ER 113, [1986] 1 WLR 1293, DC.

Cases also cited

Chant v Brown (1852) 9 Hare 790, 68 ER 735.

Minter v Priest [1929] 1 KB 655, CA; *rvsd* [1930] AC 558, [1930] All ER Rep 431, HL. c

Application for judicial review

Messrs Baines & Baines, a firm of solicitors and Anthony Michael White applied, with leave of the Divisional Court (May LJ and Roch J) given on 1 May 1987, for an order of certiorari to quash the order of his Honour Judge McLean sitting in chambers in the Crown Court at Inner London Sessions on 12 February 1987 made under s 9 of and Sch 1 to the Police and Criminal Evidence Act 1984 on the application of Det Con Bernard Clarke of the Metropolitan Police requiring the applicants to produce within seven days all accounts, records and correspondence concerning financial transactions in relation to the purchase of 292 Brockley Road, London E4. The facts are set out in the judgment of Watkins LJ. d
e

John Mathew QC and *John Bishop* for the solicitors.

Jeffrey Rucker for the police.

Cur adv vult f

30 July. The following judgments were delivered.

WATKINS LJ. Messrs Baines & Baines are a firm of solicitors with offices in Catford, London SE6. They (whom I will call 'the solicitors') apply with leave for an order of certiorari to bring up and quash an order made by his Honour Judge McLean on 13 February 1987 in the Crown Court at Inner London whilst sitting in chambers. g

That order provided as follows:

'To: Bains and Bains Solicitors, 37 Rushey Green, Catford, SE6

An application having been made in pursuance of paragraph 1 of Schedule 1 to the Police and Criminal Evidence Act 1984 by Detective Constable Bernard CLARKE of the Metropolitan Police Force that you should produce to a Constable for him to take away the material to which the said application relates, namely all client account records including ledgers, day books, cash books, account books and other records used in the ordinary business of the company, whether those records are in written form or are kept on microfilm, magnetic tape or any other mechanical or electronic data retrieval mechanism, paid cheques, inter account transfers, telegraphic transfers, all credit and debit slips, mandate, details of money market deposits and correspondence concerning financial transactions in relation to: The purchase of 292 Brockley Road, London SE24 I am satisfied after hearing [the parties to] the application that the first set of access conditions specified in the said Schedule 1 is h
j

a fulfilled in relation thereto. You are hereby ordered to produce the said material to a Constable for him to take away not later than the end of the period of 7 days from the date of this Order.'

The application for that order was made by Det Con Clarke of the Metropolitan Police. The formal notice of intention to apply was served by him on the solicitors accompanied solely by a copy of the proposed production order (the order made was in identical terms and issued to the constable who holds it pending the outcome of these proceedings).

b The actual notice filed with the Crown Court was, unknown to the solicitors, accompanied by a document called 'an information', which included what can properly be described as a proof of evidence of the constable along with an assertion by him that the first set of access conditions in Sch 1 to the Police and Criminal Evidence Act 1984 were complied with. That set I now recite in full, as was done in the information, and in addition other material paragraphs:

c '1. If on an application made by a constable a circuit judge is satisfied that one or other of the sets of access conditions is fulfilled, he may make an order under paragraph 4 below.

d 2. The first set of access conditions is fulfilled if—(a) there are reasonable grounds for believing—(i) that a serious arrestable offence has been committed; (ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application; (iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and (iv) that the material is likely to be relevant evidence; e (b) other methods of obtaining the material—(i) have been tried without success; or (ii) have not been tried because it appeared that they were bound to fail; and (c) it is in the public interest, having regard—(i) to the benefit likely to accrue to the investigation if the material is obtained; and (ii) to the circumstances under which the person in possession of the material holds it, that the material should be produced or that access to it should be given . . .

f 4. An order under this paragraph is an order that the person who appears to the circuit judge to be in possession of the material to which the application relates shall—(a) produce it to a constable for him to take away; or (b) give a constable access to it, not later than the end of the period of seven years from the date of the order or the end of such longer period as the order may specify . . .

g 7. An application for an order under paragraph 4 above shall be made inter partes . . .

The information, which also referred, wrongly, to the application for the production order as though it included premises known as Mona Lea, Beckenham Place Park, Beckenham, Kent, appears to be of a kind commonly in use in London, if not elsewhere. It can be a useful document for a judge to have before him when hearing an application for a production order. It seems to me that, providing it contains no inadmissible and h prejudicial material, evidentially speaking, and a copy of it is provided to the party against whom the order is sought before the hearing of the application, there can be no valid objection to it being given to the judge before the informant, the constable, gives evidence to him.

i In the present case it seems beyond doubt that the whole information was, unseen by counsel for the solicitors, in the hands of the judge and, it is contended by counsel who appeared for the solicitors in this court, it contained in the proof of evidence part of it highly prejudicial statements which ought not to have been there.

The grounds of appeal are, firstly, that no reasonable tribunal properly directing itself could have been satisfied that the first set of access conditions had been fulfilled, secondly, that the solicitors were given no notice of any matters on which the constable relied other

than details of the documents sought to be produced (see *R v Central Criminal Court, ex p Adegbesan* [1986] 3 All ER 113, [1986] 1 WLR 1293) and, thirdly, that the documents in question are held by the solicitors on behalf of their client White and as such are legally privileged within s 10(1)(a) and (c)(i) of the 1984 Act and therefore outside the definition of special procedure material in s 14(2) of the 1984 Act. In that context, it is maintained that the judge erred in law in holding that these documents were not privileged within the definition of the only provision which he considered to be applicable, namely s 10(1)(b).

The judge's reasons for making the production order he expressed in this way:

'No, I think this order must go. I am satisfied that the set of access conditions under para 2 of Sch 1 is fulfilled and the only question really is whether such material that is sought is subject to legal privilege. I think when one looks at s 10(1)(b) of the [1984 Act], the words "made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings" refer essentially to litigation and not conveyancing matters and there is nothing in the material sought that in my view comes within the meaning of material which is subject to legal privilege.'

The statutory provisions of the 1984 Act I have not so far recited which are material are the following:

'9.—(1) A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 below and in accordance with that Schedule.

(2) Any Act (including a local Act) passed before this Act under which a search of premises for the purposes of a criminal investigation could be authorised by the issue of a warrant to a constable shall cease to have effect so far as it relates to the authorisation of searches—(a) for items subject to legal privilege; or (b) for excluded material; or (c) for special procedure material consisting of documents or records other than documents.

10.—(1) Subject to subsection (2) below, in this Act "items subject to legal privilege" means—(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client; (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and (c) items enclosed with or referred to in such communications and made—(i) in connection with the giving of legal advice; or (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, when they are in the possession of a person who is entitled to possession of them.

(2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege . . .

14.—(1) In this Act "special procedure material" means—(a) material to which subsection (2) below applies; and (b) journalistic material, other than excluded material.

(2) Subject to the following provisions of this section, this subsection applies to material, other than items subject to legal privilege and excluded material, in the possession of a person who—(a) acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office; and (b) holds it subject—(i) to an express or implied undertaking to hold it in confidence; or (ii) to a restriction or obligation such as is mentioned in section 11(2)(b) above . . .

The background to this matter is provided by the notorious armed robbery at the

a premises of Brink's-MAT Ltd, Heathrow, when gold bullion worth about £26m was stolen. This was on 26 November, 1983. In the following year at the Central Criminal Court two men were convicted of the robbery. A third accused, namely White, who nowadays lives in Spain, was acquitted. He had been in custody for many months before he was tried. He received compensation for that loss of liberty from the Commissioner of Police. Before he was arrested he lived with his wife in a council house. He was claiming unemployment benefit.

b After he was acquitted he bought, so the constable said, several properties for cash, one of them being 292 Brockley Road (cost £33,000), another Mona Lea (cost £146,000) and a third, 195 Sandhurst Road, Catford (cost £40,000). Mona Lea was, he said, improved at a cost of £200,000. The constable's evidence with regard to the solicitors' connection with these properties was, save for 292 Brockley Road, confusing and in some respects prejudicial not only to the solicitors but also to a sensible appreciation of the scope of inquiries as to White's dealings in properties. Moreoever, in examination-in-chief he did not inform the judge of the serious arrestable offence relied on for satisfying the first requisite of para 2(a)(i) of the schedule. Finally, he must I think have given the judge the impression that the solicitors handled the Mona Lea transaction and possibly another White was said to be involved in.

d It has, of course, to be recognised that, in an application such as this, absolute compliance with strict rules of evidence is not to be expected but statements which have no substance to the prejudice of the party who is the subject of the order sought are clearly impermissible. They ought not to be made, and, if made, should be ruled out by the judge. In this context I keep in mind s 10(2), which could be considered by the judge if evidence existed tending to show the existence of the intention therein mentioned.

e The constable's evidence stung the solicitors, when they heard about it, into a rebuttal of much of it. One of the partners and an articled clerk have sworn affidavits which were put before us. In them they assert that White was their client only for the purpose of purchasing 292 Brockley Road, the purchase price of which he paid in four instalments, cash sums of £3,000, £300 and £10,000 and a cheque for £20,000. That, they say, is not regarded as an unusual way of paying the purchase price of a house. They were not aware f that White had been connected with the Brink's-MAT case until they spoke to him after receiving notice of this application. They had not seen until the hearing before us the information and, they say, the police had made no inquiries of any kind of them before serving notice of the application. White has been spoken to a number of times on the telephone. He has made it clear that he refuses to waive privilege. It is said on their behalf by counsel that counsel could not be instructed properly before and at the hearing g because they were unaware of what the constable was likely to say.

g Reverting to the constable's evidence, it is also noteworthy for the fact that he made no attempt to deal with the condition in para 2(b) to explain why he had not asked the solicitors for the assistance he sought by the production of documents. In the absence of such evidence, I fail to see how the judge could express himself to be satisfied that the access conditions were fulfilled.

h Counsel for the solicitors submitted that the judge could not, having regard to the evidence, and properly considering the matter, have been satisfied that the material sought was likely to be of substantial value to the investigation and that it was likely to be relevant evidence (para 2(a)(iii) and (iv)). I think he makes a valid point if there was a danger that the judge concluded it was likely to be of substantial value because it could be regarded with other material and that other material consisted of references to conveyancing matters with which the solicitors were not concerned but which the constable wrongly stated they were. It seems to me there is a possibility of that having occurred.

j I am bound to say that in my view the proceedings before the judge were irreparably flawed. In the first place, it was clearly wrong of him to be possessed of the constable's proof of evidence in the information without showing it to counsel for the solicitors.

Whether or not he thought the information had been served on the solicitors I do not know. In any event, an inquiry of counsel would have revealed the true position as to that. Secondly, the quality and kind of evidence provided by the constable was in my judgment unsatisfactory for the reasons I have already explained. a

In my opinion counsel's first ground of appeal is well founded and to some extent his second, seeing that the constable's proof of evidence having been filed with the court it should have been served, in my view, on the solicitors.

That leads me to explore more fully the second ground, because its implication is that notice of an application under Sch 1 should always be accompanied by a recital of the evidence on which the applicant intends to rely in order to persuade the judge that the access conditions have been fulfilled. We left this difficult point open in *R v Central Criminal Court, ex p Adegbesan* [1986] 3 All ER 113, [1986] 1 WLR 1293. It must now be dealt with. At the outset I should say that whatever is served on the court must, I believe, be served on the party against whom the order is sought. The question is whether the police are required to provide to anyone in advance of the hearing the evidence sought to be relied on. b
c

I can well understand the reluctance of the police to provide the other party with it, because it may have the effect of bringing about the destruction of the material or of encouraging someone in some other way to hinder or thwart the police in their investigations. I understand equally well that the other party would be better equipped to decide whether to accede to the application or to resist it if the applicant's evidence was served on them with the notice. d

There is nothing in the 1984 Act or the schedule to compel the police to provide the evidence in support of the application in advance of the hearing. I think the risk which would or might accompany advance information is a powerful reason why the police should not be compelled to provide it and I would hold that they are not so compelled. If in the course of an investigation special procedure material is sought and the police think no risk of harm will flow from giving their evidence in advance there is no reason why they should not provide it to the court and to the other party. Which course is adopted is best left to the judgment of the police, having regard to any special features of the investigation. In a case where no advance information is given, it will be open to a party against whom an order is sought to seek an adjournment of the hearing if evidence is given which cannot be adequately responded to there and then. It may be of use if I add a little advice to the effect that the evidence should be designed so as to, in an orderly way, deal with each condition which has to be satisfied. If that is done, it should assist the judge and the parties to avoid neglecting to consider any one or more of the necessary conditions. e
f

The third ground of appeal is not only of concern to the solicitors here but also, counsel for the solicitors told us, to the Law Society which is, not surprisingly, taking a major interest in this application. There are clearly two opposing forces to have regard to here. There is the hallowed privilege existing between solicitor and client and the public interest in the police being enabled thoroughly to investigate crime and criminals. They have to be viewed in the light of the statutory meaning given to 'items subject to legal privilege' (see s 9(2)(a)) in s 10. g
h

The judge seems to have thought that he should resolve the issue whether the items in the notice in the present case were privileged by regarding them as made in connection with or in contemplation of legal proceedings. If that is how the very short reasons for his decision on this issue are to be understood, he was in my opinion wrong. It is, of course, perfectly clear that, usually anyway, conveyancing matter is wholly unconnected with litigation. What is really to the point, however, is whether it is encompassed by the words 'communications between a professional legal adviser . . . made in connection with the giving of legal advice to the client'. j

In many conveyancing transactions advice will be given by the solicitor to his client on factors which serve to assist towards a successful completion, the wisdom or otherwise

a of proceeding with it, the arranging of a mortgage and so on. I doubt if it can possibly be denied that advice of that kind is a privileged communication. But with one possible exception the constable by the notice does not seek production of material in connection with the giving of advice. He seeks records of the conveyancing transaction itself.

b The exception arises out of the reference to correspondence concerning financial transactions. If that is meant to cover correspondence between solicitor and client, that may well be privileged because it contains advice. Clarification of what was being sought should have been asked for at the hearing and was not. The order, therefore, relating to correspondence was, in my opinion, defective. It was beyond the judge's power to make. The deletion of the reference to correspondence may of course have cured the defect, but the order as it stands now will, it seems to me, have to be quashed by this court for that reason alone.

c That still leaves the main issue to be resolved, namely is conveyancing matter of itself privileged as coming within the meaning of the giving of advice? We were referred to no authority. I doubt that any is needed for the proposition that the document known as the conveyance is not clothed with privilege and I do not see why conveyancing matter, as I have called it, can validly be said to be, seeing that in my opinion in common sense it cannot be called advice, consisting as it does of records of the financing of the purchase of, in this case, a house.

d For the reasons I have given I would quash the order. That would not prevent the constable from applying afresh for the material he wants to further investigations into the serious arrestable offence of dishonest handling.

KENNEDY J. I agree.

e *Order quashed.*

Solicitors: *Baines & Baines*; *Crown Prosecution Service*.

Sophie Craven Barrister.

R A Lister & Co Ltd and others v E G Thomson (Shipping) Ltd and others (No 2) The Benarty (No 2)

QUEEN'S BENCH DIVISION (ADMIRALTY COURT)

HOBHOUSE J

9, 10, 17 JUNE 1987

Practice – Joint tortfeasors – Contribution – Liability for damage – Action against two defendants – Action against second defendant stayed – First defendant claiming contribution from second defendant – Whether second defendant remaining ‘a party to the action’ after stay of action – Whether second defendant’s ‘liability’ required to be procedurally enforceable as current and subsisting liability at time of claim for contribution – Civil Liability (Contribution) Act 1978, s 1 – RSC Ord 16, r 8(1).

The charterers chartered a vessel belonging to the shipowners for the carriage of cargo from Europe to Indonesia. The bills of lading issued by the charterers in respect of the cargo provided for Indonesian law to apply and for the Indonesian court to have exclusive jurisdiction in disputes arising under the bills of lading. In the course of the voyage the vessel encountered heavy weather which caused the cargo to shift and sustain damage. When the cargo owners brought an action against the shipowners and the charterers in respect of the damage, the charterers, relying on the exclusive jurisdiction clause in the bills of lading, sought and obtained a stay of that action against them. Subsequently the shipowners issued a notice under RSC Ord 16, r 8(1)^a claiming contribution from the charterers under s 1(1)^b of the Civil Liability (Contribution) Act 1978 if the shipowners were held to be liable to the cargo owners in the action. The charterers applied to strike out the contribution notice, contending (i) that Ord 16, r 8(1) only authorised service of a contribution notice on ‘a person who is already a party to the action’ and at the time the notice was served the charterers were no longer a party to the action because the action against them had been stayed and (ii) that under s 1(1) of the 1978 Act contribution could only be claimed from a person who was established to be liable in respect of the same damage and, although ‘liability’ was defined by s 1(6)^c as ‘any . . . liability which has been or could be established in an action brought against him in England . . . by . . . the person who suffered the damage’, such liability could not be established because of the stay.

Held – (1) Even though the action against the charterers had been stayed, the action remained a pending or subsisting action and the charterers remained a party to it for the purposes of Ord 16, r 8 unless and until the writ was struck out or the action against them was discontinued. Therefore the service of the notice by the shipowners on the charterers was not invalid (see p 1035 *h* to p 1036 *b h j*, p 1037 *a* and p 1040 *a*, post); dicta of Lord Denning MR and Davies LJ in *Cooper v Williams* [1963] 2 All ER at 286, 288, of Sellers LJ in *Empson v Smith* [1965] 2 All ER at 883 and *Harper v Gray & Walker (a firm)* [1985] 2 All ER 507 applied.

(2) On its true construction, s 1(6) of the 1978 Act was concerned with the character of the liability which gave rise to a claim for contribution and not with the procedural

^a Rule 8(1), so far as material, provides: ‘Where in any action a defendant who has given notice of intention to defend—(a) claims against a person who is already a party to the action any contribution or indemnity . . . then . . . the defendant may, without leave, issue and serve on that person a notice containing a statement of the nature and grounds of his claim or, as the case may be, of the question or issue required to be determined.’

^b Section 1(1) is set out at p 1037 *b*, post

^c Section 1(6), so far as material, is set out at p 1035 *e*, post

- considerations of how that liability might be enforced. Accordingly, for a respondent to be liable to a claimant for contribution under s 1(1) the liability did not need to be procedurally enforceable as a current and subsisting liability so long as it had the character of a liability at the time the damage was suffered by the injured party. On the facts, the potential liability of the charterers and the potential right of the shipowners to a contribution had existed before the action was stayed and the subsequent events which had occurred had not deprived the shipowners of their previous right to claim contribution. Accordingly, the charterers' application to strike out the contribution notice would be dismissed (see p 1037 j to p 1038 a f g, p 1039 c d f h and p 1040 a, post).

Notes

- For the procedure in claims between co-defendants, see 37 Halsbury's Laws (4th edn) paras 261–263, and for cases on the subject, see 37(2) Digest (Reissue) 349–351, 2180–2189.

For the Civil Liability (Contribution) Act 1978, s 1, see 13 Halsbury's Statutes (4th edn) 533.

Cases referred to in judgment

- Bean v Flower* (1895) 73 LT 371, CA.
Benarty, The, R A Lister & Co Ltd v E G Thomson (Shipping) Ltd [1984] 3 All ER 961, [1985] QB 325, [1984] 3 WLR 1082, CA.
Cooper v Williams [1963] 2 All ER 282, [1963] 2 QB 567, [1963] 2 WLR 913, CA.
Empson v Smith [1965] 2 All ER 881, [1966] 1 QB 426, [1965] 3 WLR 380, CA.
Harper v Gray & Walker (a firm) [1985] 2 All ER 507, [1985] 1 WLR 1196.
Hart v Hall & Pickles Ltd [1968] 3 All ER 291, [1969] 1 QB 405, [1965] 3 WLR 744, CA.
Logan v Uttlesford DC [1984] CA Transcript 263.

Cases also cited

Britmac Ltd v Creosote Producers Association Ltd [1986] CA Transcript 541.
MacCabe v Joynt [1901] IR 115.

f Summons

- By a notice served pursuant to RSC Ord 16, r 8 the first defendants, E G Thomson (Shipping) Ltd, the owners of the vessel *Benarty*, sought as against the second defendants, PT Djakarta Lloyd, the charterers of the vessel, an indemnity and/or contribution in respect of an Admiralty action in personam brought by the plaintiffs, R A Lister & Co Ltd, claiming damages and interest in respect of alleged damage to cargo laden on the vessel *Benarty*. By a summons dated 27 January 1987 the charterers sought to strike out the notice issued by the shipowners on the grounds (i) that the plaintiffs' action having been stayed against the charterers by the Court of Appeal on 15 June 1984 (see [1984] 3 All ER 961, [1985] QB 325) the charterers were not 'a party to the action' under RSC Ord 16, r 8 and (ii) that there was no basis for recovery of a contribution since the liability of the charterers had not been established and could not be established following the stay of the action. The summons was adjourned into open court. The facts are set out in the judgment.

Julian Flaux for the charterers.

Richard Siberry for the shipowners.

Cur adv vult

17 June. The following judgment was delivered.

HOBHOUSE J. On this summons, which I heard in court, two short points of law

arose in connection with a contribution notice. An application has been made to strike out the notice. It is said that it does not come within the terms of RSC Ord 16, r 8 or within s 1 of the Civil Liability (Contribution) Act 1978. I have heard this application simply on the record in the action. I have not received any affidavit evidence nor is any question of discretion involved. To explain how the questions of law arise it is necessary to say something about this action and its subject matter.

The action is an admiralty action in personam. It concerns a voyage of the motor vessel *Benarty*, a general cargo ship, from United Kingdom and northern European ports to Indonesia in 1979. Whilst crossing the Bay of Biscay, one day out from Cherbourg, her cargo shifted. This gave rise to losses to cargo interests, to general average losses and/or expenditure and to other consequences. The vessel was owned by E G Thomson (Shipping) Ltd (the shipowners), incorporated in Scotland. They had demise chartered her to Ben Line Steamers Ltd (also registered in Scotland), who had in turn time chartered her to PT Djakarta Lloyd of Indonesia (the charterers). The time charter contained a London arbitration clause. The bills of lading were issued by the charterers to shippers on their own form. These named the charterers as the carriers and included an Indonesian law and jurisdiction clause. Cargo interests started two sets of Admiralty proceedings, one an action in rem against the charterers vessels and the other an in personam action against the shipowners as first defendants and the charterers as second defendants. It is this second action with which I am presently concerned.

Service was accepted on behalf of the charterers within the jurisdiction in respect of the in rem action, and leave under Ord 11 was obtained (from the Court of Appeal) to serve the charterers out of the jurisdiction in the in personam action. The shipowners also accepted service within the jurisdiction. The jurisdiction of the English courts in respect of the subject matter of these actions was accordingly established and has not been contested. However the charterers then applied for a stay of both sets of proceedings relying on the jurisdiction clause in the bills of lading. The Court of Appeal acceded to this application (see *The Benarty, R A Lister & Co Ltd v E G Thomson (Shipping) Ltd* [1984] 3 All ER 961, [1985] QB 325).

The order of the Court of Appeal in the in personam action appears not to have been properly drawn up fully in accordance with its decision: it is agreed before me that the order should have referred to certain undertakings given by the charterers and to have stated that, on the giving of those undertakings, the action as against the charterers should be stayed. The undertakings, both as stated in the relevant affidavit and as amplified by counsel for the charterers, are set out in the judgments of the Court of Appeal (see [1984] 3 All ER 961 at 967, 974, [1985] QB 325 at 338, 347). The essence of these was that in any proceedings in Indonesia which cargo interests might commence, the charterers would not raise any defence other than the tonnage limitation which they said was available to them under Indonesian law. I am told that the tonnage limitation figure is currently equivalent to only about £1,200, hence the comment of Ackner LJ ([1984] 3 All ER 961 at 971, [1985] QB 325 at 344): '... the foreign proceedings, even given an admission of liability, are not worth the effort.'

I am also told that no proceedings have in fact been started in Indonesia by cargo interests against the charterers. However the in personam action here as between cargo interests and the shipowners is proceeding and is due to be tried next term.

It is under these circumstances that the shipowners have issued a contribution notice dated 15 December 1986 (during the hearing, amended in minor respects with my leave). This notice purports to be issued pursuant to Ord 16, r 8 and was served on the solicitors on the record in the in personam action for the charterers. The contribution notice refers to the allegations which have been made by cargo interests in their amended statement of claim against the shipowners and in particular the allegations of loss and damage, causation and fault. It is denied that the shipowners are liable to the cargo interests as alleged or at all and the shipowners amended defence is referred to. The notice continues:

a 'If contrary to their case as against the Plaintiffs they are liable herein to the Plaintiffs then the First Defendants are entitled to an indemnity or contribution against the Second Defendants under Section 1(1) Civil Liability (Contribution) Act 1978 because the Second Defendants are or were liable to the Plaintiffs in respect of the shortage loss and damage to the cargo alleged in the Amended Statement of Claim for the reasons set out in the Amended Statement of Claim.'

b The shipowners also say that the charterers had admitted such a liability (subject to the tonnage limitation point) in the course of the stay applications. The shipowners then conclude by seeking an indemnity or contribution against the charterers—

c 'on the grounds that in all the circumstances of the case it is just and equitable that such order should be made having regard to the responsibility of the Second Defendants for the shortage and damage to cargo set out in the Amended Statement of Claim.'

d The charterers have applied to strike out this contribution notice, and both arguments derive from the fact that the Court of Appeal had stayed the action against them. They say that Ord 16, r 8 only authorises a contribution notice to be served on 'a person who is already a party to the action'. They say that at the time this contribution notice was issued they, the charterers, were no longer a party to the action within the use of that term in r 8, the action against them having been stayed. They said that only proceedings under Ord 16, r 1 could properly be commenced and they would require an application for the leave of the court. As regards the 1978 Act, the charterers relied on s 1(6), which reads in part:

e 'References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage ...'

f They say that the liability of the charterers has not been established in such an action and, following the stay, could not be established, and therefore the requirements of s 1(6) are not satisfied and the claim made in the contribution notice is bad in law.

RSC Ord 16, r 8

g The parts of rr 1 and 8 of Ord 16 which define what can properly be the subject matter of a third party or contribution notice are identically defined. The only difference is that r 1 relates to 'a person not already a party to the action' and r 8 to 'a person who is already a party to the action'. The remainder of the provisions of the respective rules are consequential on this difference. Where a person is not already a party then some procedure has to be adopted to make that person a party; conversely where he is already a party such procedure is not necessary. The distinction is purely procedural.

h I see no justification on the wording of these two rules to adopt any interpretation of the word 'party' other than its ordinary meaning. Whether or not a person is a party to an action is a question to be answered by looking at the record in the action. There must of course be a pending or subsisting action, but, that said, who is a party to that action is a purely formal inquiry into what persons have the status of a party to the action and what persons do not have that status. The only definition of 'party' to which I have been referred is that in s 151(1) of the Supreme Court Act 1981, which provides:

j "Party", in relation to any proceedings, includes any person who pursuant to or by virtue of rules of court or any other statutory provision has been served with notice of, or has intervened in, those proceedings.'

The charterers have at all material times satisfied these criteria. They have remained on the record and so have their solicitors. They were duly served with the writ in the

action and acknowledged such service. At no time has the writ or service of it on the charterers been set aside nor have they been struck out of the action or dismissed from it. Nor have the cargo owners discontinued the action as against the charterers; nor have they pursued it to final judgment. All that has happened is that the action as against the charterers has been stayed by the Court of Appeal on the charterers giving to the court certain undertakings. The relevant question therefore becomes whether or not the action as against the charterers has ceased to be a pending or subsisting action. A stay does not have that effect. In 37 Halsbury's Laws (4th edn) para 438 it is said:

'A stay of proceedings is not the equivalent of a judgment or of a discontinuance, and may be removed if proper grounds are shown, even if the stay is imposed by a consent order. In contrast with a judgment for the defendant or the dismissal or discontinuance of an action, in the case of a stay of proceedings, whether conditional or absolute, the action still subsists; it is still "pending", and the stay is therefore always potentially capable of being removed . . .'

This statement is amply supported by authority. For example in *Cooper v Williams* [1963] 2 All ER 282 at 286, [1963] 2 QB 567 at 580 Lord Denning MR, in connection with considering the effect of a consent order which had settled an action and had included a provision that all further proceedings in the action be stayed (except for the purpose of enforcing the order), said:

'For some time the effect of a stay has been a matter of doubt. In the ANNUAL PRACTICE, 1963 (vol 2, p 3182), it says, under the heading "Effect of a Stay of Proceedings": "Two views may be taken: first, that it is a discontinuance, and therefore cannot be removed; secondly, that it is not equivalent to a discontinuance, but may be removed if proper grounds are shown." The point was left open in the case to which we were referred of *Bean v. Flower* ((1895) 73 LT 371). Of the two views, I am of the opinion that the effect of a stay is that it is not equivalent to a discontinuance, or to a judgment for the plaintiff or the defendants. It is a stay which can be, and may be, removed if proper grounds are shown.'

In the same case Davies LJ said ([1963] 2 All ER 282 at 288, [1963] 2 QB 567 at 583): 'I also agree that the court has power if it thinks fit for good cause to remove a stay.'

Similarly in *Empson v Smith* [1965] 2 All ER 881 at 883, [1966] 1 QB 426 at 432-433 Sellers LJ expressly recognised that an action stayed on the grounds of diplomatic immunity remained a subsisting action unless and until the defendant had expressly applied to have the writ struck out.

Similarly in *Harper v Gray & Walker (a firm)* [1985] 2 All ER 507, [1985] 1 WLR 1196 a contribution notice under r 8 was upheld as valid even though prior to its issue and service the main action had been settled as between the plaintiff and the party on whom the notice was served, because it was not until after the service of the contribution notice that the plaintiff actually discontinued his action against the other party.

Accordingly, notwithstanding the order for a stay made by the Court of Appeal, the action remains a pending or subsisting action and the charterers remained parties to that action. The rule applicable to the service of a notice by the shipowners on the charterers was and remained r 8 and not r 1.

There are two further comments to be made on the submission which the charterers have made before me. First, it was submitted by the charterers that any stay would have the effect for which they contended. Thus even a temporary stay pending the provision of security would, on their submission, mean that the party in whose favour the order had been made had his status as party in the action suspended. This would be an absurdity and contrary to principle. Second, it can be commented that the problems of justice which the charterers sought implicitly to raise in relation to their submissions regarding r 8 find their solution in a different remedy: the contribution notice served under r 8 is itself valid, but, if the circumstances of the case were such as to have made it appropriate

a that not only should the proceedings as between the cargo interests and the charterers be stayed but also the proceedings as between the shipowners and the charterers (a contention which is not advanced before me), then the appropriate remedy would be not to challenge the validity of the contribution notice but to apply for a stay of all further proceedings under the contribution notice. The first ground of striking out therefore fails.

The Civil Liability (Contribution) Act 1978

b Section 1(1) of the 1978 Act provides:

'Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).'

c The remainder of s 1 is directed to making provision to give effect to this principle. Subsection (6) further identifies and defines what is meant by the word 'liable'. In this context it is relevant to note that s 6(1) of the 1978 Act provides:

d 'A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).'

Further in s 2(3) of the 1978 Act it is provided:

e 'Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to . . . (c) any corresponding limit or reduction under the law of a country outside England and Wales; the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced.'

f This same idea that foreign law may be relevant is also picked up in the second half of s 1(6):

'... but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales.'

g The 1978 Act is drafted on the basis that the word 'liability' is used potentially in the widest possible sense and can, where it is proper to do so, take into account the provisions of foreign legal systems as well as those of the legal system of England and Wales. Thus, where the party who is claiming the contribution can show that under English conflict of laws rules reference should be had to some foreign legal system, he can rely on that system of law, and where the person responding to such a claim can show that under an appropriate foreign legal system he would be entitled to a limit or reduction of liability, he can still do so provided that it corresponds to a limit or reduction available under English law.

h Subsections (2) and (3) of s 1 make provision for the situation where either the person claiming the contribution or the person responding to that claim has ceased to be liable in respect of the relevant damage at the time the claim for contribution is made. Subsection (3) deals with the position of the respondent to the contribution claim and makes it clear that provided the respondent was initially liable in respect of the relevant damage it does not matter that he had ceased to be liable by the time the claim for contribution is made unless that cessation of liability arises from the expiry of a period of limitation or prescription which has extinguished the right on which his initial liability

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in respect of the relevant damage was based. It does not otherwise have to be a continuing or present liability.

The only other subsection of s 1 that I need refer to is sub-s (5). This gives the right to the respondent to a claim for contribution to rely on previous decisions that have been given in his favour. The definition of the proceedings which may be taken into account for this purpose is:

‘A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question . . .’

Thus for that purpose one can have regard to proceedings not only in England and Wales but also in Scotland and Northern Ireland.

I now turn to the problem of the construction of s 1(6). One gets no assistance in this regard either from the Law Commission's Report on Contribution (Law Com no 79), nor from previous judicial decisions. The 1978 Act did not follow in all respects the draft legislation recommended by the Law Commission. The Act, as stated in its long title, was an Act which made ‘new provision’ for contribution and therefore no presumption of continuity with the previous law can be made.

The starting point of the submission of the charterers before me was that s 1(6) imposes a procedural as well as a substantive criterion. They argued that the words ‘could be established in an action brought against him in England and Wales’ denoted an entitlement to bring such proceedings in England even if such proceedings had not yet been brought; in the present case, because the proceedings were stayed, the only jurisdiction in which liability could be established was Indonesia. It will be seen that this submission also includes an implicit exclusion of any prior capacity of the cargo interests to have brought an action against the charterers in England. They rely on the stay which currently is in force against cargo interests in respect of their proceedings against them in this country and say that the court must exclude from consideration both the fact that at an earlier stage there was a time when those proceedings were properly on foot and had not been stayed and that there may hereafter come a time when the stay is lifted (although this is very unlikely) and the cargo interests action against them be allowed to proceed.

I consider that the submissions of the charterers are mistaken. The subsection is concerned with providing a definition of, or guidance about, what liabilities may be taken into account for the purposes of s 1 of the 1978 Act. I consider that the subsection is concerned with the character of the liability and not with any merely procedural considerations as to how it might be enforced. As it was put (admittedly obiter) by Sir John Donaldson MR in *Logan v Uttlesford DC* [1984] CA Transcript 263:

‘Subsection (6) merely provides that the test of liability is to be applied by reference to such liability as could be established before a court in England and Wales, irrespective of what substantive law that court would apply.’

I do not consider that the subsection is concerned with such problems as whether or not a writ could have been served out of the jurisdiction of the court. Such considerations are alien to the substantive scheme that is being provided for in the 1978 Act and would serve no purpose relevant to the scheme of the Act which I am able to discern. If the respondent to the contribution claim is (as here) a foreigner then before such a foreigner can be made the subject of a contribution claim the claimant must establish some procedural right recognisable under Ord 11, or other relevant provision, which entitles him, the claimant, to proceed against the respondent in this country. If he cannot establish such a procedural entitlement no question of liability under the 1978 Act will arise; if he can then there is no need for any further inquiry and the provisions of the 1978 Act should be applied. I of course have not lost sight of the fact that s 1(6) deals not with the liability of the respondent to the contribution claimant but with the liability of either or both of them to the person who has suffered the damage. If the respondent is

a present within the jurisdiction then his liability could be established here; if the claimant, however, was not, what purpose is served by asking purely hypothetically whether he would if sued in this country have chosen to submit to the jurisdiction or could have been compelled to appear before the English courts under some provision of Ord 11, as for example, a necessary and proper party to proceedings by the injured party against the respondent? Similarly what useful purpose is served by asking similar questions about a foreign respondent once one has established that it is proper for the claimant to proceed

b for contribution against that respondent in this country. If counsel for the charterers had been able to demonstrate before me some coherent purpose which was served by the construction of s 1(6) for which he contended, his submission would have become much more plausible.

The language of the subsection does leave open a construction which includes procedural considerations. But, having regard to the scheme of the 1978 Act as a whole and to its purposes both expressed and potential, I do not consider that it is correct to read s 1(6) as imposing a procedural criterion as well as a substantial, or remedial, criterion on the concept of liability that is being used.

However, even applying a procedural criterion, if one disregards for the moment any timeous element in it, the shipowners are able to satisfy the criterion. On any view, an entitlement to sue the charterers within the jurisdiction of this court was established by the cargo interests. They had a right to proceed in rem which they exercised; they also had a right to proceed in personam which they established under Ord 11. Neither of these rights were challenged by the charterers, who indeed acknowledged service of process and did not seek to set aside the writs or service of them. The argument of the charterers has to depend on reading s 1(6) as also importing a critical further criterion of what is possible actually at the time the contribution notice is issued.

e The time argument is more clearly contrary to the scheme of s 1 of the 1978 Act even than the procedural argument. Like the procedural argument it gains some textual support from the actual words used in the subsection. The subsection says 'could be established' not 'could be or could have been established'. But the argument of the charterers then becomes inconsistent both expressly and by implication with s 1(3). The liability of the respondent does not need to be procedurally enforceable as a current and subsisting liability: it can be subject to a procedural time bar. What is required is that it should have had the character of a liability at the time the damage was suffered by the injured party. The submission of the charterers before me cannot be fitted in with this because they say the procedural position at the later stage is critical. Their argument must be rejected.

g Furthermore, no purpose would be served by construing s 1(6) in the way contended for by the charterers. It would merely subject the party claiming contribution to what might be a procedural lottery which had nothing to do with the merits or demerits of his right to claim contribution from the respondent. In the present case if the contribution notice had been issued and served on the solicitors for the charterers before the decision of the Court of Appeal in 1984, as it indeed could have been, no point could

h have been taken under the 1978 Act. The potential liability of the charterers and the potential right of the shipowners to a contribution then existed and I see no justification in the wording of the 1978 Act for saying that the subsequent events which have occurred have deprived the shipowners of their previous right to claim a contribution. It would be different if there had been a determination of the liabilities of the charterers in the charterers' favour; s 1(5) would then have come into play. But that did not happen.

j All that happened was that there was a stay of the cargo interests proceedings against the charterers. To take another hypothesis, suppose that there had been a dismissal of the cargo interests proceedings against the charterers for want of prosecution, that again would not have amounted to a determination of the merits in favour of the charterers (see *Hart v Hall & Pickles Ltd* [1968] 3 All ER 291, [1969] 1 QB 405) and it is difficult to see what argument the charterers would then raise under s 1(6). To say that the right of

contribution subsists when the injured party's action has been dismissed for want of prosecution but does not subsist when it is merely been stayed seems to me to be an absurdity. a

Accordingly the arguments of the charterers under the 1978 Act in support of their application to strike out this contribution notice must be rejected.

The application of the charterers therefore fails.

Application refused. b

Solicitors: *Richards Butler* (for the charterers); *Holman Fenwick & Willan* (for the shipowners).

N P Melcalfe Esq Barrister. c

Note

Hines v Birkbeck College and another d

COURT OF APPEAL, CIVIL DIVISION
DILLON, STEPHEN BROWN AND NEILL LJ
4 AUGUST 1987

An appeal by the plaintiff, 'Albert Gregorio Hines, who argued the appeal in person, against the judgment of Hoffmann J ([1985] 3 All ER 156, [1986] Ch 524) on 8 July 1985 was dismissed by the Court of Appeal, Dillon LJ (with whom Stephen Brown and Neill LJ agreed) saying, inter alia: 'The judgment of Hoffmann J has, as a matter of law, been approved by the House of Lords [in *Thomas v University of Bradford* [1987] 1 All ER 834, [1987] 2 WLR 677]; it is not for us to differ. The House of Lords has not of course decided Mr Hines's case but the views expressed by the House of Lords are the guidelines by which we have to decide that case. We are concerned particularly with the application of what are now those guidelines by Hoffmann J. For my part, I can see no beginnings even of a successful argument that Hoffmann J has erred in his judgment, and, without any hesitation, I would dismiss this appeal.' The decision of the Court of Appeal accordingly does not call for a fuller report. On 17 November 1987 the Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Griffiths and Lord Ackner) dismissed as unfit for a hearing a petition by Mr Hines for leave to appeal. e
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Azza Abdallah Barrister.

Kyte v Kyte

COURT OF APPEAL, CIVIL DIVISION
PURCHAS, NICHOLLS AND RUSSELL LJJ
15 JUNE, 22 JULY 1987

b Divorce – Financial provision – Conduct of parties – Duty of court to have regard to conduct – Conduct such that it would be inequitable to disregard it – Wife assisting husband's suicide attempts – Wife standing to gain whole of husband's estate if attempts successful – Wife associating with another man unknown to husband – Whether wife's conduct such that it would be inequitable to disregard it – Matrimonial Causes Act 1973, s 25(2)(g).

c In the course of the parties' unhappy marriage the conduct of the husband, who suffered from manic depression, caused the wife suffering and unhappiness, while the wife, unknown to the husband, formed a relationship with another man. On two occasions when the husband attempted suicide the wife either did nothing or provided him with drugs and alcohol to facilitate the attempt. The wife, as she was aware, stood to inherit the husband's estate if he succeeded in committing suicide. The husband owned a

d company which was worth about £130,000, although the wife had a capital account in the company worth about £20,000. The matrimonial home was worth about £46,000 and the husband owned a separate flat worth about £20,000. Following the parties' divorce the wife applied in ancillary proceedings for the transfer of the matrimonial home to her and a lump sum payment. The registrar held that for the purposes of s 25(2)(g)^a of the Matrimonial Causes Act 1973 the wife's conduct was 'such that it would

e ... be inequitable to disregard it' and that although she was entitled to the matrimonial home her conduct disentitled her to a lump sum payment and, moreover, her interest in the company should be transferred to the husband. The wife appealed. The judge allowed her appeal, holding that her conduct was to be disregarded because it had occurred in the context of the husband's behaviour and the unhappiness he had caused her. The judge accordingly awarded the wife a lump sum of £14,000 as well as the

f matrimonial home. The husband appealed.

Held – For the purposes of s 25(2)(g) of the 1973 Act 'conduct' of a party which it would be inequitable for the court to disregard when determining an application for ancillary relief included any relevant conduct during and after the marriage which might have contributed to its breakdown or which it would otherwise be inequitable to ignore,

g regardless of whether or not the other party's conduct was blameless. The wife's conduct not only in actively assisting or taking no steps to prevent the husband's suicide attempts when she knew she would gain financially if he succeeded but also in forming a deceitful relationship with another man was gross and obvious conduct which it would be inequitable to disregard even taking into account the husband's own conduct. The husband's appeal would therefore be allowed and the lump sum order reduced to £5,000

h (see p 1047 j, p 1048 b g to p 1049 d j to p 1050 b, post).

Notes

For matters to which the court must have regard in making orders for financial provision, see 13 Halsbury's Laws (4th edn) paras 1060, 1062.

For the Matrimonial Causes Act 1973, s 25, see 27 Halsbury's Statutes (4th edn) 729.

j **Cases referred to in judgments**
Hall v Hall [1984] FLR 631, CA.

^a Section 25(2), so far as material, is set out at p 1042 j, post

M v M (1982) 3 FLR 83.

Martin v Martin [1976] 3 All ER 625, [1976] Fam 335, [1976] 3 WLR 580, CA; varying a
[1976] Fam 167, [1976] 2 WLR 901.

Robinson v Robinson [1983] 1 All ER 391, [1983] Fam 42, [1983] 2 WLR 146, CA.

Vasey v Vasey [1985] FLR 596, CA.

W v W (financial provision: lump sum) [1975] 3 All ER 970, [1976] Fam 107, [1975] 3 WLR 752.

Wachtel v Wachtel [1973] 1 All ER 829, [1973] Fam 72, [1973] 2 WLR 366, CA; varying b
[1973] 1 All ER 113, [1973] Fam 72, [1973] 2 WLR 84.

West v West [1977] 2 All ER 705, [1978] Fam 1, [1977] 2 WLR 933, CA.

Cases also cited

Armstrong v Armstrong (1974) 118 SJ 579, CA.

Jones v Jones [1975] 2 All ER 12, [1976] Fam 8, CA. c

Appeal

Graham Rodger Kyte (the husband) appealed with leave granted by the judge against the order made by Ewbank J in the Family division in chambers at Manchester on 16 January 1987 allowing the appeal of Diana Kathleen Kyte (the wife) against an order made by Mr Registrar Gee in the Manchester County Court on 7 October 1986. The registrar ordered that the husband transfer to the wife his interest in the matrimonial home and that the wife transfer to the husband her shareholding in G R Kyte Ltd, and dismissed the wife's claims for periodical payments for herself and for a lump sum order. The judge found that the total capital of both parties amounted to £200,000, made up of £130,000 in the company (of which £20,000 was in a capital account in the wife's name for tax reasons), £46,000 in the matrimonial home and £20,000 in a flat purchased by the husband for himself. The judge ordered that the wife's appeal be allowed to the extent that the husband pay the wife a lump sum of £14,000. The facts are set out in the judgment of Purchas LJ. d e

F J Burns for the husband.

M P Allweis for the wife. f

Cur adv vult

22 July. The following judgments were delivered.

PURCHAS LJ. This is an appeal by Graham Rodger Kyte (the husband) against an order made by Ewbank J on 16 January 1987 at Manchester when the judge allowed an appeal from an order made by Mr Registrar Gee on 7 October 1986 to the extent that, in addition to the orders made by the registrar, the husband was ordered to pay to Diana Kathleen Kyte (the wife) a lump sum of £14,000. The central issue raised in the appeal relates to s 25 of the Matrimonial Causes Act 1973, as substituted by s 3 of the Matrimonial and Family Proceedings Act 1984. The parts of the section relevant to this appeal are: g h

'(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24 or 24A above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(2) As regards the exercise of the powers . . . in relation to a party to the marriage, the court shall in particular have regard to the following matters . . . (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it . . . ' i

After hearing evidence on 20 August 1986 and submissions made by counsel, the registrar delivered a reserved judgment on 5 September 1986. The wife's application

a claimed all the usual forms of ancillary relief but as recorded in the registrar's judgment the only live issues were: (a) what provision should be made in respect of the matrimonial home at 111 Downham Crescent, Prestwich; (b) what lump sum, if any, should the husband pay to the wife; (c) what level of periodical payments should be ordered in respect of the three relevant children of the family.

The short background to the application was as follows. The parties were married on 25 July 1975. There are four children of the family, two of whom were the wife's children by a former marriage, namely Paul, born on 21 September 1965, and Andrea, born on 29 January, 1969, and two who were the issue of the parties to the marriage, Victoria, born on 7 October 1977, and Rachel, born on 17 January 1980. The marriage appears to have come under stress at or soon after the birth of Rachel. The husband suffered from depression and spent numerous periods in hospital under treatment for this condition. In the particulars of behaviour on which the wife relied in support of her petition for dissolution of marriage based on s 1(2)(b) of the 1973 Act, which generally c were accepted by the husband, it appears that, as a result of his depression, he was unpredictable and suicidal. Particularly severe incidents are recorded in April 1981. In the summer of 1982 he attempted suicide at his office and was rescued only by the wife and his office driver, who, missing him, had called the wife for assistance. Other suicidal incidents occurred in the summer of 1983.

d On the findings of fact reached by the registrar, which were generally accepted by the judge on appeal, the wife started associating with a Mr Gregory as early as June 1983, although she did not start living with him permanently until 1984. The husband's case, which was accepted by the registrar, was that, although one of the serious suicidal attempts in the summer of 1983 was caused by the wife withdrawing her support from him, he was not at that time aware of the wife's association with Gregory. Subsequently, e he realised that she was only using his conduct as a means to dissolve the marriage and set up home with Gregory.

Having initiated the suit, the wife obtained an injunction ousting the husband from the matrimonial home in February 1984. It is his assertion that this application was contrived to enable her to set up home with Gregory in the matrimonial home. The registrar found that, in presenting her version of these events to him, the wife had lied f on oath.

After hearing evidence at length from the wife, the husband, from other witnesses including Gregory's wife, the registrar came to certain firm findings of fact on the issues. The relevant parts of his judgment can conveniently be set out at this stage:

g 'I think there is no doubt that, as stated in para 1 of the particulars of behaviour in the petition the husband's behaviour was unpredictable and suicidal and he spent many periods in hospital. I need not repeat them but the incidences of the husband's behaviour, which were brought about by his condition, are set out in the particulars of behaviour and notwithstanding that no "fault" as such can be attached to the husband in the sense that his behaviour was brought about by his condition, there h is no doubt that the wife had just cause for complaint and which more than justified a petition under s 1(2)(b) of the Matrimonial Causes Act 1973. The husband for the most part accepts the allegations which were made against him, although he did file an answer denying that the marriage had broken down and asking that the prayer for dissolution be rejected. Subsequently, when he found out about the wife's relationship with Mr Gregory his answer was with leave amended to include a cross-prayer for dissolution based on an allegation of adultery with Mr Gregory who became the party cited. At the decree hearing, by agreement, cross-decrees were granted on the petition and answer. The husband's case is that until his first really serious suicide attempt in July 1983 the wife had been supportive and understanding. j It was her withdrawal of support which led to him seriously attempting to take his own life. He could not understand why her attitude had changed. He knew nothing of Mr Gregory at the time of this attempt in July of 1983 but now believes that the

wife only used his "conduct" as a basis for a divorce so that she could set up house with Mr Gregory and, as he believes, inherit all his estate in the likely event that he successfully committed suicide. The wife's case is that her relationship with Mr Gregory only started some time after the proceedings were commenced and after the suicide attempt in July and that this gradually blossomed until the stage was reached only in about October 1984 that she started to live with him permanently. I am quite satisfied on the evidence I heard that the wife has not told me the truth about her relationship with Mr Gregory. She denied writing a "love letter" to Mr Gregory as early as June 1983 but Mr Gregory's former wife Barbara Gregory gave evidence to me that she found such a letter on 17 June 1983 which read something like: "Dear Michael, Miss you very much. Can't wait for our meeting. Love You. Diana." Mrs Gregory appeared on witness summons and had no reason to tell me any untruths. I accept her evidence, which I think proves conclusively that the relationship between the wife and Mr Gregory, for it to have reached the stage in which a letter such as that was written, must have started some time well before June 1983. The wife therefore in my view lied to me on that point. Next, the husband asserts that the obtaining by the wife of an injunction ousting him from the matrimonial home in February 1984 was a manufactured set of circumstances to give her premises in which she could set up house with Mr Gregory. The wife asserts that whilst Mr Gregory, after she returned, stayed from time to time it was much later in that year before he moved in finally. Certainly in April 1984 the wife's solicitors wrote to the husband's then solicitors asserting that there in effect was no relationship at all. That was clearly not the case. Mrs Gregory gave evidence that she believed that her husband had started to live with Mrs Kyte at the Kyte matrimonial home in about February 1984. She had been told that his taxi (he was then a taxi driver) was there day and night and she asked him about it and he told her that he was living there. He had already admitted to her that "sex was involved" when she had found the letter to which I have referred. I accept Mrs Gregory's evidence on this point and accordingly conclude that again the wife has not told me the truth on this issue and that Mr Gregory was effectively living with her from shortly after she moved back to the matrimonial home. The husband put to the wife that she had thrown a party for Mr Gregory in February 1984. The wife whilst accepting that there had been a party at this time at which Mr Gregory was present, denied that it was for him (his birthday being on 10 February) and said that the birthday party she threw for him was in February 1985 which was after he had admittedly moved in. Mrs Gregory gave evidence on this point as well. Mr Gregory had told her of a party in February 1984 which was "for his birthday and because Mr Kyte had left the house". Again I think the wife was less than truthful. I think the husband is right. She wanted him out of the house "to set up shop" with Mr Gregory and having successfully attained her objective she threw a party to celebrate this and Mr Gregory's birthday.

The registrar also found in the husband's favour over an incident which occurred in April 1984 on the day that the husband was discharged from hospital and went to the outside of the matrimonial home, where he had a shouted conversation with the wife who was speaking from an upstairs window. The husband alleged that he asked the wife what she wanted and received an answer to the effect: 'I want the house, the contents and £50,000.' Having had this conversation the registrar accepted evidence of admissions made by the wife to a third party that she, the wife, returned to the adulterous bed, which she was, at the time of the conversation, sharing with Mr Gregory.

The first major suicidal attempt with which the registrar dealt was in July 1983. He made this finding:

'I therefore conclude that on this occasion, whilst the wife did not give active assistance in the attempted suicide, she left him alone to get on with it. In the result

a it would seem that the husband, whilst taking sufficient drugs and alcohol to kill himself came downstairs (although he could not recall it) with the result that medical assistance was called (presumably by the wife) and after a period in intensive care he recovered. I conclude that the wife only called for medical assistance because she was really left with no alternative.'

Turning to the second incident, the registrar found the facts in these terms:

b 'The next and perhaps most serious incident was when the husband was in a psychiatric ward following his period in intensive care after his July 1983 suicide attempt. The husband's case is that he telephoned the wife indicating that he again wished to kill himself and asked her to bring round some tablets and some alcohol to his office, which in fact was only just round the corner. He walked round to the office having told the wife where there were some more tablets hidden under a bed
c and having told her to park her car on a main road and walk round so that her car would not be seen nearby. She arrived after about 10 minutes and rang the bell. When he answered the door she was there but no car was in view. She had a bag in her hand which contained a bottle of whisky and some cans of lager and some sodium amatol and other tablets. He asked her to come in but she didn't want to. He asked if he could kiss her or touch her one last time and she refused. She then
d left but in the result the [husband] felt unable to go through with it and having drunk some of the alcohol did not take the tablets. He phoned his father who came for him. Before this he had again telephoned the wife and said that he could not go through with it to which she replied, "I knew you had no guts."

e Finally, before parting with the facts as found by the registrar, I wish to quote one further passage:

f 'I do however conclude that the wife's main objective was to set up house with the party cited and to get as much from the [husband] as possible. If she had admitted the allegations concerning her assistance with the [husband's] attempts at suicide but said that they arose from humanitarian principles I would have been more sympathetic to her. However, she denied the allegations and I accordingly do conclude that it was in the back of her mind, if not in the forefront that if he was successful she would inherit all his estate.'

The registrar applied the provision of s 25(2)(g) of the 1973 Act in these terms:

g 'I think the right question I have to ask myself is whether a right thinking member of society, faced with the conclusions I have reached, would say that the matters of conducts were such as to reduce or extinguish the wife's entitlement. Many, I am sure, would say that on these facts that she should get as little as possible but in my view the position is not so simple. I certainly conclude that the conduct is such that it would be inequitable to disregard it but that is only one of the factors I have to take into account under s 25 of the 1973 Act.'

h The registrar then carefully reviewed all the features of the financial resources and needs of the parties in accordance with the provisions of s 25. I do not find it necessary to rehearse this careful appraisal of the position which is shown in the notes of the registrar's judgment. It is not criticised by the judge nor has it been attacked on appeal save only as to one respect: that is that the registrar's estimation of the total capital assets of the family
j was too low.

In the event, the registrar ordered that the wife should have the whole of the interest in the property 111 Downham Crescent, Prestwich and that, on completion of the transfer to her of the husband's interest, she should transfer to him or to his nominee her shareholding in the husband's limited company. The registrar then dismissed the wife's claim for periodical payments and a lump sum and ordered periodical payments at the

nominal amount of 5p per annum in favour of Andrea and periodical payments at the rate of £25 per week until the age of 17 or further order in favour of Victoria and Rachel.

The wife appealed against the order of the registrar and sought a transfer of the proceedings to the High Court District Registry at Manchester. Thus the matter came on before Ewbank J. The procedure to be adopted by the judge in dealing with an appeal of this sort must be essentially a matter for his own discretion. There may be occasions which call for a complete hearing of the evidence *de novo* and others where the appropriate course is to deal with the matter on the evidence before, and findings of fact by, the registrar. Counsel who appeared for the wife before Ewbank J has told the court that he, and indeed the husband, had arrived prepared for a full hearing by Ewbank J of all the evidence *de novo*.

Somewhat to the parties' surprise the judge indicated at the outset that the witnesses would not be required, except that evidence would be received from the husband to deal with his financial position. If a judge decides to adopt the course taken by Ewbank J in this application, then the exercise of his discretion in determining facts, other than the financial position of the husband, will be constrained in the same manner as this court is inhibited on appeal. By the same token, this court is in just as good a position as the judge to review the findings of the registrar, particularly as regards the central issue of conduct.

Turning now to the transcript of the judgment of Ewbank J, the judge recorded the respective ages of the husband and wife (48 and 39 respectively) and the ages of the children, and then continued to deal with the financial position of the husband's company and the financial position he enjoyed in relation to the company, namely that he was substantially living on the capital and income of the company as a wasting asset. It is only necessary to refer to one finding in detail:

'The registrar had rather diffuse evidence about the company, and he came to the conclusion that the total assets with which he had to deal were in the region of £160,000. This was an underestimate, and I have to say that the figures I have got, on the evidence I have heard today, bring the total assets to £200,000, rather than £160,000.'

It is accepted by counsel for the husband that the judge's finding on the total assets is correct.

The judge then passed to deal with the question of conduct. It is not apparent that he criticised any of the findings of fact or assessments of credit reached by the registrar. Indeed, in view of the course that he decided to take in hearing the appeal, it would be quite impossible for him so to do. He dealt with this aspect of the case in the following terms:

'The registrar went into great detail about the wife's conduct, and took a very adverse view of her conduct. Now, it was right to say, to an extent at any rate, that the husband was not responsible for his behaviour since it developed from his mental ill-health, but it is not right to divorce the wife's behaviour from the general history; that is made clear in *Vasey v Vasey* [1985] FLR 596. The wife's behaviour has to be weighed in the light of the history of the marriage and not taken in isolation, and I fear the registrar has treated it in isolation. The wife is blameworthy in some of the things she has done. She has committed adultery; she has been less than kind to the husband; and she has told lies to the court. But that has to be taken in the context of the deep unhappiness caused to her by the husband's behaviour, albeit as a result of his mental ill-health, and, having considered all the factors in this case, I would have thought the registrar was wrong to come to the conclusion that it would be inequitable to disregard the wife's conduct.'

The judge eventually decided to allow the appeal in these terms:

- a* 'The registrar, in my judgment, was wrong in two aspects, as I have mentioned. First of all, in the assessment of the total capital, I have had up-to-date evidence from the husband himself on this and, as I have mentioned, the registrar's figure of £160,000 is wrong. The right figure is, about £200,000. The second ground on which the registrar was wrong was in deciding that it would be inequitable to disregard the wife's conduct, and thereby reducing what would otherwise have been her entitlement. Having come to that conclusion, I come to the decision that there should be a lump sum to the wife, as well as the house, to meet the requirements of s 25, and I assess that lump sum at £14,000.'
- b*

Turning now to the central issue raised in this appeal, namely that of conduct, it is first necessary to notice the alterations in the statutory law achieved by the Matrimonial and Family Proceedings Act 1984. This Act in its long title is described as:

- c* 'An Act to amend the Matrimonial Causes Act 1973 . . . so far as [it relates] to the exercise of the jurisdiction of courts in England and Wales to make provision for financial relief . . .'

- d* Counsel for the husband informed the court that the alterations to s 25 of the 1973 Act so far as conduct is concerned have been viewed by the Bar as confirming but in no way affecting the law as it existed immediately prior to the passing of the 1984 Act under the wording of s 25 in the 1973 Act before amendment together with the case law ensuing thereon. The relevant parts of s 25 of the 1973 Act as originally enacted are:

- e* '(1) It shall be the duty of the court in deciding whether to exercise its powers . . . in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say . . . and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.'

- f* The new form of s 25 in its relevant provisions for this purpose has already been set out in this judgment. The significant changes involve: (a) an emphasis that the welfare of the minors must be given 'first consideration'; (b) that subject to (a) the various factors of the parties, e.g. income, financial needs, standard of living, age, physical disability etc, all of which are incorporated in the original form of s 25(1), are to be taken into account with the addition, as a specific matter to be taken into account, of the question of conduct; and (c) the revocation of the duty subject to conduct making it 'just so to do' to place the parties in the financial position in which they would have been if the marriage had not broken down etc. The first and third differences are substantive amendments to the law as originally provided so far as financial relief, the first emphasising that, not only as regards provision for the children under ss 23 and 24, first regard must be had to their welfare in all other aspects of the case and, second, a recognition of the futility of the third provision, attention to which was repeatedly drawn by the courts having to deal with applications for ancillary relief. It may well, therefore, be argued that the 1984 Act, being an amending Act, should in the first instance be read so as to give effect to the ordinary meaning of the words used. These are not the test of gross and obvious conduct as developed in *Wachtel v Wachtel* [1973] 1 All ER 829, [1973] Fam 72, or conduct such as to make it repugnant to ignore it as between the parties. It may well be that the use of the words 'it would in the opinion of the court be inequitable to disregard it [the conduct of each of the parties]' may give a broader discretion to the court than that envisaged hitherto under the authorities. Happily, in this case, it is not necessary to decide this matter as, in my judgment, the behaviour established against the wife would satisfy the test under either approach and, as the point has not been argued, it would be wrong for me to express a concluded view.
- j*

Counsel for the husband referred the court to a number of cases which involved violent physical conduct: *Hall v Hall* [1984] FLR 631, *M v M* (1982) 3 FLR 83 and then to *Vasey v Vasey* [1985] FLR 596, which was an authority to which the judge referred in his judgment. That case was an appeal from the magistrates, although the relevant statutory provisions were in equivalent terms, namely that the financial needs and capacities of the parties must all be weighed in the balance and, if appropriate, conduct must also be placed in the scales. Counsel for the husband submitted (and in my view rightly) that the judge was not justified when he criticised the registrar for failing to consider the conduct against the whole context of the marriage. a

Counsel for the wife submitted that the inclusion of conduct as one of a number of paragraphs in s 25(2) of the 1973 Act in the new form of s 25 indicated that, if the court came to the conclusion conduct should be considered, it must be considered along with all the other factors to which reference is specifically made in the paragraphs in s 25(2). He submitted that the authorities showed a general theme that conduct is only to be taken into account when the victim of the conduct is 'blameless'. In support of this submission he referred to part of the judgment of Waller LJ in *Robinson v Robinson* [1983] 1 All ER 391 at 394-395, [1983] Fam 42 at 50 where the Lord Justice said in referring to *West v West* [1977] 2 All ER 705, [1978] Fam 1: b

"There is, however, an important point of difference in that in *West v West* the judge found that the husband had to accept a share of the responsibility for the breakdown or failure to start the marriage, although by far and away the greater burden was on the wife. In the present case the husband was said to be blameless. In my opinion there is very little to choose between them. For the husband to be blameless is an unusual feature and the fact that the marriage broke down in just over four years does not make the case so different when this feature is taken into account. This is not the kind of case Ormrod J refers to [in *Wachtel v Wachtel* [1973] 1 All ER 113 at 119, [1973] Fam 72 at 80] when he says: "Generally speaking the causes of breakdown are complex and rarely to be found wholly or mainly on one side." c

Counsel for the wife emphasised the finding of the registrar and the judge that, during the marriage, notwithstanding that the husband 'could not help himself' as a result of his manic depression, the wife must have suffered. In the present case the husband, therefore, could not be said to be 'blameless'. d

With respect to the submissions of counsel for the wife, I am not impressed by this approach. Section 25(2)(g) of the 1973 Act refers to 'the conduct of each of the parties' and this must relate to relevant conduct and does not envisage one or the other being blameless. Again, under the old authorities, the conduct did not necessarily have to be conduct contributing to the breakdown of the marriage, and frequently conduct subsequent to the breakdown was taken into account: see *Hall v Hall* [1984] FLR 631, *W v W* (financial provision: lump sum) [1975] 3 All ER 970, [1976] Fam 107 and *Martin v Martin* [1976] 3 All ER 625, [1976] Fam 335, CA; *varying* [1976] Fam 167. As I have indicated earlier in this judgment, I see no restricting words or meaning to be inferred in the wording of s 25(2)(g). The court is entitled, in my judgment, to look at the whole of the picture, including the conduct during the marriage and after the marriage which may or may not have contributed to the breakdown of the marriage or which in some other way makes it inequitable to ignore the conduct of each of the parties. A clear example of such a case is where the parties may each not have been blameless (almost inevitably in a normal marriage) but where the imbalance of conduct one way or the other would make it inequitable to ignore the comparative conduct of the parties. e

I accept the submission made by counsel for the husband that it is abundantly clear from the long and careful judgment of the registrar that he took into account the conduct of the wife in the context of the conduct of the husband and all the circumstances arising during the marriage and that the judge, with great respect to him, was not entitled to f

a criticise his judgment in this respect in the way in which he did. I add only one comment, namely that the findings of the registrar as to the credibility of the wife cannot be ignored when viewing the contents of her petition as being reliable evidence of the specific facts there set out. The husband did in general terms accept that many of the allegations were true and to this extent, subject to the qualification just mentioned, the contents of the petition are reliable. The suit was finally determined by consent on cross-decrees and it is not clear to me to what extent the allegations in the petition were ever fully examined.

b I have, reluctantly, come to the conclusion that the judge was wrong to have reversed the registrar on the findings of conduct. The test as to conduct which the registrar set for himself is as apt an interpretation of the phrase 'inequitable to disregard it' in s 25(2)(g) as I can readily envisage. The conduct of the wife not only in actively assisting or, alternatively, taking no steps to prevent the husband's attempts at suicide in the presence of the motive of gain which the registrar found on ample evidence to be established, together with her wholly deceitful conduct in relation to her association with Mr Gregory, would amount to conduct of a gross and obvious kind which would have fallen within the concept under the old law and, in my judgment, could certainly without doubt render it inequitable to disregard it even against the conduct of the husband which contributed to the unhappy conditions which existed during the marriage and afterwards as a result of the husband's manic depression.

c I have, therefore, come to the conclusion that this appeal must be allowed on one of the two aspects on which the judge in turn reversed the order of the registrar. This leaves the question of what this court ought to do in those circumstances. I am unable to accept the submission of counsel for the husband that the court should adopt the view that the order of the registrar provided the financial provision that was required to comply with the interests of the minors within s 25(1) of the 1973 Act and that, therefore, no further payment should be made to the wife in any event. This would place too much weight on the conduct of the wife and would be inconsistent with the approach of the registrar: 'I do not think that her conduct is such as to disentitle her altogether . . .' On the other hand, I cannot accept the submission of counsel for the wife that conduct should not affect the distribution of the extra £40,000 of capital assets and that the judge's decision to give the wife £14,000 of it as a matter of discretion ought not to be disturbed. This ignores the fact that the judge was working on the basis that conduct was irrelevant, and we have found that he was in error in doing this. The judge also had the matter of costs in mind. Although the husband appeared in person in order to reduce costs, the wife has at all stages been an assisted person under the Legal Aid Act 1974. Before the registrar the wife's costs of the ancillary relief proceedings were expected to be in the region of £5,000. Before the judge her costs were said to be £15,000 in respect of which there would be a charge in the favour of the Law Society. On inquiring about this extraordinary difference, the court was told that the figure for the wife's costs included costs incurred in numerous applications involving the children. Although the information given to the court was not very clear, I understand that certainly not all the additional £10,000 costs related to the costs of this appeal. Again on the basis that the registrar was wrong over conduct, the judge awarded costs to the wife both before the registrar and on appeal.

h In view of the decision we have reached in this court, it would be quite wrong to allow the judge's orders on costs to stand. The order of the registrar, ie no order as to costs, should be restored and, subject to further argument, it would appear that the husband should be awarded the costs of the appeal against the wife, such order not to be enforced without the leave of the court. In these circumstances, it appears probable that, apart from the protected part of any lump sum award, the Law Society charge will absorb the balance. This is, of course, no reason for not making an award.

j The approach which I propose to adopt is to vary the judge's apportionment of the £40,000 additional capital to take into account the question of conduct which he wrongly ignored. Bearing in mind that the interests of the minors have already been catered for and that the wife enjoys the support of Mr Gregory, and her conduct, which I considered

was extremely grave, even taking into account the difficulties of the marriage, I would reduce the lump sum to £5,000. a

NICHOLLS LJ. I agree.

RUSSELL LJ. I also agree.

Appeal allowed. b

Solicitors: *Clifford Otten & Co*, Manchester (for the husband); *March Pearson & Skelton*, Manchester (for the wife).

Wendy Shockett Barrister. c

Brady (Inspector of Taxes) v Group Lotus Car Cos plc and another d

COURT OF APPEAL, CIVIL DIVISION

DILLON, MUSTILL AND BALCOMBE LJJ

21, 22, 31 JULY 1987

Income tax – Case stated – Remission to commissioners – Rehearing – Further evidence – Deception of commissioners – Commissioners giving decision in favour of taxpayer – Evidence adduced before commissioners concealing material facts to knowledge of taxpayer – Evidence which would have affected commissioners' decision becoming available subsequently – Case stated disclosing error of law on part of commissioners – Power of court to remit case to commissioners with direction to hear further evidence. e

The taxpayer companies were the manufacturers of well-known sports cars in the United Kingdom. In 1978, through their directors, they became involved in the development and manufacture by D of a sports car in Northern Ireland and various arrangements were entered into, whereby, inter alia, on 1 November 1978 DLMC, a Northern Ireland company controlled by D, contracted with GPD, a Panamanian company controlled in Switzerland, for services for design work on the new car, and on the same day the taxpayer companies also contracted with GPD that they would perform the necessary design and development work on the car. GPD subsequently received \$17.65m advance payment from DMLC and an American company controlled by D and shortly thereafter made a payment of \$8.5m to D. The taxpayer companies duly performed their obligations under their contract and were paid by DLMC on the receipt of invoices. The Revenue made estimated alternative assessments to corporation tax on the taxpayer companies for the accounting periods ending in December 1978 and 1979. All the assessments were made in due time. The Revenue contended that, as the taxpayer companies alone had done the contractual work for DLMC, they alone must have been entitled to the balance of \$9.15m of the advance payment to GPD and therefore the \$9.15m remained part of the taxpayer companies' profits. The General Commissioners discharged the assessments, holding that there was no evidence before them of the alleged payments being made or becoming due to the taxpayer companies and that if in fact the payments were made or due to be made then the contract between the taxpayer companies and GPD must have been fraudulent and if that was so then it was incumbent on the Revenue to prove such fraud, which they had not done. The Crown appealed, contending that the commissioners had misdirected themselves in law, and sought an f
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- order remitting the case to the commissioners and directing them to hear further evidence which had come to light in liquidation proceedings shortly before the hearing of the appeal and which showed, inter alia, that in November 1978 GPD had paid very large sums in US dollars to accounts in the names of C (who had since died) and B, who were then the directors in control of the taxpayer companies. The judge allowed the appeal, holding that the commissioners had misdirected themselves in law since the burden of proving that the assessments were wrong lay throughout on the taxpayer companies, and he remitted the case to the Special Commissioners for a complete rehearing. The taxpayer companies appealed.

Held – The appeal would be dismissed for the following reasons—

- (1) Where an assessment to income or corporation tax was made in time, the burden to displace the assessment lay on the taxpayer throughout; and, even where an assessment had been made for the purpose of making good to the Crown a loss of tax wholly or partly attributable to the fraud, wilful default or neglect of any person, there was no onus on the Crown to prove fraud, wilful default or neglect to support the assessment itself. Since the commissioners had misdirected themselves in law over the onus of proof when they made their decision and since it could not be said that the evidence was such that they would necessarily have reached the same conclusion if they had directed themselves correctly, the judge had been right to remit the case for a rehearing (see p 1055 *cf*, p 1056 *b c*, p 1057 *f* to *h*, p 1058 *d j* to p 1059 *a e f*, p 1060 *b* to *e*, p 1061 *h*, p 1062 *d f* to *j* and p 1063 *f*, post); *T Haythornthwaite & Sons Ltd v Kelly (Inspector of Taxes)* (1927) 11 TC 657 and dictum of Pennycuik J in *Hudson v Humbles (Inspector of Taxes)* (1965) 42 TC at 384 applied.

- (2) (Mustill LJ dissenting) Although fresh evidence would not ordinarily be admissible on a remission of a case to the General or Special Commissioners, the existence of special circumstances could justify or indeed require its admission. Such special circumstances were created when, as appeared to be the case with B, a party had deliberately misled the court in a material matter and that deception had probably (or might reasonably have) tipped the scale in his favour and it would be wrong to allow him to retain the judgment thus unfairly procured (see p 1056 *g h*, p 1057 *d* to *f* and p 1063 *a b e f*, post); *Meek v Fleming* [1961] 3 All ER 148 applied.

Decision of Sir Nicolas Browne-Wilkinson V-C [1987] 2 All ER 674 affirmed.

Notes

For the jurisdiction of the High Court in cases stated in tax appeals and for amendment and remission of cases stated, see 23 Halsbury's Laws (4th edn) paras 1626–1628.

g Cases referred to in judgments

- Astrovlanis Cia Naviera SA v Linard* [1972] 2 All ER 647, [1972] 2 QB 611, [1972] 2 WLR 1414, CA.
- Bird (R A) & Co v IRC* (1924) 12 TC 785, Ct of Sess.
- Bradshaw v Blunden (Inspector of Taxes)* (No 2) (1960) 39 TC 73.
- de Lasala v de Lasala* [1979] 2 All ER 1146, [1980] AC 546, [1979] 3 WLR 390, PC.
- h Haythornthwaite (T) & Sons Ltd v Kelly (Inspector of Taxes)* (1927) 11 TC 657, CA.
- Hillenbrand v IRC* (1966) 42 TC 617, Ct of Sess.
- Hornal v Neuberger Products Ltd* [1956] 3 All ER 970, [1957] 1 QB 247, [1956] 3 WLR 1034, CA.
- Hudson v Humbles (Inspector of Taxes)* (1965) 42 TC 380.
- Jonesco v Beard* [1930] AC 298, [1930] All ER Rep 483, HL.
- j Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA.
- Meek v Fleming* [1961] 3 All ER 148, [1961] 2 QB 366, [1961] 3 WLR 532, CA.
- Murphy (Inspector of Taxes) v Australian Machinery and Investment Co Ltd* (1948) 30 TC 244, CA.
- Slattery v Mance* [1962] 1 All ER 525, [1962] 1 QB 676, [1962] 2 WLR 569.
- Yuill v Wilson (Inspector of Taxes)* [1980] 3 All ER 7, [1980] 1 WLR 910, HL.

Cases also cited

- Aviagents Ltd v Balstravest Investments Ltd* [1966] 1 All ER 450, [1966] 1 WLR 150, CA. **a**
- Cannon Industries Ltd v Edwards (Inspector of Taxes)* [1966] 1 All ER 456, [1966] 1 WLR 580.
- Hip Foong Hong v H Neotia & Co* [1918] AC 888, PC.
- Jonas v Bamford (Inspector of Taxes)* [1973] STC 519.
- McLeish v IRC* (1958) 38 TC 1, Ct of Sess.
- R v Chief Constable of the Merseyside Police, ex p Calvey* [1986] 1 All ER 257, [1986] QB 424, CA. **b**
- R v Crown Court at Knightsbridge, ex p Goonatilleke* [1985] 2 All ER 498, [1986] QB 1, DC.
- Soul v Caillebotte (Inspector of Taxes)* (1964) 43 TC 657.

Appeal

Group Lotus Car Cos Ltd and Lotus Cars Ltd (the taxpayer companies) appealed against an order of Sir Nicolas Browne-Wilkinson V-C ([1987] 2 All ER 674) dated 18 October 1986 whereby on a case stated (set out at [1987] 2 All ER 675-681) at the request of the Crown by the Commissioners for the General Purposes of the Income Tax for the division of Wymondham in the county of Norfolk it was directed that the matter be remitted to the Commissioners for the Special Purposes of the Income Tax Acts for rehearing with liberty to each party to adduce new evidence. The grounds of the appeal were (1) that the Vice-Chancellor had misdirected himself and erred in law regarding the burden of proving fraud, wilful default or neglect and (2) that there was no justification for remitting the case for rehearing or for ordering that on such rehearing there should be any liberty to adduce fresh evidence. The facts are set out in the judgment of Dillon LJ. **d**

Leolin Price QC and *James Munby* for the taxpayer companies. **e**

J M Chadwick QC and *Alan Moses* for the Crown.

Cur adv vult

31 July. The following judgments were delivered.

DILLON LJ. Group Lotus Car Cos plc and Lotus Cars Ltd (the taxpayer companies) appeal against a decision of Sir Nicolas Browne-Wilkinson V-C ([1987] 2 All ER 674), given on 18 December 1986 whereby on a case stated at the request of the Crown under s 56 of the Taxes Management Act 1970 by the General Commissioners for the Wymondham division of Norfolk the Vice-Chancellor directed that the matter be remitted to the Special Commissioners for rehearing with liberty to each party to adduce fresh evidence. **f**

The issues debated in argument before the Vice-Chancellor and in this court have been essentially issues of procedure and onus of proof. What lies behind them, however, is the desire of the Crown to get in, if possible, certain fresh evidence which the Crown obtained for the first time after the commissioners had given their decision and which could not have been obtained with reasonable diligence for use at the hearing before the commissioners. **g**

Since the only appeal to the High Court against a decision of the commissioners, Special or General, in a tax case is an appeal by case stated on a question of law, it is accepted by the Crown that new evidence cannot in general be received in the High Court or in this court on a tax appeal, even if the three well-known conditions laid down in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489 are satisfied. It is submitted, however, for the Crown that if it can be shown that there has been error of law on the part of the commissioners such that the matter should be remitted for rehearing then it may be appropriate, and would in the present case be appropriate, for new evidence to be admitted on the rehearing. The particular error of law relied on in the present case is, it **h**

is said, and the Vice-Chancellor held, that the commissioners misdirected themselves in law in relation to the onus of proof on the questions which they had to consider.

In the years down to 1978 the taxpayer companies had been engaged with some success in the manufacture of high quality sports cars and in building specialised cars designed for the racetrack. The driving force behind the taxpayer companies, until his death on 16 December 1982, was a Mr Colin Chapman, who, according to the case stated, had virtually complete control of the companies and had built up an international reputation as a designer and for the development of motor cars in all their aspects, with particular reference to cars of a sporting nature. Mr Chapman's right-hand man for many years was a Mr F R Bushell. Mr Bushell is one of Mr Chapman's executors, and on Mr Chapman's death he became managing director of Lotus Cars Ltd. At the time of the hearing before the commissioners he was chief executive of the taxpayer companies, though he is not now, and he was one of the principal witnesses for the taxpayer companies during that hearing.

In 1978 the taxpayer companies became involved in the notorious affair of the De Lorean motor car. There were three relevant agreements, all dated 1 November 1978. The first was an agreement between De Lorean Research Ltd Partnership of America, De Lorean Motor Cars Ltd of Northern Ireland and a company called GPD Services Inc (GPD). GPD agreed to provide its services for design, test and calculation work for the purpose of developing a sports car, the DMC 12, and it was provided that Lotus Cars Ltd and Mr Chapman himself would be engaged in doing the work. The second was a letter of agreement whereby Lotus Cars Ltd warranted and guaranteed to De Lorean Research Ltd Partnership and De Lorean Motor Cars Ltd the timely and full performance of each and every obligation of GPD under the first agreement. The third was an agreement between GPD and Lotus Cars Ltd whereby Lotus Cars Ltd agreed to carry out research, design and development work in connection with the DMC 12 prototype sports coupé which was to be manufactured by De Lorean Motor Cars Ltd. Under this third agreement a good faith deposit of £2m was paid to Lotus Cars Ltd on 6 November 1978, but was refunded in April 1979.

GPD was a Panamanian company controlled by a M and Mme Juhan of Geneva in Switzerland, who apparently acquired it off the shelf. It had an address in Geneva and a bank account, but neither facilities nor experience for research, design or development work on sports cars. It received, however, on the signing of the first agreement, a total of some \$17.65m from De Lorean Motor Cars Ltd and the De Lorean Research Ltd Partnership. It is now known that some \$8½m were paid out to Mr De Lorean personally, but a balance of \$9.15m or thereabouts remained unaccounted for.

Since it was plain that the work which GPD had contracted to do for De Lorean Motor Cars Ltd and the De Lorean Research Ltd Partnership had in fact been done by Lotus Cars Ltd, the Revenue were concerned to inquire whether any of the moneys thus received by GPD had come to the hands of the taxpayer companies or either of them, or their officers, in addition to sums for work done admittedly received by the taxpayer companies directly from De Lorean Motor Cars Ltd. The Revenue consequently carried out a lengthy investigation into the books of the taxpayer companies. In the upshot, on 16 December 1983 the Revenue made a number of estimated assessments on the taxpayer companies for the accounting period ended 31 December 1977, and subsequent years. Some have since been withdrawn but at the end of the hearing before the commissioners two remained outstanding, each in a sum of £9m.

The taxpayer companies appealed against the assessments and it was those appeals which the commissioners heard in April 1984. They correctly formulated the point at issue in para 5 of the case stated as follows ([1987] 2 All ER 674 at 678):

'The real point of issue for us to decide was how much, if any, of the considerable sums of money paid by the De Lorean Partnership and De Lorean Motor Cars Ltd

was either received by or came into the control of Lotus or officers of the company in their capacity as such officers, and it is on these sums that the assessments have in effect been raised.' a

The three commissioners who sat to hear the appeal all agreed that the two outstanding assessments on the taxpayer companies ought to be discharged, and they ordered accordingly. They reached that conclusion, however, by somewhat different routes. Their reasoning is set out in the following passages in the case stated ([1987] 2 All ER 674 at 680): b

'The Chairman, Dr. H. G. Hudson and Mr. E. R. Mason consider that the contract between GPD Services Inc. (GPD) and Lotus Cars Limited has been fulfilled and that no additional payments are due to Lotus Cars Limited under this contract. We have considered the evidence before us and have decided, on perusal of the contract between GPD and Lotus Cars Limited and the evidence relating thereto, that there is no evidence that any further payments were made or were due to Lotus Cars Limited. If, in fact, such payments were made or were due to be made to Lotus Cars Limited, it is clear that the contract must then have been fraudulent and, if this was so, then it was incumbent on the Inland Revenue to prove such fraud. This they have failed to do and therefore we must accept that the contract between Lotus Cars Limited and GPD and the audited accounts submitted to the Revenue must be accepted. We therefore find for [the taxpayer companies] and discharge the assessments.' c
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Major J. R. Hunter

I agree that all the assessments should be discharged but for different reasons as follows:—It was not contested that millions of dollars including public money had passed to GPD from the De Lorean Companies under the DMCL contract. Evidence was lacking on the details of those payments and their subsequent destination. Although a proportion was public money, Northern Ireland Development Agency did not monitor it beyond DMCL. I contend that the evidence showed that GPD provided practically no service for these payments and the greater part must therefore have been due to Lotus Cars Limited who did the engineering work. Against this I found that in none of the contracts, letters or evidence given was there anything to show that Lotus did in fact receive or could have claimed any of the initial payments. Even the 2 million pounds which was held for a short time was returned to GPD under the back-dated contract. Having found that the up-front payments were largely due to Lotus for work done by them but that it had then been impossible for the Company to claim the money, I came logically to the conclusion that it must be alleged that the Lotus principals had conspired to defraud the Company. Now that conspiracy and fraud are alleged, the onus of proof devolves from [the taxpayer companies] to the Inland Revenue. No evidence was given to prove that any of the contracts or letters were falsified nor to rebut the evidence of Mr. Bushell or Mr. Kimberley given on oath. I therefore find for [the taxpayer companies], and discharge the assessments.' e
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Their view thus was that the outstanding assessments could only be justified if there had been fraud on the part of the taxpayer companies or their officers, that, if fraud was in question, the onus was on the Revenue to prove the fraud and that the Revenue had failed to discharge that onus. Therefore the assessments were discharged. j

The question of onus is thus crucial. Indeed in their case stated the commissioners formulated the question of law for the opinion of the court as being whether their decision that the onus of proof fell on the Revenue was correct in law.

At this juncture it is important to note that all the assessments raised by the Revenue on 16 December 1983 were raised in due time, viz as provided by s 34 of the 1970 Act,

at a time 'not later than six years after the end of the chargeable period to which the assessment relates'.

Section 36 of the 1970 Act provides:

'... where any form of fraud or wilful default has been committed by or on behalf of any person in connection with or in relation to tax, assessments on that person to tax may, for the purpose of making good to the Crown any loss of tax attributable to the fraud or wilful default, be made at any time',

ie even after the expiration of six years after the end of the chargeable period. With such out-of-time assessments, the onus is clearly on the Revenue to prove the fraud or wilful default: see *Hillenbrand v IRC* (1966) 42 TC 617 and *Hudson v Humbles* (*Inspector of Taxes*) (1966) 42 TC 380 esp at 384 per Pennycuik J.

Where the assessments are made in time, however, as these were, the burden lies on the taxpayer from the start to displace the assessments: see *Hudson v Humbles* (at 384) and *T Haythornthwaite & Sons Ltd v Kelly* (*Inspector of Taxes*) (1927) 11 TC 657, a decision of this court. This ruling on onus was founded on the statutory provisions for appeals against assessments, now in s 50 of the 1970 Act and especially in sub-s (6) of that section: see the statement of Lord Hanworth MR in *T Haythornthwaite & Sons Ltd v Kelly* (at 667):

'Now it is to be remembered that under the law as it stands the duty of the Commissioners who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to the majority of the Commissioners by examination of the Appellant on oath or affirmation, or by other lawful evidence, that the Appellant is over-charged by any assessment, the Commissioners shall abate or reduce the assessment accordingly; but otherwise every such assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment standing good unless the subject—the Appellant—establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced...'

Estimated assessments may be made by an inspector where the taxpayer has failed to make any return at all and the inspector has no idea what the taxpayer's taxable income truly is or they may be made where the inspector suspects that the taxpayer has concealed part of his income whether by fraud, wilful default or mere mistake. In either case, if the assessment is made in due time, the onus to displace the assessment is on the taxpayer throughout.

There are certain complications in the 1970 Act. Section 39 sets out in relation to corporation tax, with which these assessments were concerned, certain provisions which are to be found in s 37 of the 1970 Act in relation to income tax and capital gains tax. The effect is that where, for the purpose of making good to the Crown a loss of tax wholly or partly attributable to the fraud, wilful default or neglect of any person, an assessment to corporation tax for any accounting period has been made on him not later than six years after the end of that accounting period, assessments to tax may be made for earlier accounting periods or years of assessment even though they would otherwise be out of time. Section 39 has, however, never had any application to the present case since, because of the timing of the De Lorean venture, the Revenue have never sought to go back before the calendar year 1977 for which the assessments made on 16 December 1983 were in time.

More importantly, s 88 of the 1970 Act provides that, where an assessment has been made for the purpose of making good to the Crown a loss of tax wholly or partly attributable to the fraud, wilful default or neglect of any person, the tax charged by the assessment, or such part thereof as corresponds to the part so attributable, shall carry interest from the date on which the tax ought to have been paid. With this section in mind (so we were told by counsel for the Crown) the Revenue wrote on 14 December 1983 to the taxpayer companies' accountants telling them that the assessments were

going to be made and that they were going to be made on the basis that there had been fraud, wilful default or neglect on the part of, or on behalf of, the taxpayer companies. In the event, as the assessments were discharged by the commissioners, no question of interest arose. It may well be that the onus would be on the Crown to prove fraud, wilful default or neglect if and when the time came for claiming interest on the tax assessed. But it does not follow, in my judgment, that that puts the onus on the Crown to prove fraud, wilful default or neglect to support the assessment itself.

I agree therefore with the Vice-Chancellor that the commissioners misdirected themselves in law over the onus of proof when they made their decision. It cannot be said that the evidence was such that they would necessarily have reached the same conclusion if they had directed themselves correctly. Therefore, since the High Court hearing a tax appeal by way of a case stated on a question of law has no power to find facts or make further findings of fact, it must follow that the case must be remitted for further hearing. Ordinarily the remitter of a tax appeal would be to the same body of commissioners who had originally heard the case, but in the present case there was a difficulty in that one of the commissioners who heard the taxpayer companies' appeals had retired and another was about to retire. It was therefore agreed before the Vice-Chancellor that, if he concluded that the case had to be remitted, it ought to be remitted to the Special Commissioners.

What is in issue, however, is whether the remitted case should be heard by the Special Commissioners merely on the evidence which was before the General Commissioners or whether, as the Vice-Chancellor held, there should be power to adduce fresh evidence.

The particular new evidence which the Crown wants to put in on a rehearing is evidence which the Crown has obtained since the hearing before the commissioners, and could not with reasonable 'diligence have obtained before. It shows that, out of the moneys received by GPD from the De Lorean Research Ltd Partnership, as above mentioned, GPD made the following payments, namely: (i) on 14 November 1978 \$90,000-odd to a numbered account at Crédit Suisse, Zurich in the name of Mr Bushell and \$723,000 to another numbered account at Crédit Suisse, Zurich in the name of Mr Chapman and (ii) on 6 December a further \$400,000 to Mr Bushell's numbered account at Crédit Suisse and a further \$3.6m-odd to Mr Chapman's numbered account. These payments are of obvious relevance to the taxpayer companies' tax appeal, having regard to the commissioners' formulation of the issue in that appeal set out in para 5 of the case stated. It is the contention of the Revenue, on the validity of which we are not at this juncture required to pronounce, that, if directors intercept and appropriate moneys due to their company so as to be accountable to the company for those moneys, then the moneys concerned rank as receipts of the company and may be taxable accordingly.

The general rule, described by Pennycuik J in *Bradshaw v Blunden (Inspector of Taxes) (No 2)* (1960) 39 TC 73 at 80 as 'a well-established and salutary rule' is that the parties to a tax appeal to the High Court should not, in the absence of special circumstances, be enabled to go back to the commissioners and call fresh evidence on issues which were raised in the original proceedings and as to which they had full opportunity of calling such evidence as they might be advised.

So far as I am aware there has been no attempt to define what may be held to be 'special circumstances' for this purpose. I would for my part have been disposed to think that, if there was fresh evidence which satisfied the conditions in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, that would amount to 'special circumstances' which would warrant the court in allowing that fresh evidence to be used on the rehearing when a tax appeal has been remitted to the commissioners for further hearing. But the Vice-Chancellor was not prepared to go so far; he did not think that the mere fact that the requirements of *Ladd v Marshall* were satisfied was sufficient to justify the court, on a tax appeal, directing the commissioners to receive on a rehearing fresh evidence which complies with the requirements of *Ladd v Marshall*, and there has been no respondent's notice from the Crown challenging this ruling.

a The Vice-Chancellor, however, allowed the fresh evidence to be adduced on the rehearing of the remitted case on what he described as another and more fundamental principle than that in *Ladd v Marshall*. That was the principle exemplified in *Meek v Fleming* [1961] 3 All ER 148 at 154, [1961] 2 QB 366 at 379, where Holroyd Pearce LJ said:

b 'Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so) it would be wrong to allow him to retain the judgment thus unfairly procured.'

c Counsel for the taxpayer companies submits that there is no evidence that Mr Bushell ever knew that there were Swiss bank accounts in his name and in the name of Mr Chapman or ever knew that GPD had paid moneys into those accounts. He also submits that the error of law on the part of the commissioners is adventitious. If the commissioners had directed themselves correctly in law, their decision on the facts discharging the assessments would have been final and conclusive against the Crown and the Crown would, he submits, not have been able to use the evidence it has now discovered except possibly in an action to set aside the commissioners' decision on the ground that it was
d obtained by the taxpayer companies by fraud. He therefore submits that it would be wrong to allow the Crown to profit from the evidence just because there happens to have been, in the view of the court, an error of law on the part of the commissioners.

I strongly suspect that Mr Bushell deceived the court when he gave evidence to the commissioners. If he did, it would be wrong that the decision he obtained from the commissioners should stand. Compared with that, the factor that in the absence of error
e of law on the part of the commissioners there would be no means of getting in the new evidence short of a separate action alleging fraud is of relatively minor significance. I see no good reason why the Special Commissioners should be required to approach their task in blinkers, denied the benefit of the new evidence which is now known to be available. The present case is a fortiori to the ordinary case where fresh evidence which satisfies the requirements of *Ladd v Marshall* becomes available after a trial. The Vice-Chancellor was
f right in my judgment, in the circumstances of this case, to allow fresh evidence to be adduced on the rehearing, and I would dismiss this appeal.

MUSTILL LJ. This appeal raises two issues. As to the first, which concerns the burden of proof, I feel no doubt that Sir Nicolas Browne-Wilkinson V-C was right to find a
g misdirection on the part of the General Commissioners. The starting point is an ordinary appeal before the commissioners. Here, however unacceptable the idea may be to the ordinary member of the public, it has been clear law binding on this court for sixty years that an inspector of taxes has only to raise an assessment to impose on the taxpayer the burden of proving that it is wrong: see *T Haythornthwaite & Sons Ltd v Kelly (Inspector of Taxes)* (1927) 11 TC 657. The taxpayer companies do not dispute this principle but
h maintain that they have done everything which it requires by tendering senior officials and the auditors of the taxpayer companies to give evidence and producing the taxpayer companies' accounts and records to show that there is nothing in them to justify the raising of an assessment in respect of the sums which the inspector has asserted were wrongfully diverted from the taxpayer companies' funds. They go on to say that the burden of displacing this evidence rested on the Revenue, given that the case against
j them was fundamentally one of fraud, a case which the party asserting it must always be under a heavy burden to prove.

I believe that when analysed this proposition has two quite different aspects. The first is based on the way in which the Revenue approached the matter in correspondence. In a letter of 14 December 1983 the inspector notified the taxpayer companies that a number of assessments would be made and went on to say that he had decided to make

them 'on the basis that there has been fraud, wilful default or neglect' on the part of the taxpayer companies. It would, I believe, have been natural to read this letter as an intimation that the Revenue were proposing either to claim lost tax out of time under s 36 of the Taxes Management Act 1970 by proving fraud or wilful default or to use an in-time assessment based on fraud, wilful default or neglect as a springboard for subsequent out-of-time assessment under s 39. If this had indeed been the basis on which the hearing had been conducted before the commissioners, it would indeed have been perfectly clear on general principle, without the need for recourse to specialist revenue law, that the burden of proof would rest on the Crown; and, if authority were needed on this particular field, *Hudson v Humbles (Inspector of Taxes)* (1965) 42 TC 380 at 384 is only one example of cases which could be called up in support. We have, however, had the benefit of an explanation of the way in which the dispute was actually conducted before the commissioners. We are told that, whatever the letter may have said, the Revenue were concerned only to protect their right to interest under s 88, and that, when it came to the hearing before the commissioners, no attempt was made to advance a case under ss 36 and 39. Rather, the matter was approached, so far as the Revenue were concerned, on an ordinary *Haythornthwaite* basis. If this is so, and the contrary has not, as we understand it, been asserted, the formal burden of proof was not assumed by the Revenue. The commissioners had no ground for approaching their fact-finding functions on any other basis than that it was for the taxpayer companies to make the running.

It is, however, contended that there is a quite different reason why the commissioners were right in their general approach, namely that once the taxpayer companies had produced their books and had called their auditors to say that the books were in order the Revenue could displace the taxpayer companies' case only by putting in contention a rival account of events which necessarily involved an allegation that the taxpayer companies, or one or more of their senior officers, were guilty of fraud. Such an allegation, even if never explicitly articulated, must be a matter which the Revenue should prove as the party which had brought it into the arena. To express the same notion in different words, once the taxpayer companies had made out a *prima facie* case that the returns were soundly based, the evidentiary burden of proof passed to the Revenue.

References to a shifting burden of proof can be found in many cases. The expression may have more than one significance. In some cases it signifies that, in order to reach a conclusion on the entire dispute, the court must successively decide two or more issues, in respect of which the burden is not consistently on the same party. An example is furnished by *Slattery v Mance* [1962] 1 All ER 525, [1962] 1 QB 676. Under an insurance against the risk of 'fire' the insured must prove that the subject matter was lost as a result of a fire. The right of recovery is, however, qualified by the general rule that an insured has no right of indemnity against his own deliberate and wrongful act. The claim will therefore fail, even on proof of a loss by fire, if it is shown that the insured wilfully caused or connived in the loss. This is, however, something for the insurer to prove, not the insured to disprove. Accordingly, when the judge comes to arrive at a decision he must proceed by two stages: first, to decide whether the subject matter is lost by fire; if this is not proved, the claim fails; then to decide whether, if so, the loss was brought about by the wilful act of the insured; if this is not proved, the claim succeeds. Thus, it may be said in one sense that the burden of proof shifts as the judge passes through the successive stages of his inquiry. In truth, however, this is an inaccurate use of language, for the dispute involves two separate issues, each with its own burden of proof, which remains unchanged throughout the course of the action.

If the Revenue had pursued before the commissioners the line of attack foreshadowed in the inspector's letter of 14 December 1983, the case would have fallen into this category, with the *Haythornthwaite* burden of proof on the taxpayer companies and the burden of proof on the Revenue in respect of fraud, successively applied. In fact, however, the only question in issue was whether the taxpayer companies could establish that the

assessments were wrong, and the general burden rested on them alone throughout the hearing.

a It is, however, submitted that the concept of a shifting burden has another meaning, relative to what is called the 'evidentiary burden of proof'. Although this term is widely used, it has often been pointed out that it simply expresses a notion of practical common sense and is not a principle of substantive or procedural law. It means no more than this, that during the trial of an issue of fact there will often arrive one or more occasions when, b if the judge were to take stock of the evidence so far adduced, he would conclude that, if there were to be no more evidence, a particular party would win. It would follow that, if the other party wished to escape defeat, he would have to call sufficient evidence to turn the scale. The identity of the party to whom this applies may change and change again during the hearing and it is often convenient to speak of one party or the other as having the evidentiary burden at a given time. This is, however, no more than shorthand, which c should not be allowed to disguise the fact that the burden of proof in the strict sense will remain on the same party throughout, which will almost always mean that the party who relies on a particular fact in support of his case must prove it. I do not see how this fact of forensic life bears on the present case. It is a commonplace that, if there is a disputed question of fact admitting of only two possible solutions, X and Y, with party A having the burden of proving X in order to establish his case, if A produces credible d evidence in favour of X and B produces none in favour of Y, it is very likely that A will win. B must therefore exert himself if he wishes to avoid defeat. But this does not mean that B ever has the burden of proof. So also here. It may well be that, if the taxpayer companies' version does not correspond with the true facts, it must follow that someone was guilty of fraud. This does not mean that, by traversing the taxpayer companies' case, the Revenue have taken on the burden of proving fraud. Naturally, if they produce e cogent evidence or argument to cast doubt on the taxpayer companies' case, the taxpayer companies will have a greater prospect of success. But this has nothing to do with the burden of proof, which remains on the taxpayer companies because it is they who, on the law as it has stood for many years, are charged with the task of falsifying the assessment. The contention that, by traversing the taxpayer companies' version, the f Revenue are implicitly setting out to prove a loss by fraud overlooks the fact that, in order to make good their case, the Revenue need only produce a situation where the commissioners are left in doubt. In the world of fact there may be only two possibilities: innocence or fraud. In the world of proof there are three: proof of one or other possibility and a verdict of not proven. The latter will suffice, so far as the Revenue are concerned.

g Once again there is an analogy with the law of insurance. Where a vessel is insured against perils of the seas, it is for the insured to prove that the loss was fortuitous; and fortuity is understood as involving the absence of wrongful participation in the loss on the part of the insured. Thus an insured claiming for a loss by perils of the seas must prove that he was not privy to the loss. If the court is left in doubt, the claim fails: see the authorities collected in *Arnould on Marine Insurance* (16th edn, 1981) §§ 1357-1358. The position is therefore in sharp contrast to that which exists in the case of an insurance h against fire. If the insurer refuses to pay the claim on the ground that the vessel was cast away with the privity of the insured, there will often be no middle ground so far as the facts are concerned. Either there was a loss by perils insured against or there was fraud. The insurer throws down the gauntlet and challenges the insured to disprove fraud. Naturally he must set out to support his imputation with evidence or critical comment because, if there really are only two alternatives, the stronger his attack on the case put j forward by the insured, the less likely that case is to succeed. But this does not mean that any burden of proof rests on, or is assumed by, an insurer who chooses to conduct his case in this way. If the insured cannot carry his case far enough to enable the trial judge to conclude that his claim is well founded, it must fail, notwithstanding that the judge is equally unable to make a finding of fraud, as happened, for example, in *Astrovlanis Cia Naviera SA v Linard* [1972] 2 All ER 647, [1972] 2 QB 611.

Before leaving this part of the case, I should mention the contention that there is a presumption of innocence which operates in any case where the defendant, by a
controversing the case put forward by the plaintiff, impliedly suggests that he has been guilty of dishonest conduct. I do not accept this argument. The fact that the possibility of fraud is on one side of the case will of course require the tribunal to take particular care when weighing the evidence, given the seriousness of any finding which puts in question the honesty of a party to a civil suit (see *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970, [1957] 1 QB 247). At the same time, I cannot accept that this bears on the b
burden of proof. The burden is material only to the question of which party succeeds if the tribunal is left in doubt. I can see no reason why the rule which entails that the taxpayer should fail in such a situation needs to be completely turned round simply because the alternative version of the facts to that advanced by the taxpayer is one which is explicable only on the ground of dishonesty on his part.

I therefore conclude without hesitation that the commissioners were in error in stating c
that it was for the Revenue to prove fraud if the taxpayer companies' claim for an adjustment of the assessments was to be defeated. This does not automatically dispose of the relief to be granted, and I have felt some initial doubts about whether the wording chosen to express the decisions of the majority and minority of the commissioners (if the division of opinion amongst them can properly be described in this way) really disclosed d
a misunderstanding of the position, rather than an inapt choice of language. I have also felt some hesitation whether the misdirection could safely be taken to have had a sufficient influence or possibility of influence on the outcome of the hearing to make it necessary for the High Court to intervene. After hearing argument, however, I am satisfied that the decision cannot properly be allowed to stand, and that the matter must be remitted for reconsideration.

I now turn to the second aspect of the appeal, which is concerned with the manner in e
which the remitted hearing should be conducted and in particular with the question whether the Revenue should now be permitted to lead evidence on the renewed hearing to suggest that, contrary to the original findings of the commissioners, the taxpayer companies or one or more of their officers had defrauded either the taxpayer companies or the Revenue or both. The taxpayer companies submit that the Revenue should not f
have this right for reasons which may be summarised as follows.

(1) Except where there is a specific right of appeal under statute, the decisions of the commissioners are final: see s 46(2) of the 1970 Act.

(2) There is no right of appeal on questions of fact, and no right to ask the commissioners to reopen their findings.

(3) Thus, if it had not been for the remission, there could have been no question of the g
commissioners hearing any further evidence of their own motion, or of their being ordered to do so by the court: see *R A Bird & Co v IRC* (1924) 12 TC 785 at 794 and *Murphy (Inspector of Taxes) v Australian Machinery and Investment Co Ltd* (1948) 30 TC 244.

(4) The only remedy available to the Revenue would have been to bring an action claiming an order that the decision of the commissioners should be set aside on the h
ground that they had been deliberately misled by the taxpayer companies in a material particular: see *de Lasala v de Lasala* [1979] 2 All ER 1146 at 1155-1156, [1980] AC 546 at 561. Perhaps there might also have been scope for a claim for judicial review.

(5) On any such proceedings being brought, the burden would be on the Revenue to allege and prove with particularity the fraudulent conduct by which the tribunal was misled: see *Jonesco v Beard* [1930] AC 298 at 300-301, [1930] All ER Rep 483 at 484.

(6) In the situation which now exists, the fact that the case will have to go back to the j
commissioners is immaterial. The remission follows from the conclusion that the commissioners failed to adopt the correct legal approach to the assessment of the evidence brought before them. The appropriate remedy for this error is for the commissioners to reassess on the correct basis the evidence which was before them when they made their mistake of law.

a (7) It would be wrong, on the hearing of the remitted case, to allow the Revenue to put in fresh evidence, for this would not simply give them the right to reargue the facts on the correct legal foundation, but to start the factual inquiry all over again.

b (8) For the reasons previously stated, such a fresh start could not ordinarily be engaged on without proof of fraud in respect of which the burden of proof would rest on the Revenue. It is not enough simply to set out on affidavit various grounds on which it must be suspected that the taxpayer companies had misled the commissioners. The issue of fraud must be tried out, with oral evidence and cross-examination, before any question of reopening the assessment can arise.

c (9) The procedure for which the Revenue now contend is founded on a remission which has nothing to do with the fresh evidence which they wish to adduce. If it is allowed to proceed, the Revenue will have been able, by swearing an affidavit stating grounds of suspicion, not tested in any way and not the subject of any finding by this or any other court, to outflank that part of the orthodox procedure in respect of which they have the burden of proof. Instead they will have proceeded directly to a rehearing where the burden of proof will be on the taxpayer companies. This is not an appropriate use of the powers to make consequential orders under s 56(6) of the 1970 Act on the decision of a case stated on a question of law.

d I have found this a persuasive argument but there are undeniable difficulties in finding a practical way of putting it into effect. The problem is that the solution which would ordinarily be appropriate, namely that the Revenue should institute proceedings for having the commissioners' order set aside, cannot be followed here, since as soon as the order of this court is drawn up there will no longer be in existence any effective order of the commissioners and hence nothing which any originating proceedings by the Revenue could operate to strike down. For my part, however, I would be sorry to think that the court is forced by the undoubted need to give the Revenue an opportunity to air their new evidence into adopting an expedient which must inevitably involve a conflation into one set of proceedings of a process which ought really to take place in two stages, with the burden on the Revenue at the first stage and on the taxpayer companies at the second. I believe that this court should not take away the advantage which the taxpayer companies would ordinarily have at the first stage, and that this unwarranted prejudice can properly be avoided by refusing to order that the Revenue should have as of right the opportunity to adduce further evidence on the remission, but rather that the new hearing should await the outcome of an action by the Revenue for a declaration that the previous decision was improperly obtained. If the action succeeds, the investigation before the commissioners will of course recommence de novo. But, if it fails, the proceedings will recommence only to the extent required by our decision on the question of law, but to no greater extent, since a decision on the question of law is all that was invited by the stating of a case for the opinion of the High Court. I am very conscious of the cumbersome nature of the suggested procedure, and of the inevitability that much of the same ground will have to be traversed twice by the different tribunals. This must however always be the case when a judgment on the facts is challenged on the ground of deception, and for my part I would not regard it as an excessive price to pay for maintaining the correct shape of the dispute in regard to burden of proof.

h Accordingly, I would dismiss the appeal on the question whether the matter should be remitted, but would propose that the terms of the remission should be modified in the way which I have described.

i **BALCOMBE LJ.** The facts of this case are set out in the judgment of Dillon LJ, which I have had the advantage of reading in draft. There are two issues before us: (1) whether the General Commissioners erred in law by misdirecting themselves as to the burden of proof, and (2) if so, whether the appropriate order was to remit the case to the Special Commissioners for a hearing de novo with fresh evidence.

The first issue: the burden of proof

Before the commissioners the taxpayer companies accepted that the burden of proof was on them to show that the assessments under appeal were not justified. That is because of the decision of this court in *T Haythornthwaite & Sons Ltd v Kelly (Inspector of Taxes)* (1927) 11 TC 657. The commissioners so directed themselves, and they also correctly identified the real issue before them as being ([1987] 2 All ER 674 at 678):

‘... how much, if any, of the considerable sums of money paid by the De Lorean [companies] was either received by or came into the control of [the taxpayer companies] or officers of the company in their capacity as such officers, and it is on these sums that the assessments have in effect been raised.’

However, they were led into error by the submissions on behalf of the taxpayer companies that, once the taxpayer companies had led evidence to show that no part of the money had reached them, this inevitably led to an allegation of fraud on the part of Mr Chapman (and, possibly, others), and that the burden of proof then shifted to the Revenue to prove such fraud. Although the commissioners reached their conclusions by different routes, they all fell into this error.

In my judgment the burden of proof remained on the taxpayer companies throughout. This was accepted by the taxpayer companies before the Vice-Chancellor and was not seriously contested before us. The main thrust of the argument of counsel for the taxpayer companies before us was that, even if there had been a technical misdirection of themselves by the commissioners, and that only the evidential burden had shifted to the Revenue, the Revenue had not (in the words of the Vice-Chancellor) shown—

‘circumstances which might leave the commissioners in doubt, on a balance of probabilities, whether Lotus (either itself or through its officers) in fact received or was entitled to receive payments giving rise to the assessments.’

(See [1987] 2 All ER 674 at 687.)

The evidence was all one way, submitted counsel for the taxpayer companies, and, even if the commissioners had correctly directed themselves, they must necessarily have come to the same conclusion as they did.

I cannot accept this submission. The evidence was not all one way. No valid explanation had ever been given for the payment of \$9.15m to GPD for minimal services. The sub-contract apparently provided no profit element for the taxpayer companies. No attempt was made to identify what was the nature of the fraud which caused the burden of proof to shift. Thus, to consider only one possible situation, if the moneys truly belonged to the taxpayer companies, their fraudulent diversion by Mr Chapman and Mr Bushell could not of itself mean that the moneys were not taxable in the hands of the taxpayer companies.

If the commissioners had properly directed themselves, it is possible that they would have reached the same conclusion. It is also possible that they would have said that they remained in a state of uncertainty and unable to answer the question which they had identified as being the real issue before them. In the latter case the taxpayer companies would not have discharged the onus of proof which remained with them throughout, and the assessments should not be discharged. In my judgment the Vice-Chancellor was correct in his decision on this issue.

The second issue: the remitter with fresh evidence

As a result of the error of law made by the commissioners, it will in any event be necessary for the case to be remitted. Thus this case is wholly different from those of *Jonesco v Beard* [1930] AC 298, [1930] All ER Rep 483 and *de Lasala v de Lasala* [1979] 2 All ER 1146, [1980] AC 546, on which counsel for the taxpayer companies sought to rely. There is no need to bring an action to set aside the decision by the commissioners, even if it be the case that the decision was obtained by improper conduct on the part of

- Mr Bushell. The real question is: accepting that a remitter is in any event necessary, should the case be remitted with or without a direction as to the admissibility of the further evidence relating to the payments into the Swiss bank accounts in the names of Mr Chapman and Mr Bushell? Ordinarily such further evidence would not be admissible: see *Yuill v Wilson (Inspector of Taxes)* [1980] 3 All ER 7, [1980] 1 WLR 910. However, there may be special circumstances when a case can be remitted and fresh evidence adduced: see per Pennycuik J in *Bradshaw v Blunden (Inspector of Taxes) (No 2)* (1960) 39 TC 73 at 80, cited with approval in *Yuill v Wilson (Inspector of Taxes)* [1980] 3 All ER 7 at 16, [1980] 1 WLR 910 at 921. In my judgment there are here such special circumstances.
- If on a remitter the commissioners are not entitled to receive any further evidence, it is possible that on a proper direction as to the law they will decide that the taxpayer companies have not discharged the burden of proof, and that the assessments must stand. Then cadit quaestio. But, if they then decide that the assessments should be discharged, it is almost certain that the Revenue will then bring an action to have the decision set aside as having been improperly obtained, since the almost irresistible inference from the uncontradicted evidence of the payments into Mr Chapman's and Mr Bushell's Swiss accounts, bearing in mind that Mr Bushell is also one of Mr Chapman's executors, is that Mr Bushell knew of these payments and deliberately failed to disclose them. So there will then have to be further proceedings to set aside the decision for a second time, and assuming that those proceedings are successful, as it seems in the highest degree probable that they would be, a yet further hearing de novo before the commissioners at which this highly material evidence will be admitted. Such a multiplicity of proceedings cannot be sensible, and, if that is what the law requires, then the law must be in a sorry state. I am glad to be able to say that in my judgment the law does not require such a roundabout course to be taken. Section 56(6) of the Taxes Management Act 1970 empowers the court which hears an appeal by way of case stated to remit the matter to the commissioners or to 'make such other order in relation to the matter as to the Court may seem fit'. This clearly gives the court the power to make the order for remitter with further evidence. In my judgment, applying by analogy the principles of *Meek v Fleming* [1961] 3 All ER 148, [1961] 2 QB 366, there are here special circumstances which enable, indeed require, the court to direct that when the case is remitted it should be with a direction to admit the further evidence which is now available, and which would have been previously available but for the actions of Mr Bushell.

In my judgment the Vice-Chancellor was right on both issues and this appeal should be dismissed.

- Appeal dismissed. Leave to appeal to House of Lords refused.*

Solicitors: *Gouldens* (for the taxpayer companies); *Solicitor of Inland Revenue*.

Diana Brahams Barrister.

Practice Note

COURT OF APPEAL, CRIMINAL DIVISION

LORD LANE CJ, O'CONNOR AND STEPHEN BROWN LJ

2 NOVEMBER 1987

Crown Court – Distribution of court business – Classification of offences – Allocation of business to Crown Court centres – Committals – Appeals under court's original civil jurisdiction – Transfer of proceedings – Allocation of business within the Crown Court – Allocation to court comprising lay justices – Transfer between circuits – Presiding judges' directions – Offences against the Person Act 1861, ss 18, 58 – Official Secrets Act 1911, s 1 – Geneva Conventions Act 1957, s 1 – Theft Act 1968, s 8 – Magistrates' Courts Act 1980, ss 6, 7 – Forgery and Counterfeiting Act 1981 – Supreme Court Act 1981, ss 74, 75, 76.

LORD LANE CJ gave the following directions at the sitting of the court.

With the concurrence of the Lord Chancellor and pursuant to s 75(1) and (2) of the Supreme Court Act 1981 I direct that, with effect from 1 January 1988, the following directions shall supersede those given on 14 October 1971 (see *Practice Note* [1971] 3 All ER 829, [1971] 1 WLR 1535) as amended.

CLASSIFICATION OF THE BUSINESS OF THE CROWN COURT AND ALLOCATION TO CROWN COURT CENTRES

Classification

1. For the purposes of trial in the Crown Court, offences are to be classified as follows.

Class 1: (1) any offences for which a person may be sentenced to death; (2) misprision of treason and treason felony; (3) murder; (4) genocide; (5) an offence under the Official Secrets Act 1911, s 1; (6) incitement, attempt or conspiracy to commit any of the above offences.

Class 2: (1) manslaughter; (2) infanticide; (3) child destruction; (4) abortion (Offences against the Person Act 1861, s 58); (5) rape; (6) sexual intercourse with a girl under 13; (7) incest with a girl under 13; (8) sedition; (9) an offence under the Geneva Conventions Act 1957, s 1; (10) mutiny; (11) piracy; (12) incitement, attempt or conspiracy to commit any of the above offences.

Class 3: all offences triable only on indictment other than those in classes 1, 2 and 4.

Class 4: (1) wounding or causing grievous bodily harm with intent (Offences against the Person Act 1861, s 18); (2) robbery or assault with intent to rob (Theft Act 1968, s 8); (3) incitement or attempt to commit any of the above offences; (4) conspiracy at common law, or conspiracy to commit any offence other than those included in classes 1 and 2; (5) all offences which are triable either way.

Committals for trial

2. A magistrates' court on committing a person for trial under the Magistrates' Courts Act 1980, s 6 shall, if the offence or any of the offences is included in classes 1 to 3, specify the most convenient location of the Crown Court where a High Court judge regularly sits, and if the offence is in class 4 shall specify the most convenient location of the Crown Court.

3. In selecting the most convenient location of the Crown Court, the justices shall have regard to the considerations referred to in s 7 of the Magistrates' Courts Act 1980 and to the location or locations of the Crown Court designated by a presiding judge as the location to which cases should normally be committed from their petty sessions area.

4. Where on one occasion a person is committed in respect of a number of offences, all the committals shall be to the same location of the Crown Court and that location shall be the one where a High Court judge regularly sits if such a location is appropriate for any of the offences.

Committals for sentence or to be dealt with

- a 5. Where a probation order, order for conditional discharge or a community service order has been made, or suspended sentence passed, and the offender is committed to be dealt with for the original offence or in respect of the suspended sentence, he shall be committed in accordance with the paragraphs below.
- b 6. If the order was made or the sentence was passed by the Crown Court, he shall be committed to the location of the Crown Court where the order was made or suspended sentence was passed, unless it is inconvenient or impracticable to do so.
7. If he is not so committed and the order was made by a High Court judge he shall be committed to the most convenient location of the Crown Court where a High Court judge regularly sits.
8. In all other cases where a person is committed for sentence or to be dealt with he shall be committed to the most convenient location of the Crown Court.
- c 9. In selecting the most convenient location of the Crown Court the justices shall have regard to the location or locations of the Crown Court designated by a presiding judge as the locations to which cases should normally be committed from their petty sessions area.

Appeals and proceedings under the Crown Court's original civil jurisdiction

- d 10. The hearing of an appeal or of proceedings under the civil jurisdiction of the Crown Court shall take place at the location of the Crown Court designated by a presiding judge as the appropriate location for such proceedings originating in the areas concerned.

Application for removal of a driving disqualification

- e 11. Application should be made to the location of the Crown Court where the order of disqualification was made.

Transfer of proceedings between locations of the Crown Court

- f 12. Without prejudice to the provisions of s 76 of the Supreme Court Act 1981 (committal for trial: alteration of place of trial) directions may be given for the transfer from one location of the Crown Court to another of (i) appeals, (ii) proceedings on committal for sentence, or to be dealt with, (iii) proceedings under the original civil jurisdiction of the Crown Court where this appears desirable for expediting the hearing, or for the convenience of the parties.
13. Such directions may be given in a particular case by an officer of the Crown Court, or generally, in relation to a class or classes of case, by the presiding judge or a judge acting on his behalf.
- g 14. If dissatisfied with such directions given by an officer of the Crown Court, any party to the proceedings may apply to a judge of the Crown Court, who may hear the application in chambers.

ALLOCATION OF BUSINESS WITHIN THE CROWN COURT

General

- h 1. Cases in class 1 are to be tried by a High Court judge. A case of murder, or incitement, attempt or conspiracy to commit murder, may be released, by or on the authority of a presiding judge, for trial by a circuit judge approved for the purpose by the Lord Chief Justice.
- j 2. Cases in class 2 are to be tried by a High Court judge unless a particular case is released by or on the authority of a presiding judge for trial by a circuit judge. A case of rape, or of a serious sexual offence against a child of any class, may be released by a presiding judge for trial only by a circuit judge approved for the purpose by the Lord Chief Justice.
3. Cases in class 3 may be tried by a High Court judge or, in accordance with general or particular directions given by a presiding judge, by a circuit judge or a recorder.

4. Cases in class 4 may be tried by a High Court judge, a circuit judge, a recorder or an assistant recorder. A case in class 4 shall not be listed for trial by a High Court judge except with the consent of that judge or of a presiding judge. a

5. Appeals from decisions of magistrates and committals to the Crown Court for sentence shall be heard by (i) a resident or designated judge, or (ii) a circuit judge, nominated by the resident or designated judge, who regularly sits at the Crown Court centre, or (iii) an experienced recorder specifically approved by the presiding judges for the purpose, or (iv) where no circuit judge or recorder satisfying the requirements above is available and it is not practicable to obtain the approval of the presiding judges, by a circuit judge or recorder selected by the resident or designated judge to hear a specific case or cases. b

6. Applications or matters arising before trial (including those relating to bail) should be listed where possible before the judge by whom the case is expected to be tried. Where a case is to be tried by a High Court judge who is not available, the application or matter should be listed before any other High Court judge then sitting at the Crown Court centre at which the matter has arisen, before a presiding judge, before the resident or designated judge for the centre, or, with the consent of the presiding judge, before a circuit judge nominated for the purpose. In other cases, if the circuit judge, recorder or assistant recorder who is expected to try the case is not available, the matter shall be referred to the resident or designated judge or, if he is not available, to any judge or recorder then sitting at the centre. c

7. Matters to be dealt with (eg in which a probation order has been made or suspended sentence passed) should, where possible, be listed before the judge who originally dealt with the matter, or, if not, before a judge of the same or higher status. d

Allocation of proceedings to a court comprising lay justices e

8. In addition to the classes of case specified in s 74 of the Supreme Court Act 1981 (appeals and proceedings on committals for sentence) any other proceedings apart from cases listed for pleas of not guilty which in accordance with these directions are listed for hearing by a circuit judge or recorder are suitable for allocation to a court comprising justices of the peace. f

Transfer of cases between circuits

9. An application that a case be transferred from one circuit to another should not be granted unless the judge is satisfied that (i) the approval of the presiding judges and circuit administrator for each circuit has been obtained or (ii) the case may be transferred under general arrangements approved by the presiding judges and circuit administrators. g

10. When a resident or designated judge is absent from his centre, the presiding judges may authorise another judge who sits regularly at the same centre to exercise his responsibility. j

Presiding judges' directions

11. For the just, speedy and economical disposal of the business of a circuit, presiding judges shall with the approval of the Senior Presiding Judge issue directions as to the need where appropriate to reserve a case for trial by a High Court judge and as to the allocation of work between circuit judges, recorders and assistant recorders and where necessary the devolved responsibility of resident or designated judges for such allocation. In such directions specific provision should be made for cases in the following categories: h

(a) cases where death or serious risk to life, or the infliction of grave injury are involved, including motoring cases of this category arising from reckless driving and/or excess alcohol; j

(b) cases where loaded firearms are alleged to have been used;

(c) cases of arson or criminal damage with intent to endanger life;

(d) cases of defrauding government departments or local authorities or other public bodies of amounts in excess of £25,000;

- a** (e) offences under the Forgery and Counterfeiting Act 1981 where the amount of money or the value of goods exceeds £10,000;

(f) offences involving violence to a police officer which result in the officer being unfit for duty for more than 28 days;

(g) any offence involving loss to any person or body of a sum in excess of £100,000;

(h) cases where there is a risk of substantial political or racial feeling being excited by the offence or the trial;
 - b** (i) cases which have given rise to widespread public concern;

(j) cases of robbery or assault with intent to rob where gross violence was used, or serious injury was caused, or where the accused was armed with a dangerous weapon for the purpose of the robbery, or where the theft was intended to be from a bank, a building society or a post office;
 - c** (k) cases involving the manufacture or distribution of substantial quantities of drugs;

(l) cases the trial of which is likely to last more than ten days;

(m) cases involving the trial of more than five defendants;

(n) cases in which the accused holds a senior public office, or is a member of a profession or other person carrying a special duty or responsibility to the public, including a police officer when acting as such;
 - d** (o) cases where a difficult issue of law is likely to be involved, or a prosecution for the offence is rare or novel.
12. With the approval of the Senior Presiding Judge, general directions may be given by the presiding judges of the South Eastern Circuit concerning the distribution and allocation of business of all classes at the Central Criminal Court.

N P Metcalfe Esq Barrister.

Coltman and another v Bibby Tankers Ltd

The Derbyshire

HOUSE OF LORDS

LORD KEITH OF KINKEL, LORD ROSKILL, LORD GRIFFITHS, LORD OLIVER OF AYMERTON AND LORD GOFF OF CHIEVELEY

26, 27 OCTOBER, 3 DECEMBER 1987

Employment – Liability of employer – Defective equipment – Ship – Whether ‘equipment’ including ship – Employer’s Liability (Defective Equipment) Act 1969, s 1(1)(3).

In September 1980 a 90,000 ton bulk carrier owned by the defendants sank off the coast of Japan with the loss of all hands. The plaintiffs, who were the personal representatives of a member of the crew, brought an action against the defendants alleging that the ship was unseaworthy because of defects in the hull and claiming damages on the ground, inter alia, that the crew member’s death was caused in the course of his employment in consequence of defects in equipment, namely the ship, provided by the defendants. Under s 1^a of the Employer’s Liability (Defective Equipment) Act 1969, where an employee suffered personal injury or loss of life in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer’s business, the injury or loss of life was deemed to be attributable to negligence on the part of the employer. By s 1(3) of the 1969 Act ‘equipment’ was defined as including ‘any plant and machinery, vehicle, aircraft and clothing’. The question whether the ship was ‘equipment’ provided by the defendants for the purposes of their business was tried as a preliminary issue. The judge held that it was. The defendants appealed to the Court of Appeal, which allowed the appeal on the ground that the ship was not ‘equipment’ provided by the defendants. The plaintiffs appealed to the House of Lords.

Held – A ship provided by its owner for the purposes of his business was ‘equipment’ for the purpose of s 1(1) of the 1969 Act, regardless of its size. Accordingly, where a seaman suffered personal injury or loss of life in consequence of the unseaworthiness of a ship, its owner was liable in negligence for that injury or loss of life (see p 1069 d g h, p 1072 c d f to j, p 1073 a b d h, p 1074 d to j and p 1075 g h, post).

Decision of the Court of Appeal [1987] 1 All ER 932 reversed.

Notes

For employers’ liability for defective equipment, see 16 Halsbury’s Laws (4th edn) para 718, and for cases on the subject, see 20 Digest (Reissue) 490–494, 511–514, 3844–3864, 3965–3991.

For the Employer’s Liability (Defective Equipment) Act 1969, s 1, see 16 Halsbury’s Statutes (4th edn) 180.

Cases referred to in opinions

Davie v New Merton Board Mills Ltd [1959] 1 All ER 346, [1959] AC 604, [1959] 2 WLR 331, HL.

Munby v Furlong (Inspector of Taxes) [1977] 2 All ER 953, [1977] Ch 359, [1977] 3 WLR 270, CA.

Yarmouth v France (1887) 19 QBD 647, DC; on appeal (1888) 4 TLR 561, CA.

Appeal

The plaintiffs, Eugenia Margaret Coltman and Alisa Elizabeth Martin, the personal

a Section 1, so far as material is set out at p 1070 j to p 1071 c, post

- a representatives of Leo Thomas Mackenzie Coltman deceased, appealed with the leave of the Court of Appeal against the decision of that court (O'Connor and Glidewell LJ, Lloyd LJ dissenting) ([1987] 1 All ER 932, [1987] 2 WLR 1098) on 27 January 1987 allowing the appeal by the defendants, Bibby Tankers Ltd, the owners of the ore/bulk/oil carrier Derbyshire on which the deceased was employed at the time of his death, against the judgment of Sheen J ([1986] 2 All ER 65, [1986] 1 WLR 751) given in the Admiralty Court of the Queen's Bench Division on 14 March 1986, whereby he determined, on the trial of a preliminary issue in an action brought by the plaintiffs against the defendants, that the vessel was 'equipment' provided by the defendants within s 1 of the Employer's Liability (Defective Equipment) Act 1969. The facts are set out in the opinion of Lord Oliver.

- b Geoffrey Brice QC and Belinda Bucknall for the plaintiffs.
c Kenneth Rokison QC and Robin Hay for the defendants.

Their Lordships took time for consideration.

3 December. The following opinions were delivered.

- d **LORD KEITH OF KINKEL.** My Lords, I have had the benefit of considering in draft the speech to be delivered by my noble and learned friend Lord Oliver. I agree with it, and for the reasons he gives would therefore allow the appeal and restore the declaration of Sheen J.

- e **LORD ROSKILL.** My Lords, I must confess that I have found the problem of construction to which this appeal gives rise more difficult than have your Lordships. The marked difference of opinion in the courts below between O'Connor and Glidewell LJ on the one hand and Lloyd LJ and Sheen J on the other shows how difficult the problem is. For most of the argument I was disposed to share the views of the majority in the Court of Appeal because I found it difficult to accept that if Parliament in enacting the Employer's Liability (Defective Equipment) Act 1969 had intended that Act to embrace merchant ships in the word 'equipment' in s 1(1)(a) that word would have been defined in s 1(3) in a manner which includes vehicles and aircraft but does not include merchant ships. But I recognise the strength of the submission that if the main engines of merchant ships are included in the definition, for they are clearly machinery, it is difficult to deduce any rational reason for excluding the hulls of such ships. Moreover, the derricks and winches of a merchant ship must surely be 'equipment' within the ordinary meaning of that word irrespective of the definition in s 1(3).

- g Ultimately, therefore, I have found the reasoning in the speech of my noble and learned friend Lord Oliver, which I have had the benefit of reading in advance, compelling. I therefore agree that the appeal must be allowed and the question answered in the same sense as that in which it was answered by Lloyd LJ and Sheen J.

- h **LORD GRIFFITHS.** My Lords, I have had the advantage of reading in advance the speech of my noble and learned friend Lord Oliver, and I agree that for the reasons he gives the appeal must be allowed and the question answered in the same sense as that in which it was answered by Lloyd LJ and Sheen J.

- j **LORD OLIVER OF AYLMEYTON.** My Lords, the appellants in this appeal (the plaintiffs) are the personal representatives of Leo Thomas Mackenzie Coltman deceased who was, at the date of his death, employed by the respondent company (the defendants) as third engineer aboard the Derbyshire. The Derbyshire was a vessel of some 90,000 tons which sank off the coast of Japan on 9 September 1980 with the loss of all hands while on a voyage from Canada to Japan with a cargo of iron ore. On 5 February 1982

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the plaintiffs commenced proceedings in the Admiralty Court claiming damages under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976 alleging that the sinking of the vessel and the death of the deceased had been caused by the negligence of the defendants. The particulars of negligence included allegations of defective construction and design of the vessel rendering her unseaworthy. Paragraphs 7 and 8 of the statement of claim contain a plea that the defects, which are said to be attributable wholly or in part to fault on the part of the manufacturers of the vessel, were defects in 'equipment' provided by the defendants for the purposes of their business within the meaning of the Employer's Liability (Defective Equipment) Act 1969 and were thus deemed to be attributable to the negligence of the defendants. The defendants by their defence denied that the vessel constituted 'equipment' within the meaning of that Act. Accordingly, on 13 February 1986 the Admiralty registrar ordered by consent that there be determined as a preliminary point the question whether the vessel was 'equipment' provided by the defendants within the meaning of s 1 of the 1969 Act. On the trial of the preliminary point on 14 March 1986 Sheen J ([1986] 2 All ER 65, [1986] 1 WLR 751) answered the question in the affirmative but on 27 January 1987 the Court of Appeal by a majority (Lloyd LJ dissenting) ([1987] 1 All ER 932, [1987] 2 WLR 1098) allowed an appeal by the defendants, declaring that the vessel was not 'equipment' provided by the defendants within the meaning of the Act and gave leave to appeal to your Lordships' House.

My Lords, it is common ground that the 1969 Act was introduced with a view to rectifying what was felt to be the possible hardship to an employee resulting from the decision of this House in *Davie v New Merton Board Mills Ltd* [1959] 1 All ER 346, [1959] AC 604. In that case an employee was injured by a defective drift supplied to him by his employers for the purpose of his work. The defect resulted from a fault in manufacture but the article had been purchased by the employers without knowledge of the defect from a reputable supplier and without any negligence on their part. It was held that the employers' duty was only to take reasonable care to provide a reasonably safe tool and that that duty had been discharged by purchasing from a reputable source an article whose latent defect they had no means of discovering. Thus the action against them failed although judgment was recovered against the manufacturer. Clearly this opened the door to the possibility that an employee required to work with, on or in equipment furnished by his employer and injured as a result of some negligent failure in design or manufacture might find himself without remedy in a case where the manufacturer and the employer were, to use the words of Viscount Simonds, 'divided in time and space by decades and continents' so that the person actually responsible was no longer traceable or, perhaps, was insolvent or had ceased to carry on business (see [1959] 1 All ER 346 at 351, [1959] AC 604 at 620-621). Parliament accordingly met this by imposing on employers a vicarious liability and providing, in a case where injury was due to a defect caused by the fault of the third party, that the employer should, regardless of his own conduct, be liable to his employee as if he had been responsible for the defect, leaving it to him to pursue against the third party such remedies as he might have whether original or by way of contribution.

The purpose of the Act, as set out in the long title, is—

'to make further provision with respect to the liability of an employer for injury to his employee which is attributable to any defect in equipment provided by the employer for the purposes of the employer's business; and for purposes connected with the matter aforesaid.'

The relevant provisions of the Act, for present purposes, are contained in s 1(1) and (3) and are as follows:

'(1) Where after the commencement of this Act—(a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment

provided by his employer for the purposes of the employer's business; and (b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not), the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection), but without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury.

(3) In this section—"business" includes the activities carried on by any public body; "employee" means a person who is employed by another person under a contract of service or apprenticeship and is so employed for the purposes of a business carried on by that other person, and "employer" shall be construed accordingly; "equipment" includes any plant and machinery, vehicle, aircraft and clothing; "fault" means negligence, breach of statutory duty or other act or omission which gives rise to liability in tort in England and Wales or which is wrongful and gives rise to liability in damages in Scotland; and "personal injury" includes loss of life, any impairment of a person's physical or mental condition and any disease.'

My Lords, if sub-s (1) stood alone and without such assistance as is provided by sub-s (3), I would not, for my part, have encountered any difficulty in concluding that, in the context of this Act, a ship was part of the 'equipment' of the business of a shipowner. In the Court of Appeal, O'Connor LJ expressed the view that the word in its natural meaning denoted something ancillary to something else (see [1987] 1 All ER 932 at 934, [1987] 2 WLR 1098 at 1100) and an echo of this is to be found in the judgment of Glidewell LJ. Thus both Lords Justices would, I think, regard machinery attached to a ship as 'equipment', because it would be ancillary to the main object, the vessel, but both regarded the word as inappropriate to describe the vessel itself. I do not doubt that the word is frequently and quite properly used to describe the appurtenances of some larger entity, but I can see no reason either in logic or as a matter of language why its use should be so confined. Indeed, there is nothing in the entry in the *Oxford English Dictionary* quoted by O'Connor LJ which necessarily imports that 'equipment' is restricted to parts of a larger whole. The meaning is given as 'Anything used in equipping; furniture; outfit; warlike apparatus; necessities for an expedition or voyage'. Moreover, your Lordships are concerned not with the meaning of 'equipment' simpliciter but of the composite phrase 'equipment provided by his employer for the purposes of the employer's business'. Speaking for myself, I can think of no more essential equipment for the setting up and carrying on of the business of a shipowner than the ship or ships with which the business is carried on. This involves, in my judgment, no misuse of language. As Lloyd LJ observed in his dissenting judgment in the Court of Appeal, one would talk naturally of a fleet being 'equipped' with battleships, cruisers and destroyers or of the 'equipment' of an expedition as including supply ships (see [1987] 1 All ER 932 at 936, [1987] 2 WLR 1098 at 1104). In my judgment, a shipowner's fleet of ships is properly described as the equipment of his business. They are, in truth, the tools of his trade and I can see no ground for treating the word 'equipment' in s 1(1)(a) (leaving aside for the moment the more difficult questions posed by sub-s (3)) as excluding this particular type of chattel as opposed to other articles, of whatever size or construction, employed by a trader in carrying on his trade.

It has been submitted on behalf of the defendants that the word derives a more restricted flavour from its juxtaposition with the word 'provided' and that that word imports the notion of something provided to the employee for use in the course of his work and is therefore more appropriate to the type of small tool provided to the appellant in *Davie v New Merton Board Mills Ltd*. There is, however, no context from which this can properly be deduced; indeed the extended definition in sub-s (3) leads to a precisely contrary conclusion, and I can see no reason for reading the word 'provided' in anything other than its normal signification of 'furnished'.

Then it is said that 'equipment' is to be distinguished from the factory or workplace in which working tools or machinery are provided or to which they are affixed and that a ship, or, certainly, an ocean-going vessel of the size of the Derbyshire, is akin to a factory in the sense that it provided the accommodation within which the employee does his work. While, therefore, it is accepted that the various mechanical contrivances which are installed in or affixed to a vessel are properly described as equipment, the ship itself, taken as a whole, is, it is argued, not 'equipment' because it constitutes the employee's 'workplace'. It is, of course, true that the provisions of the Occupiers' Liability Act 1957 apply to a ship as they do to real property, but they equally apply, in appropriate circumstances, to a vehicle or an aeroplane, so that nothing can, I think, turn on this. It is also true that it is inherent in the nature of a vessel that those whose task it is to navigate it are accommodated within it for the purposes of their employment. But here, as it seems to me, any analogy with real estate ends. No one, I venture to think, would regard the power-boat provided for the purpose of a water-skiing school or a pleasure launch on the River Thames as being in the slightest degree akin to real estate or as being anything other than a chattel employed in a business. Such a vessel would, in my judgment, be comprehended in the term 'equipment of the business' even in the most everyday use of language and I can see no justification for excluding from it some category of vessel merely by reason of its size and of its necessarily providing accommodation for the crew who are required to be on board in order to operate it for the proper carrying on of the business of carrying cargo from one part of the world to another.

It is, however, argued that s 1(1) does not stand alone. It has to be read in the context of an Act which also contains s 1(3) and it is this which, in my judgment, constitutes the strongest argument for the defendants. Here, it is said, is a specific definition of 'equipment' which goes out of its way to include plant and machinery, vehicles and aircraft and clothing. Is it conceivable, it is asked, that the draftsman of the statute, who evidently regarded himself as indicating, in sub-s (3), particular articles which might possibly not be thought of as ordinarily embraced in the phrase 'equipment provided . . . for the purposes of . . . business', should have specifically included vehicles and aircraft but should have omitted any reference to vessels if such omission were not intentional? Thus, it is argued, if vessels were omitted deliberately from the expanded or clarifying definition in sub-s (3) this demonstrates that the word is used in sub-s (1)(a) in a more restricted sense. My Lords, I have found myself unable to accept this approach to the problem of construction. To begin with, it is quite clear, as was pointed out by Lloyd LJ ([1987] 1 All ER 932 at 937, [1987] 2 WLR 1098 at 1104), that the word 'includes' in sub-s (3) cannot be construed as 'means and includes' so as to confine that which is embraced in the word 'equipment' to the exemplars there specified. Granted that there may be circumstances in which an inclusive definition of this sort can have a restrictive effect, that cannot, in my judgment, possibly apply in the case of this statute. Here, where the draftsman intends a restricted meaning, he makes it quite clear. One has only to contrast the definitions of 'business', 'equipment' and 'personal injury', all of which are by reference to what is included, with those of 'employee' and 'fault', where the Act makes it clear that there is to be a single exclusive meaning for the purposes of the Act. Subsection (3) cannot, therefore, be used to cut down the meaning of the word 'equipment' as it is used in sub-s (1). It must have been inserted in the statute either for the purpose of enlarging the word by including in its articles which would not otherwise fall within it in its ordinary signification or it must have been inserted for clarification and the avoidance of doubt. For my part, I agree with Lloyd LJ that the definition is a clarifying and not an enlarging one (see [1987] 1 All ER 932, [1987] 2 WLR 1098 at 1105). Why the draftsman felt it necessary to clarify in this way is a matter for speculation. Quite clearly, for instance, some 'plant and machinery' would be properly described as 'equipment' even in the most ordinary use of the term and the purpose of the express inclusion of plant and machinery can, I think, only have been to make it clear that every type of plant and machinery is to be regarded as equipment within the

a meaning of the 1969 Act. The key word in the definition is the word 'any' and it underlines, in my judgment, what I would in any event have supposed to be the case, having regard to the purpose of the Act, that is to say that it should be widely construed so as to embrace every article of whatever kind furnished by the employer for the purposes of his business. Thus it is not just particular plant and machinery or vehicles (for instance, a combine harvester) or particular types of aircraft (for instance, a crop-spraying aeroplane) which are to be regarded as 'equipment' but plant and machinery, b vehicles, aircraft and clothing of all types and sizes subject only to the limitation that they are provided for the purposes of the employer's business.

It is certainly curious that, having resolved to refer specifically to means of transport, the draftsman should have omitted to refer in terms to water transport. Indeed, it is difficult to see why, after the express inclusion of 'plant and machinery', it was thought necessary to refer to any further examples. The word 'plant' is itself one of the widest c import and is apt to embrace anything from a wharfinger's cart-horse (see *Yarmouth v France* (1887) 19 QBD 647) to a lawyer's textbook (see *Munby v Furlong (Inspector of Taxes)* [1977] 2 All ER 953, [1977] Ch 359). 'Plant and machinery' is even wider and had at the date of the passing of the Act a well-recognised meaning to those familiar with taxing statutes. In the ordinary way, therefore, had it not been for the express reference to vehicles and aircraft, I would, in any event, have been disposed to regard a ship as d something properly embraced in the phrase 'plant and machinery': see, for instance, s 31 of the Capital Allowances Act 1968, where new ships are specifically referred to and are treated as a special type of plant and machinery for the purposes of initial allowances. However, the express reference to vehicles and aircraft, while it indicates that the word 'equipment' is to be construed in its widest sense (a conclusion reinforced by the inclusion e also of 'clothing'), does seem to indicate at least a doubt in the draftsman's mind whether every type of vehicle or aircraft had been embraced in what had gone before and highlights the omission of any express reference to water-borne means of transport, for if the draftsman considered that some or all of the possible land-borne or airborne means of locomotion might not properly be described as 'plant and machinery' it seems curious that he did not entertain at least equal doubt about water-borne craft. It has been f suggested that a ship may properly be described as a water-borne vehicle and reference has been made to the Hovercraft Act 1968 in which a hovercraft is defined as a 'vehicle ... designed to be supported ... by air expelled from the vehicle ...' (see s 4(1)). It would, it is submitted, be absurd that a hovercraft should be a vehicle for the purpose of the definition and that a water-borne craft of commensurate size and purpose should not be. I find myself, however, unpersuaded by the transposition into this Act of a definition from a quite different statute. The juxtaposition of 'vehicle' and 'aircraft' demonstrates, I g think, that 'vehicle' is used in this Act as referring specifically to a land-borne means of transport. It must, in the light of this, be at least doubtful whether, in the context of this Act, the expression 'plant and machinery' is properly to be construed as including ships, and I am, for my part, content to approach the problem on the footing that it is not. The omission is certainly curious but I find myself entirely unpersuaded that there can be deduced from it an intention to cut down the very wide meaning of 'equipment' in sub- h s (1) which is indicated both by the legislative purpose of the statute and by the width of the clarifying definition. Various explanations have been suggested for what it is submitted was a deliberate omission. It is said, for instance, that having regard to the provisions of s 458 of the Merchant Shipping Act 1894 a ship may have been deliberately omitted because of a perceived possible conflict between liability of the shipowner under that section (which imposes only an obligation of reasonable care to ensure seaworthiness) j and the vicarious liability imposed by the 1969 Act. It is also submitted that there could be difficulty in reconciling that vicarious liability with the limitation of a shipowner's liability for injury or loss of life under s 503 of the 1894 Act in the absence of actual privity or fault. Again, it is said that to apply the provisions of the 1969 Act to a ship would give rise to problems of conflict of laws in cases where injury was caused on ships

under foreign flags or where it occurred on the high seas or in a foreign port, a difficulty, however, which would equally arise in the case of an aircraft. These suggested difficulties are to my mind more illusory than real and, in so far as they exist at all, constitute a quite insufficient reason for imposing on the wide words of the statute an unexpressed limitation which would produce some quite extraordinary anomalies. Whatever may be embraced in the expression 'plant and machinery' it quite clearly includes any machinery installed in or affixed to a ship in the absence of some compelling context to the contrary; and there is no context whatever in this Act for reading the expression as excluding maritime machinery from 'any' plant and machinery. Unless, therefore, one is to read the Act as if it contained some unexpressed limitation excluding from its operation plant or machinery which comes to be installed in a ship, the exclusion from the definition of 'equipment' of a ship itself produces the absurd position that the employer is liable for injury caused by defective machinery on or in the ship but not for injury caused by anything which can properly be described as constituting the ship itself, i.e. the hull or a part of the hull. This at once raises almost insoluble problems of demarcation between those constituent parts of the ship which may properly be described as 'plant' or 'machinery' and those parts which are properly to be described as the hull or parts of the hull. There simply is no context in the Act which enables one to read 'equipment' as including the ship's winches, derricks, generators, pumps, engine-room plant, steering gear and so on, but as excluding the structure of the ship itself. The alternative approach of treating all ships and all their gear machinery and accoutrements as sub silentio excluded from the operation of the Act raises, to my mind, equal difficulty. It seems to me almost unarguable that 'equipment' does not include at least some vessels. The example of a dredger, for instance, was suggested by Lloyd LJ (see [1987] 1 All ER 932 at 938, [1987] 2 WLR 1098 at 1105) and it is not difficult to think of other examples of water-borne craft which would clearly be properly styled 'business equipment'. 'Business' includes, by definition, the operations of a public body. The customs cutter, the fire-tender or the Trinity House launch, would, I should have thought, be quite clearly 'equipment' of the operations for which they were provided. If, then, some ships are equipment, where is the line to be drawn? It cannot, in my judgment, be drawn simply by reference to size as the majority of the Court of Appeal appear to have concluded. There is no logic in such a criterion nor any functional difference between vessels of different types which enables a line to be sensibly drawn. The purpose of the Act was manifestly to saddle the employer with liability for defective plant of every sort with which the employee is compelled to work in the course of his employment and I can see no ground for excluding particular types of chattel merely on the ground of their size or the element on which they are designed to operate. Indeed, the express inclusion of all vehicles and all aircraft militates strongly against any such distinction. Like Lloyd LJ, I am impressed both by the width of the words used by the legislature and by the legislative purpose behind the statute and I am driven to the same conclusion that he reached.

I would allow the appeal and answer the question raised on the preliminary issue in the same sense as it was answered by Sheen J.

LORD GOFF OF CHIEVELEY. My Lords, I am entirely in agreement with my noble and learned friend Lord Oliver, that, for the reasons he gives, a ship may form part of the 'equipment' of the business of a shipowner, on the natural and ordinary meaning of that word. Accordingly, if the word 'equipment' were not defined in the Employer's Liability (Defective Equipment) Act 1969, I would have no difficulty in deciding the present case in favour of the plaintiffs. The real difficulty in the case, as it seems to me, arises from the fact that the word 'equipment' is defined in s 1(3) of the 1969 Act, and that the definition expressly includes any vehicle and aircraft, but makes no mention of ships or vessels. This fact provided the basis for the powerful submission advanced on behalf of the defendants that Parliament could not, in these circumstances, have

a inadvisedly excluded ships or vessels from the definition and must therefore have intended, for some reason, to exclude them.

b I have struggled to discover any rational basis for such a deliberate exclusion. The only possible basis which has occurred to me is as follows. It is, I understand, accepted that, in respect of operations on land, the 1969 Act only provides protection for the employee in respect of defects in equipment provided by the employer on the premises, but provides no protection in respect of defects in the premises themselves. It might therefore have been thought that, in respect of operations at sea, a similar distinction should be drawn between defects in equipment provided by the employer on the relevant ship, and defects in the structure of the ship itself. In both cases, whether the defect is in the structure of a building or in the structure of a ship, the employee would, on this hypothesis, be restricted to his rights against his employer as occupier, even where the defect in the building or the ship was attributable to the fault of a third party. In both cases, no doubt, nice distinctions might have to be drawn between equipment on the one hand and the structure of the building or the ship on the other hand; but, since it is plain that in any event such distinctions would have to be drawn in the case of premises on land, it is not necessarily surprising that Parliament should have intended similar distinctions to be drawn in respect of a ship at sea, although it is likely that more difficult questions could arise in the case of ships than in the case of premises on land. If this were to be right, it would explain why ships or vessels were excluded from the definition of 'equipment' in the Act, and it would follow that the appeal in the present case would have to be dismissed.

c I must confess to having felt some attraction for this approach, as a matter of logic; but I have come to the conclusion that its practical consequences are such that I do not think that it can have been the intention of the legislature so to provide. As my noble and learned friend Lord Oliver points out in his speech, ships or vessels may vary enormously in character and in size, from the Trinity House launch or even a speedboat to a supertanker or a bulk carrier. It is very difficult indeed to imagine that small craft should be excluded from 'equipment' provided by the employer for the purposes of his business; but no sensible distinction can be drawn between small and large vessels for present purposes; certainly the approach which I have set out provides no basis for any such distinction. Moreover, it seems to me that, in the case of ships, the distinction between the equipment on the ship and the structure of the ship is not only very difficult to draw in practice, but is artificial in the extreme. In any event, the duty of care imposed under the Occupiers' Liability Act 1957 may apply not only in respect of vessels, but also in respect of vehicles and aircraft: see s 1(3)(a). I have therefore come to the conclusion, in agreement with my noble and learned friend, and with Lloyd LJ in the Court of Appeal, that the definition of equipment in s 1(3) of the 1969 Act must have been included in the Act for the purpose of clarification only, and that the mere fact that ships and vessels were not expressly included in the definition cannot have been intended to have the effect of cutting down the ordinary meaning of the word 'equipment' by excluding ships or vessels from that word.

g For these reasons I too would allow the appeal.

h *Appeal allowed.*

Solicitors: *Evill & Coleman* (for the plaintiffs); *Holman Fenwick & Willan* (for the defendants).

Mary Rose Plummer Barrister.

Re S and others (minors) (wardship: police investigation) a

FAMILY DIVISION

BOOTH J

30 OCTOBER, 16 DECEMBER 1986 b

Ward of court – Jurisdiction – Protection of ward – Confidential papers in wardship proceedings – Release of confidential papers to police investigating offence against ward – Medical records, video recordings of diagnostic interviews and local authority's case records – Whether leave of court required for release of records to police – Whether leave ought to be given – Administration of Justice Act 1960, s 12(1). c

In the course of wardship proceedings in respect of four young children the local authority claimed that the children had been sexually abused by the man who was cohabiting with their mother. The judge continued the wardship and granted leave for the wards to be interviewed and examined in hospital. As a result of the hospital's findings that some of the wards had been sexually abused, criminal investigations were begun. The police sought the leave of the wardship court to permit disclosure to the police of medical records and video recordings made at diagnostic interviews with the wards at the hospital and for leave to interview the wards and have them medically examined. The police also sought leave to inspect the local authority's case records. Much of the evidence given by the local authority's social workers in the wardship proceedings had been based on information contained in the case records although those records did not themselves form part of the evidence. The local authority were willing to allow access to the case records but sought directions from the court whether leave was required, having regard to s 12(1)^a of the Administration of Justice Act 1960, which precluded the publication of information relating to wardship proceedings. d

Held – (1) Although the medical records and video recordings had come into existence after the conclusion of the wardship hearing, leave of the wardship court was required to be obtained for their disclosure, since the court continued to retain its duty to protect the interests of the ward during the wardship and had not divested itself of that duty by committing the ward to the care of the local authority, and a decision whether to disclose such information was a matter outside the scope of a party into whose care the ward had been committed (see p 1079 *b* to *d*, post). e

(2) When deciding whether to grant an application to disclose information relating to a ward for the purpose of a criminal investigation the court had an unfettered discretion and although the court had a duty to protect the ward from potential harm it also had a duty to uphold the public interest in protecting society from the perpetration of crime. In balancing those interests, it was only in exceptional circumstances that the interests of the individual ward should prevail. In the circumstances, although the results might be far-reaching and unpleasant for the wards, their interests were secondary to the greater public interest and therefore leave would be granted for disclosure to the police of the medical records and video recordings and for the police to interview the wards and, if necessary, have them medically examined (see p 1079 *e* to p 1080 *f*, post). f

(3) On its true construction, s 12 of the 1972 Act did not cover the ordinary case records of a local authority since they were not prepared for the purpose of legal proceedings but were made in pursuance of the local authority's statutory duty. Such records were as a general rule confidential and privileged from disclosure in court and g

^a Section 12(1), so far as material, is set out at p 1080 *j*, post h

a since the court could not compel their disclosure there was no basis on which the court could give directions under s 12 as to their use. In those circumstances the local authority were free to determine whether to allow the police access to their ordinary case records (see p 1081 d to f, post).

(4) Where a local authority's case records formed the basis of evidence given to the court by a social worker, the confidentiality in the records could not be said to have been waived by reason only of the fact that the social worker's evidence was based on those records. Accordingly, those records also did not fall within the ambit of s 12(1) and the local authority were free to determine whether to make them available to the police. However, confidentiality had been waived in respect of a verbatim extract from the case records exhibited to a social worker's affidavit and therefore the extract came within the ambit of s 12(1), with result that it could not be disclosed without the leave of the court. Nevertheless, leave for the disclosure to the police of that extract would be given for the same reason that leave had been given for the disclosure of the medical records and video recordings (see p 1081 h to p 1082 b, post).

Notes

d For contempt of court relating to publication of reports of cases heard in private, see 9 Halsbury's Laws (4th edn) para 20, and for cases on the subject, see 16 Digest (Reissue) 42-45, 425-431.

For the publication of information relating to wardship proceedings in private, see 24 Halsbury's Laws (4th edn) para 591.

For the Administration of Justice Act 1960, see 12, see 11 Halsbury's Statutes (4th edn) 175.

e Cases referred to in judgment

D v National Society for the Prevention of Cruelty to Children [1976] 2 All ER 993, [1978] AC 171, [1976] 3 WLR 124, CA; *rvsd* [1977] 1 All ER 589, [1978] AC 171, [1977] 2 WLR 201, HL.

D (infants), *Re* [1970] 1 All ER 1088, [1970] 1 WLR 599, CA.

f *G-U (a minor) (wardship)*, *Re* [1984] FLR 811.

R (MJ) (an infant) (proceedings transcripts: publication), *Re* [1975] 2 All ER 749, [1975] Fam 89, [1975] 2 WLR 978.

S and W (minors) (confidential reports), *Re* (1982) 4 FLR 290, CA.

Scott (orse Morgan) v Scott [1913] AC 417, [1911-13] All ER Rep 1, HL.

g *Y (a minor) (child in care: access)*, *Re* [1975] 3 All ER 348, [1976] Fam 125, [1975] 3 WLR 342, Fam D and CA.

Cases also cited

AB (wardship: jurisdiction), *Re* [1985] FLR 470.

C (wardship: independent social worker), *Re* [1985] FLR 56.

F (a minor) (publication of information), *Re* [1977] 1 All ER 114, [1977] Fam 58, [1976] 3 WLR 813, CA.

H (a minor), *Re* [1985] 1 All ER 1, [1985] 1 WLR 1164, CA.

J (a minor) (wardship), *Re* [1984] FLR 535.

X v Comr of Police of the Metropolis [1985] 1 All ER 890, [1985] 1 WLR 420.

Summons

j The Commissioner of Police of the Metropolis applied for an order that the medical records and video recordings made in diagnostic interviews with four wards of the court, subsequently committed to the care of a local authority, be disclosed to the police, for permission to interview the wards and, if necessary, for further medical examination of the wards, and for disclosure of the case records kept by the local authority. The summons

was heard and judgment was given in chambers. The case is reported by permission of Booth J. The facts are set out in the judgment.

Patricia May for the police.

Barbara Slomnicka for the local authority.

Cur adv vult

16 December. The following judgment was delivered.

BOOTH J. On 29 October 1985 I made an order dealing with the long-term future of four wards of court, two boys, aged 8 and 5, and two girls, one of whom is nearly 4 and the other is 2. The plaintiffs in the proceedings are the local authority. The mother is the first defendant and her former cohabitee, who is the father of the youngest child, is the second defendant; I will refer to him as 'Mr D'. By my order I confirmed the wardship and committed all the wards to the care of the local authority with leave for them to be placed with long-term foster parents with a view to adoption. I terminated access by the mother and Mr D.

During the course of a long hearing some evidence was given by the local authority's social workers which strongly suggested that the wards had been subjected to sexual abuse by Mr D. In view of that, at the conclusion of the hearing I gave leave to the local authority plaintiffs to take the wards to Great Ormond Street Hospital for Sick Children for interview and examination by the specialist team working with sexually abused children. The findings of this team have confirmed the likelihood that some, if not all, of the wards have indeed been so abused and this matter is now the subject of investigation by the Metropolitan Police.

It is against that background that counsel instructed on behalf of the Metropolitan Police Commissioner has sought the leave of the court for the disclosure to the police of medical records and video recordings made in consequence of any order at diagnostic interviews with the children at Great Ormond Street Hospital and for leave for the police to interview the children and subject them to medical examinations. Counsel also seeks directions with regard to inspection by the police of the local authority's case records which are relevant to this issue and which may be of some assistance to their inquiry. The summons also asked that all documents in the wardship proceedings be disclosed to the police but that request has not been pursued.

The application was first made on behalf of the police by the local authority without notice to the mother or Mr D. Quite apart from the question whether or not the mother and Mr D should be informed, I took the view that in the circumstances it was not a proper step for the local authority to take since a conflict might arise between the interests of the police and those of the wards for whom, by my order, the local authority were responsible. I further indicated that I wished to hear legal argument with regard to this application.

Accordingly, I directed that the police should be separately represented for this purpose, as is now the case. Their application is, however, supported by the local authority, save in so far as it relates to having the wards further medically examined, as to which some concern is now expressed whether it is in the best interests of the wards.

Notice of this application has not been given either to the mother or Mr D. The police have at all times been anxious that they should not be given prior knowledge of the intended investigations as they believe that this could be prejudicial to their final outcome. Having regard to the nature of the relief sought I consider this to be a proper course to take. The police do not now ask to see any affidavits or any transcript of the oral evidence before the court, nor do they seek the disclosure of any documents which have at any time been in the possession or control of either the mother or Mr D.

a So far as the wards are concerned the protection of their interests is now primarily a matter for the local authority, to whose care they have been committed. So it seemed to me that neither the mother nor Mr D was directly concerned with the subject matter of this application and that in view of the possible prejudice to the police investigations, were they to be involved, it was proper to proceed in their absence.

b In so far as the police desire to see the medical records and video recordings held by Great Ormond Street Hospital, in my judgment leave of the court is first required, despite the fact that such records and recordings only came into existence after the conclusion of the wardship hearing.

c When the wardship jurisdiction is invoked and exercised the court retains its duty to protect the interests of the ward for the duration of the wardship and does not divest itself of that duty by committing them to the care and control of one or more of the parties or, as in this case, to the care of the local authority: see *Re Y (a minor) (child in care: access)* [1975] 3 All ER 348, [1979] Fam 125, *Re G-U (a minor) (wardship)* [1984] FLR 811. So it is still necessary to seek directions from the court whenever it is proposed to take a major step in the lives of the wards.

d In my judgment, the disclosure to the police of the medical records and video recordings for the purpose of criminal investigations falls into the category of decision and is a matter outside the scope of a party to whose care the ward is committed. The decision is not a matter which arises in the day-to-day care of the ward and the effect of granting the application could be far-reaching. Indeed, the result of it could lead to the direct involvement of the ward in criminal proceedings, a fact which could be regarded as detrimental to his or her interests. It is, therefore, clearly a step of considerable importance in the life of any child.

e Similarly, if the police are to interview and conduct medical examinations of the wards then leave of the court must first be given. Such medical examinations do not have a therapeutic purpose but a forensic purpose and, as in the case of the disclosure of the medical records and the video recordings, they may lead to the wards' direct involvement in subsequent proceedings. But if leave is given for the disclosure of those records and video recordings it seems to me that it must follow that leave must also be given to the police to conduct interviews with and, if necessary, examinations of the wards. Having f enabled the police to start on an inquiry it would not be realistic, save in exceptional and presently unforeseen circumstances, to impose such limits on them.

g A judge dealing with an application such as is now made by the police has an unfettered discretion to grant or to refuse it: see *Re R (MJ) (an infant) (proceedings transcripts: publication)* [1975] 2 All ER 749 at 756, [1975] Fam 89 at 98 per Rees J. In this case it is a matter of balancing the interests of the four young children who are the wards against the public interest that requires that no obstacle be placed in the way of the police in the course of their criminal investigations. From the wards' point of view, they have already been subjected to disturbed and unsettled lives during the course of which some, if not all, have been sexually abused. The elder children are undoubtedly able to remember a good deal of what has taken place and their memories cannot be healthy or pleasant. The process of healing those wounds, in so far as they can be healed, has only just begun. If h the wards are now to be subjected to renewed questioning and examination it seems to me, as a matter of common sense, that it could lead to further distress and unhappiness which would be compounded were they to be called to give evidence in criminal proceedings.

i I accept the assurance of the police that all necessary procedures would be carried out with the least possible inconvenience and distress to the wards and with their welfare in mind. It has been made clear that medical examinations would be conducted only when they were clearly shown to be necessary by reason of the other information in the hands of the police. Nevertheless, I would be failing in my judicial duty to the wards were I not to consider that by granting the leave that is sought the likely outcome for them would

be unhappy, if not, in a sense, detrimental. The court not only has a duty to protect its wards from potential harm, it also has a duty to uphold the public interest. Counsel for the police has argued that public policy dictates that nothing should impede the police in carrying out their statutory duties or impede anyone from giving the police information in furtherance of their lawful inquiries. a

I am told by counsel for the local authority that it is the invariable practice of the local authority, and no doubt of many other local authorities, to invite representatives of the police to attend case conferences relating to the children in their care. This being so, information is available to the police from this source regarding whether or not a criminal offence may have been committed. b

In relation to those children who are not wards of court the police, with the co-operation of the local authority, are free to conduct such investigations as they think fit and they will, where necessary, have access to the case records made by the social workers.

The court, therefore, should be slow to interfere in this process in respect of its wards who are in local authority care. The protection afforded to a child by the exercise of the wardship jurisdiction should not be extended to the point where it gives protection to offenders against the law and, indeed, offenders against the wards themselves. The court must take into consideration, as a matter of public policy, the need to safeguard not only its wards but other children against the harm they may suffer as the result of recurring crimes by undetected criminals. c

The likely outcome and its effects on a ward of granting an application such as the police now make must be considered in each and every case. But when balanced against the competing public interest which requires the court to protect society from the perpetration of crime it could only be in exceptional circumstances that the interests of the individual ward should prevail. d

In this case, although the results may be far-reaching and unpleasant for these young and damaged children, their interests are secondary to that greater public need. I am satisfied that on the facts this application is wholly justified and that the police should have the leave they seek in respect of the medical records and video recordings now in the possession of Great Ormond Street Hospital and that they should have leave to interview and, if necessary, medically examine the wards. e

I turn now to the application which relates to the case records made in respect of the wards by the local authority. The police ask for access to those documents. They do not ask to see the evidence filed by the local authority in the wardship proceedings. Nevertheless, much of that evidence, particularly that of the social workers, was based on information contained in the records. In one instance an extract from the case records relating to allegations made by the children to their foster mother and to the social worker was exhibited to an affidavit which was before the court. As a result, if the police have access to the case records then they will come to know a good deal of the information which was placed by way of evidence before the court. The local authority are willing that this should be so, but in the circumstances they seek directions whether or not the leave of the court is first required. f

Section 12 of the Administration of Justice Act 1960 precludes the publication of information relating to proceedings in private. The relevant part of that section reads as follows: g

‘(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—(a) where the proceedings relate to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant . . .’ h

It is well established that the court has an absolute discretion to give leave in a proper case to publish such information relating to proceedings: see *Re R (MJ) (an infant)* [1975] 2 All ER 749, [1975] Fam 89. Thus, if it is desired to disclose evidence placed before the i

a court in such proceedings, leave is undoubtedly necessary. In this case the first question I have to determine is whether the words in the section 'information relating to proceedings' should be construed to cover documents which do not themselves form part of the evidence but which contain information on which evidence was based.

b The general rule that the court sits in private in wardship proceedings was evolved to guard the interests of the ward: see *Scott (or se Morgan) v Scott* [1913] AC 417 at 437, [1911-13] All ER Rep 1 at 9 per Viscount Haldane LC. Equally, the statutory prohibition against publication of information relating to such proceedings must be deemed to have been enacted for the protection of the child.

c I have not heard argument from counsel as to the construction of this subsection but if the court is to fulfil its duty to protect a child then the words 'information relating to proceedings' must not bear too narrow a meaning. In the context of a case such as this, the statute would preclude publication of the evidence presented to the court and in my judgment this would extend to statements prepared by a party or a witness for the purposes of such proceedings. If this were not to be the case the intention of the legislature could be thwarted by the publication of such statements on the basis that they did not themselves constitute evidence before the court.

d The case records of the social services department come within a different category. First, they are not records which are prepared for the purpose of legal proceedings: they are made by local authorities pursuant to a duty imposed on them by the Boarding-Out of Children Regulations 1955, SI 1955/1377. Second, by reason of public interest, the confidentiality of case records is preserved and as a general rule they are privileged from disclosure in court: see *Re D (infants)* [1970] 1 All ER 1088, [1970] 1 WLR 599, applied in *D v National Society for the Prevention of Cruelty to Children* [1976] 2 All ER 993 at 1000, [1978] AC 171 at 191. This is the application of the principle now known as public
e interest immunity.

In those circumstances, since it cannot compel the disclosure of those records it would not seem appropriate for the court to seek to exercise any control over them and to make them the subject matter of any directions. If this is so, then in this case the local authority must be free to determine whether or not to allow the police access to them.

f Again, this is not a matter on which I have had full argument from counsel. But I am satisfied that, so far as the case records do not relate to matters which were placed in evidence before the court, there could be no basis on which the court could, or should, give the local authority any directions as to their use. If, by reason of having had access to such records, the police or any other authorised agency or person then wishes to take steps directly affecting a ward, leave of the court will first be necessary.

g I have been less clear as to the position with regard to those case records on which evidence placed before the court was based, although they do not of themselves form part of that evidence. Undoubtedly, such records continue to be protected from disclosure by reason of the principle of public interest immunity: see *Re S and W (minors) (confidential reports)* (1982) 4 FLR 290. Although the court has the statutory right and duty to protect a child by means of its control over information relating to proceedings heard in private,
h this must be balanced against the right of the local authority to preserve the confidentiality of their records and thereby to control access to them.

Since confidentiality in the records could not be considered to have been waived by reason only of the fact that they have been relied on as the foundation for the social workers' evidence, I have come to the conclusion that those records also do not fall within the ambit of s 12(1) of the 1960 Act. In fact, to come to the contrary decision could have the effect of placing an unrealistic fetter on the local authority in the course of their day-to-day use of their records and it would also serve to draw a distinction between the records of those children in care who are wards and those who are not, which would be difficult to observe.

j In my judgment, a distinction must be made with regard to the verbatim extract from the case records which in this case was exhibited to an affidavit made by a social worker.

This exhibit was disclosed and filed by the local authority as part of their evidence to the court. Confidentiality in respect of this part of the case records has clearly been waived. a

The exhibit undoubtedly contains information relating to the proceedings since it constitutes a part of the evidence. I am satisfied that for this reason the extract of the case records comes within the ambit of s 12(1) of the 1960 Act and that its publication is precluded without leave of the court. With regard to whether or not that leave should be given I must adopt the approach I have taken with regard to the medical records and video recordings, so that for the same reasons I give leave for this extract from the local authority's case records to be made available to the police. b

Directions accordingly.

Solicitors: *D M O'Shea* (for the police); *F Nickson* (for the local authority).

Bebe Chua Barrister. c

Dixon v Allgood d

HOUSE OF LORDS

LORD KEITH OF KINKEL, LORD BRANDON OF OAKBROOK, LORD BRIGHTMAN, LORD TEMPLEMAN
AND LORD ACKNER

7, 8 OCTOBER, 26 NOVEMBER 1987

Landlord and tenant – Leasehold enfranchisement – Tenancy at a low rent – Rateable value – Appropriate day – House – House and premises – Leasehold including two houses – Tenant renovating two derelict adjoining cottages and erecting garages on forecourt – Cottages and garages appearing in valuation list for first time on different days – Tenant later converting cottages into single dwelling house – Appropriate day for determining rateable value of house – Leasehold Reform Act 1967, ss 1(1), 4(1)(a) – Rent Act 1977, s 25(3)(4). e

In 1964 the tenant was granted a lease of two adjoining derelict cottages together with six acres of land for a term of 51 years at a rent of £52 a year (which was subsequently reduced to £51.44). After he had renovated the cottages he occupied one as his residence and sublet the other. The cottage occupied by him was first entered in the valuation list on 9 May 1966 with a rateable value of £42 and the other cottage was first entered in the valuation list on 6 February 1967 with a rateable value of £34. In 1971 the tenant constructed five garages on the forecourt adjoining the cottages and they were separately rated on 22 December 1971 with a rateable value of £24. In 1977, after the termination of the subtenancy, the tenant converted the two cottages into a single dwelling house which he occupied as his residence. On 18 February 1981 the tenant served a notice on the landlord claiming to be entitled to acquire the freehold of the house and premises under the Leasehold Reform Act 1967 on the basis that the tenancy was a 'tenancy at a low rent' for the purposes of s 1(1)^a of the 1967 Act since the rent payable was less than two-thirds of the rateable value of the cottages and garages (ie £100) on the 'appropriate day', as defined by s 4(1)(a)^b of the 1967 Act read with s 25(3)^c of the Rent Act 1977. The landlord refused to admit the tenant's claim and the tenant applied to the court for a declaration that he was entitled to acquire the freehold of the house and premises under the 1967 Act. The judge upheld the tenant's claim, holding that the rent of £51.44 was f

^a Section 1(1), so far as material, is set out at p 1084 j, post

^b Section 4(1), so far as material, is set out at p 1085 e g, post

^c Section 25, so far as material, is set out at p 1086 a b, post g

h

j

a 'low rent'. The landlord appealed to the Court of Appeal, which reversed the judge's decision, holding that the appropriate rateable value was the aggregate rateable value of the cottages excluding the garages (ie £76), and the rent of £51.44 was more than two-thirds of that rateable value. The tenant appealed to the House of Lords, contending that for the purposes of the 1967 Act the 'appropriate day' was 22 December 1971 when the garages were rated or the day in 1977 when 'the house', comprising the three hereditaments of two cottages and the garages, came into existence.

b **Held** – Under s 4(1)(a) of the 1967 Act the appropriate day for the purpose of determining the rateable value of a dwelling house was the day on which the house first appeared in the valuation list either as a single hereditament or as two or more hereditaments, and events which took place after the appropriate day were to be disregarded unless the variation in the property had the effect of increasing the rateable value in the limited
c circumstances provided for in s 25(4) of the 1977 Act (which did not apply). It followed that the appropriate day for determining the rateable value of the tenant's house and premises was 6 February 1967, when the house, consisting of the two cottages only, was first rated as two hereditaments. Since at that date the rent of £51.44 payable by the tenant was more than two-thirds of the rateable value of £76, the tenancy was not a
d tenancy at a low rent under s 1(1) of the 1967 Act and the tenant was not entitled to acquire the freehold. The appeal would therefore be dismissed (see p 1083 j to p 1084 b, p 1086 d e, p 1087 c to f j to p 1088 b d e, post).

Notes

For the 'appropriate day' for determining the rateable value of a dwelling house, see 27
e Halsbury's Laws (4th edn) paras 613, 1004.

For the Leasehold Reform Act 1967, ss 1, 4, see 23 Halsbury's Statutes (4th edn) 198, 204.

For the Rent Act 1977, s 25, see *ibid* 435.

Case referred to in opinions

f *Gilbert (Valuation Officer) v S Hickinbottom & Sons Ltd* [1956] 2 All ER 101, [1956] 2 QB 40, [1956] 2 WLR 952, CA.

Appeal

James Dixon (the tenant) appealed with leave of the Appeal Committee of the House of
g Lords given on 18 February 1987 against the decision of the Court of Appeal (Slade LJ and Waite J) ([1987] RVR 200) on 5 November 1986 allowing an appeal by Lancelot Guy Allgood (the landlord) against the order of his Honour Judge Hall given on 24 October 1985 in Hexham County Court declaring that the tenant was entitled to acquire the freehold of the house and premises known as Riverside Cottages, Acomb, Hexham, Northumberland from the landlord under the provisions of the Leasehold Reform Act
h 1967. The facts are set out in the opinion of Lord Templeman.

Michael Gadd for the tenant.

Nigel Hague QC and John Fryer-Spedding for the landlord.

Their Lordships took time for consideration.

j 26 November. The following opinions were delivered.

LORD KEITH OF KINKEL. My Lords, I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend Lord Templeman. I agree with it and for the reasons he gives would dismiss the appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Templeman. I agree with it, and for the reasons which he gives I would dismiss the appeal. a

LORD BRIGHTMAN. My Lords, I have had the advantage of reading in advance the speech about to be delivered by my noble and learned friend Lord Templeman. I agree with it, and for the reasons given by him would dismiss this appeal. b

LORD TEMPLEMAN. My Lords, the Leasehold Reform Act 1967 enables a tenant occupying a dwelling house as his residence under a long lease at a low rent to acquire the freehold of the house and premises. A low rent is less than two-thirds of the rateable value. b

By a lease dated 31 December 1964 the appellant, the tenant, became the tenant of two derelict cottages and six acres of land at Acomb, Hexham in the county of Northumberland for a term of 51 years. The rent was £52 a year. The tenant reconstructed one of the cottages, which he named 'Riverside Cottage', for which a rateable value was first shown in the valuation list on 9 May 1966; the rateable value was £42. The tenant occupied Riverside Cottage as his residence. The second cottage was then reconstructed by the tenant, named 'Riverside Cottage East' and sublet. A rateable value for Riverside Cottage East was first shown in the valuation list on 6 February 1967; the rateable value was £34. The two cottages formed a pair of semi-detached houses divided by vertical internal walls. Adjoining the cottages was a forecourt. The tenant constructed on the forecourt a single building with five doors which he used to garage cars and as a domestic store-room. The new building was separately rated on 22 December 1971 under the description 'five garages adjoining Riverside Cottage'; the rateable value was £24. In 1977 the tenant obtained vacant possession of Riverside Cottage East, inserted doors in the vertical walls dividing Riverside Cottage from Riverside Cottage East and, the trial judge held, thereby converted both cottages into one dwelling house which he calls 'Riverside Cottages' and which he occupies as his residence. A small part of the land comprised in the lease was compulsorily acquired and the tenant's rent payable under the lease for the remaining 5½ acres or thereabouts, including Riverside Cottages, was reduced to £51.44. c

On 18 February 1981 the tenant served notice on his landlord, the respondent, claiming to purchase under the 1967 Act the freehold of the house and premises 'Riverside Cottages'. The notice as amended on 22 June 1981 claims that 'the rateable value of the cottages and premises at the "appropriate day" was £100'. It is conceded that 'the premises' of Riverside Cottages includes an area of about half an acre comprising the driveway, garden and forecourt with the five garages erected thereon used for the purposes of the cottages. d

The trial judge, his Honour Judge Hall, held that the tenant was entitled to acquire the freehold of the cottages and premises because his rent of £51.44 was less than two-thirds of £100, the aggregate rateable value of the cottages including the garages. The Court of Appeal (Slade LJ and Waite J) ([1987] RVR 200) reversed the trial judge because the rent of £51.44 was more than two-thirds of £76, the aggregate rateable value of the cottages excluding the garages. The tenant appeals. e

The 1967 Act, as amended, and so far as material, provides as follows. By s 1: f

'(1) ... this Act shall have effect to confer on a tenant of a leasehold house, occupying the house as his residence, a right to acquire on fair terms the freehold ... of the house and premises where ... (b) at the relevant time (that is to say, at the time when he gives notice in accordance with this Act of his desire to have the freehold ...) he has been tenant of the house under a long tenancy at a low rent, and occupying it as his residence, for the last three years ...'

g

The tenant fulfilled all these conditions if he was a tenant at a 'low rent'. h

By s 2: i

(1) ... "house" includes any building designed or adapted for living in and reasonably so called ...'

a

The trial judge found that though the cottages had originally been two houses they had become one 'house' as defined by the Act by the relevant date when the tenant gave notice to purchase under the Act.

Section 2 continues:

b

(3) ... premises [in relation to a house let to and occupied by a tenant means] any garage, outhouse, garden, yard and appurtenances which at the relevant time are let to him with the house and are occupied with and used for the purposes of the house ...'

The five garages and forecourt were part of the premises of the cottages at the relevant time, namely 18 February 1981 when the tenant gave notice to purchase under the Act.

c

If the tenant is entitled to purchase the cottages, the purchase will by virtue of the 1967 Act include 'the premises', ie the five garages, the courtyard and any other outhouses and appurtenances of the cottages 'at the relevant time', ie 18 February 1981 when the tenant served notice under the Act. The price payable by the tenant will be the amount which on 18 February 1981 the cottages and premises if sold for an estate in fee simple subject to the tenant's tenancy might have been expected to realise in the open market.

d

By s 3:

(1) ... "long tenancy" means ... a tenancy granted for a term of years certain exceeding twenty-one years ...'

The tenant's lease was for 51 years.

e

By s 4:

(1) ... a tenancy of any property is a tenancy at a low rent at any time when rent is not payable under the tenancy in respect of the property at a yearly rate equal to or more than two-thirds of the rateable value of the property on the appropriate day ...'

f

The rent of £51.44 payable by the tenant was more than two-thirds of the rateable value of the cottages, £76, until the garages were built and rated on 22 December 1971. If the 'appropriate day' falls before 22 December 1971, the tenant is not entitled to purchase the cottages and premises under the Act. By s 4(1)(a):

"appropriate day" means the 23rd March 1965 or such later day as by virtue of section 25(3) of the Rent Act 1977 would be the appropriate day for purposes of that Act in relation to a dwelling-house consisting of the house in question.'

g

The date 23 March 1965 was the date on which the Bill for the Rent Act 1965 was introduced. That Act contained, in s 43(3), provisions similar to s 25(3) of the Rent Act 1977 and by Sch 1, para 1(3) directed that a tenancy was to be exempt from the restrictions imposed by the Rent Act 1965 if the rent payable was less than two-thirds of the rateable value 'on the appropriate day'.

h

The cottages were not rated on 23 March 1965. The 'appropriate day' is by virtue of s 4(1)(a) of the 1967 Act to be determined under s 25(3) of the 1977 Act in relation to 'the house in question', ie the cottages excluding the garages.

Section 25 of the 1977 Act provides:

j

(1) ... the rateable value on any day of a dwelling-house shall be ascertained for the purposes of this Act as follows:—(a) if the dwelling-house is a hereditament for which a rateable value is then shown in the valuation list, it shall be that rateable value; (b) if the dwelling-house ... consists of ... more than one such hereditament, its rateable value shall be taken to be such value as is found by ... aggregation of the rateable ... values so shown ...

(3) . . . "the appropriate day"—(a) in relation to any dwelling-house which, on 23 March 1965, was or formed part of a hereditament for which a rateable value was shown in the valuation list then in force, or consisted or formed part of more than one such hereditament, means that date, and (b) in relation to any other dwelling-house, means the date on which such a value is or was first shown in the valuation list. a

(4) Where, after the date which is the appropriate day in relation to any dwelling-house, the valuation list is altered so as to vary the rateable value of the hereditament of which the dwelling-house consists or forms part and the alteration has effect from a date not later than the appropriate day, the rateable value of the dwelling-house on the appropriate day shall be ascertained as if the value shown in the valuation list on the appropriate day had been the value shown in the list as altered . . . b

By s 37(6) of the 1967 Act, as amended, s 25(1), (2) and (4) of the 1977 Act shall apply to the ascertainment for purposes of the 1967 Act of the rateable value of a house and premises or any other property as they apply to the ascertainment of that of a dwelling house for the purposes of the 1977 Act. c

The dwelling house, Riverside Cottages, which now embraces both the former Riverside Cottage and the former Riverside Cottage East consists of two hereditaments, namely the former Riverside Cottage and Riverside Cottage East, both of which appeared in the valuation list on 6 February 1967. The appropriate day for the purposes of determining the rateable value of the dwelling house now occupied by the tenant is not later than 6 February 1967 and the aggregate rateable value of the two hereditaments which now constitute the tenant's dwelling house is £76. The rent payable by the tenant is £51.44, which is more than two-thirds of the rateable value of £76 on the appropriate day and it follows that the tenant is not entitled to purchase the freehold reversion of Riverside Cottages and premises. d

Slade LJ, delivering judgment in the Court of Appeal in the present case, pointed out that there is a clear and unequivocal difference between the provisions of the 1967 Act which entitle a tenant to purchase 'the house and premises' and the provisions of s 4(1)(a) which require the appropriate day to be determined in relation to a dwelling house 'consisting of the house in question' ([1987] RVR 200 at 203). The reason for this distinction is not far to seek. A hereditament for rateable purposes is not limited to buildings. e

'Where two or more properties are within the same curtilage or contiguous to one another, and are in the same occupation, they are as a general rule to be treated for rating purposes as if they formed parts of a single hereditament. There are exceptional cases, however, where for some special reason they may be treated as two or more hereditaments. That may happen, for instance, when they are situate in different rating areas, or because they were valued at different times . . . or because they were at one time in different occupations . . . or because one part is used for an entirely different purpose . . . f

(See per Denning LJ in *Gilbert (Valuation Officer) v S Hickinbottom & Sons Ltd* [1956] 2 All ER 101 at 103, [1956] 2 QB 40 at 48.) g

The 1967 Act was inspired by the plight of a large number of lessees of houses whose building leases granted in the nineteenth century were coming to an end. A tenant of a house under such a lease held a wasting asset which was difficult or impossible to sell; he was faced with the prospect of large dilapidation claims and was not entitled to security of tenure under the Rent Acts. By fixing 25 March 1965 as the appropriate day for houses rated before that day, the 1967 Act indicated clearly that events taking place after 25 March 1965 resulting in an increase or decrease of rateable value were to be ignored. Changes in rateable value could take place as a result of a quinquennial or other general revaluation or as a consequence of changes taking place to a particular hereditament h

a which included a house. The rateable value of such a hereditament might be reduced as a result of deterioration of the house or the neighbourhood. The rateable value of the hereditament could be increased by an extension or improvement to the house itself or by the erection of a building in the curtilage of the house. All these changes must be ignored. For example, if in the present case Riverside Cottages had been rated before 25 March 1965, the hereditament comprising Riverside Cottages would have included the courtyard. If after 25 March 1965 the tenant had erected five garages in the curtilage of Riverside Cottages, the rating authority might have increased the rateable value of Riverside Cottages or might have rated the five garages as a separate hereditament. Whether the garages were rated with the cottages or as a separate hereditament, the rateable value attributable to Riverside Cottages and the premises including the five garages for the purposes of the 1967 Act would remain the rateable value as fixed on 25 March 1965. A tenant of a house rated on 25 March 1965 cannot improve his position under the 1967 Act by building in the curtilage of the house garages or other buildings which become rated as a separate hereditament or lead to an increase in the rateable value of the house. Under the 1967 Act the tenant is entitled to purchase both the house and the garages which are included in the curtilage as premises, provided that the rent payable for the house and premises is less than two-thirds of the rateable value of the house on 25 March 1965. Similarly, in the present case the tenant could not improve his position under the 1967 Act by building five garages in the curtilage of the cottages after the appropriate day. It is significant that s 25(4) of the 1977 Act does permit an increase in rateable value after the appropriate day in limited circumstances. By s 25(4) such a variation is taken into account but only where the variation 'has effect from a date not later than the appropriate day'. In other words if a garage is built in the courtyard of a house before the appropriate day but is not rated until after the appropriate day or is not taken into account in the rateable value of the house until after the appropriate day, nevertheless effect can be given to the variation for the purposes of the 1967 Act if the variation when it takes place 'has effect from a date not later than the appropriate day'. But, unless the conditions specified in s 25(4) are satisfied, events which take place after the appropriate day must be disregarded, and the appropriate day itself is by s 4(1) of the 1967 Act judged by reference to the first day on which the house as a single hereditament or as two or more hereditaments first appears in the valuation list.

Counsel for the tenant relied on s 4(2) of the 1967 Act. That subsection provides:

g 'Where ... a question arises under section 1(1) above whether [the tenant's] tenancy of the house is or was at any time a tenancy at a low rent, the question shall be determined by reference to the rent and rateable value of the house and premises as a whole, and in relation to a time before the relevant time shall be so determined whether or not the property then occupied with the house or any part of it was the same in all respects as that comprised in the house and premises for purposes of the claim ...'

h If the five garages had been built before 6 February 1967, s 4(2) would have required the garages to be taken into account although they were separately rated, because of the requirement that the question shall be determined by reference to the rateable value of the house and premises as a whole. Section 4(2) also requires that Riverside Cottage East shall be taken into account notwithstanding that Riverside Cottage East was sublet and did not form part of 'the house' on 6 February 1967. But s 4(2) does not in my opinion alter or cast any doubt on the clear direction in s 4(1)(a) that for the purpose of determining the appropriate day the only question is when the house was first rated either as a single hereditament or as two or more hereditaments. In the present case, Riverside Cottages, the house, was rated as two hereditaments on 6 February 1967 which is therefore the appropriate day.

j Counsel for the tenant also submitted that 'the house' did not come into existence until 1977 when the two cottages were converted into one house and that 1977 was, therefore,

the appropriate day and that the house then consisted of three hereditaments comprised of the two cottages and the garages. But s 4(1)(a) of the 1976 Act, read in conjunction with s 25(1) of the 1977 Act, requires the appropriate day to be the day when 'the house', consisting of two cottages and no more, was first rated and that day was 6 February 1967. A tenant of two semi-detached houses, each rated at £50 on 25 March 1965, could not by inserting communicating doors between the two houses and converting them into one house, rated in 1987 at £150, alter the appropriate day or increase the rateable value for the purposes of the 1967 Act. In the present case, 'the house' created by the tenant in 1977 consisted of two hereditaments rated for the first time by 6 February 1967.

Counsel for the tenant, who did not appear before the trial judge or the Court of Appeal, also sought to raise the argument that 'the house and premises' did not consist of the whole five acres or thereabouts remaining subject to the lease, but was limited to the area of about half-an-acre consisting of Riverside Cottages, the garages, forecourt and garden, occupied and used for the purposes of the cottages. Therefore the sum of £51.44 ought to be apportioned between the cottages and premises on the one hand and the remainder of the five acres on the other hand. Such an apportionment might well result in the rent apportioned to the cottages and premises being less than two-thirds of the rateable value of £76. This point was not raised prior to the appeal to this House. Moreover, it involves questions of fact and evidence and would necessitate a retrial. Your Lordships declined to allow counsel for the tenant, in these circumstances, to take the point at this late stage. In the result, in agreement with the reasons expressed by the Court of Appeal, I would dismiss this appeal.

LORD ACKNER. My Lords, I have had the advantage of reading in advance the speech about to be delivered by my noble and learned friend Lord Templeman. I agree with it, and for the reasons given by him would dismiss this appeal.

Appeal dismissed.

Solicitors: *Park Nelson*, agents for *Septimus G Ward & Rose*, Newcastle upon Tyne (for the tenant); *Hyde Mahon & Bridges Sawtell*, agents for *Wilkinson Maughan*, Newcastle upon Tyne (for the landlord).

Mary Rose Plummer Barrister.